Arbitration of Statutory Claims in a Union Setting: History, Controversy and a Simpler Solution

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In 1974, the United States Supreme Court decided that an employee covered by a collective bargaining agreement had the right to bring an individual Title VII claim, even though the contract between the employer and the union provided for arbitration of employment disputes. That case, *Alexander v. Gardner-Denver*, has remained the law in spite of the Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.* Recently, some courts have questioned the continued viability of *Alexander.* It is worthwhile to examine the history of arbitration of statutory claims under collective bargaining agreements, the controversies it has engendered, and what might be done to ensure fairness in resolving these disputes.

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II. History

Wilko, Lincoln Mills and the Steelworkers Trilogy

The Federal Arbitration Act of 1925 first expressed Congress's endorsement of arbitration as a forum although, arguably, only for commercial disputes. In Wilko v. Swan, the Supreme Court declined to extend that endorsement to a claim under section 12(2) of the Securities Act of 1933 because it doubted the adequacy of arbitration as a forum for the resolution of statutory claims. The courts continued to find that a judicial forum was superior for enforcing statutory rights, that compulsory arbitration contravened public policy by forcing an individual to waive the right to a judicial forum, and that the informality of arbitration was not conducive to subsequent judicial review of the award.

In the context of labor relations, however, the Supreme Court developed a strong policy favoring arbitration of collective bargaining disputes. In Textile Workers Union v. Lincoln Mills, it decided that, under section 301 of the Taft-Hartley Act, parties to a collective bargaining agreement could be required to submit labor disputes to binding arbitration, despite the exclusion of employment contracts under the Federal Arbitration Act. The Court stressed that grievance arbitration is a substitute, not for litigation, but for a strike. Agreeing to arbitrate labor disputes in return for agreeing not to strike was the bargain that was to be enforced by the federal courts.

6. See id.; See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (The FAA was passed in 1925 to "place arbitration agreements upon the same footing as other contracts," and expressly mandated enforcement of arbitration agreements.) Section 2 of the statute provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1994).
12. Id. at 448.
In 1960, in the three cases which came to be known as the Steelworkers Trilogy, the Court announced that grievance arbitration would be the endorsed method for resolving industrial disputes arising under collective bargaining agreements. To that end, a court would no longer review the merits of a grievance because it was the arbitrator's judgment, not the court's, for which the parties had bargained when they agreed to submit their disputes to arbitration. Conversely, an arbitrator's award was to be confined to interpretation and application of the collective bargaining agreement and would be enforceable only as long as it "drew its essence" from the contract.

From Alexander to Gilmer

The Court's endorsement of grievance arbitration as a substitute for industrial strikes was not an endorsement of arbitration as a substitute for litigation of statutory employment claims, as it made clear in the Alexander case. Alexander was a member of a collective bargaining unit who claimed that he had been discharged because of racial discrimination. The employer alleged that the termination was justified by Alexander's work performance. The

In essence, Section 301(a) provides that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting interstate commerce or between any such labor organizations may be brought in any United States District Court having jurisdiction of the parties, without regard to the amount in controversy or the parties' citizenship.

Section 301(b) states that any labor organization or employer in an industry affecting interstate commerce shall be bound by the acts of its agents, and any such labor organization may sue or be sued in the United States courts as an entity and on behalf of the employees whom it represents, and any money judgment against the labor organization in a United States District Court shall be enforceable only against the organization as an entity and against its assets, and not against any individual member or his assets.

Id.

19. See Warrior & Gulf Navigation Co., 363 U.S. at 582.
21. See id. at 39.
22. See id. at 38.
union filed a grievance under the procedure provided in the contract, and Alexander filed a Title VII claim.\textsuperscript{23} When the union lost the grievance at arbitration, the employer moved for summary judgment on the Title VII action.\textsuperscript{24}

The district court found that Alexander was precluded from bringing his statutory claim because of the arbitrator’s decision, and the Tenth Circuit affirmed the decision.\textsuperscript{25} The Supreme Court reversed, and held that bringing the grievance to arbitration did not preclude Alexander from subsequently pursuing his statutory claim, even though he had not been successful in the arbitration.\textsuperscript{26}

The issue in \textit{Alexander} was whether a union’s agreement to arbitrate employment claims could subsume the plaintiff’s right to file a Title VII claim.\textsuperscript{27} The Court found that it could not, citing the possibility of conflict between the interests of the union and its individual members.\textsuperscript{28} It held:

\textquote{T}here can be no prospective waiver of an employee’s rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities. Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee’s rights under Title VII are not susceptible of prospective waiver.\textsuperscript{29}

\textsuperscript{23} See \textit{id.} at 39, 42.
\textsuperscript{24} See \textit{id.} at 43.
\textsuperscript{25} See \textit{Alexander}, 415 U.S. at 43.
\textsuperscript{26} See \textit{id.} at 59-60.
\textsuperscript{27} See \textit{id.} at 45-46.
\textsuperscript{28} See \textit{id.} at 55.
\textsuperscript{29} \textit{Id.} at 51-52 (citations omitted).
Since 1974, the Court has extended this doctrine to claims under other Federal employment statutes.\(^\text{30}\)

The *Alexander* Court also expressed its "mistrust" of arbitration as an adequate forum for statutory claims.\(^\text{31}\) The Court gave several reasons for finding labor arbitration to be inappropriate in these cases. It believed that labor arbitrators did not have the right kind of experience to hear statutory claims or the authority to do so.\(^\text{32}\) In addition, it questioned the adequacy of fact-finding procedures in arbitration and the informality of arbitration hearings.\(^\text{33}\)

Although the Supreme Court held that an employee's statutory right to trial under Title VII is not foreclosed by submitting a claim to arbitration under a collective bargaining agreement,\(^\text{34}\) in the 1980's, it began to uphold arbitration of statutory claims in a commercial context, under the Federal Arbitration Act [FAA].\(^\text{35}\) As the Court expanded arbitration to commercial transactions, it created a presumption, based on the language of the FAA, that Congress did not intend to prohibit arbitration of statutory claims unless it was clearly prohibited by the statute in question.\(^\text{36}\) It also assumed, in commercial cases, that arbitrators were competent to

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\(^{30}\) See, e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1994); McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (reasoning that when a claim was brought under 42 U.S.C. § 1983, "an arbitration proceeding cannot provide an adequate substitute for a judicial trial" in protecting individual rights); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737 (1981) (recognizing the federal policy behind encouraging arbitration where a claim was brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, but concluding that an employee's specific, substantive rights would be intolerably compromised by mandatory arbitration of claims "arising out of a statute designed to provide minimum substantive guarantees to individual workers"); Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980).

\(^{31}\) See *Alexander*, 415 U.S. at 56.

\(^{32}\) See id. at 57 & n.18.

\(^{33}\) See id. at 57-58.

\(^{34}\) See id. at 49.


\(^{36}\) See *Mitsubishi*, 473 U.S. at 628.
hear them and that the procedures were adequate to ensure fairness and comity with a judicial forum.37

In 1991, the Court decided a case in which the lower court had refused to compel arbitration of a statutory employment claim.38 Gilmer was a stockbroker who was required, as a condition of employment, to register with the New York Stock Exchange.39 The registration agreement contained a provision in which he agreed to take to arbitration any dispute arising from his employment or its termination.40 He was not a member of a bargaining unit, there was no collective bargaining agreement and he signed the registration agreement in his individual capacity.41

When his employment was terminated, Gilmer filed a claim under the Age Discrimination in Employment Act ("ADEA") and Interstate moved to compel arbitration.42 The district court, citing Alexander, upheld Gilmer's right to take his statutory claim to court.43 The Fourth Circuit looked to the recent commercial cases, such as Mitsubishi, and finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements," reversed the lower court's decision.44

Gilmer relied on Alexander when he argued that mandatory arbitration of his claim would compel him to waive his right to bring a statutory claim to court.45 Attempting to rebut the presumption created by the courts in the commercial cases, he argued that mandatory arbitration was inconsistent with the purposes of the ADEA and that it usurped the enforcement powers of the Equal Employment Opportunity Commission.46 He also claimed that it

37. See, e.g., Shearson, 482 U.S. at 232 ("[T]he streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."); Mitsubishi, 473 U.S. at 628 ("By 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.");
39. See id.
40. See id. at 23.
41. See id. at 33.
42. See id. at 23-24.
43. See Gilmer, 500 U.S. at 24.
44. See id.
45. See id.
46. See id. at 27.
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deprived him of the judicial forum guaranteed by statute.\textsuperscript{47} The Supreme Court found arbitration of the claim to be mandatory under the FAA.\textsuperscript{48}

Addressing Gilmer's reliance on \textit{Alexander}, the Court distinguished the cases in three ways.\textsuperscript{49} It noted that Alexander had been subject to a collective bargaining agreement, creating a "tension between collective representation and individual statutory rights," while "Gilmer's access to arbitration, if a dispute arose, was not controlled by a union, or any other entity or individual."\textsuperscript{50} Secondly, \textit{Alexander} dealt with the conflict between the preclusive effect of an arbitration award and the right subsequently to litigate a statutory claim, while the issue in \textit{Gilmer} was whether an individual agreement to arbitrate a statutory claim could be enforced.\textsuperscript{51}

The third distinction was that, unlike \textit{Gilmer}, \textit{Alexander} was not decided under the Federal Arbitration Act.\textsuperscript{52} Citing the FAA, the Court found a Congressional presumption in favor of arbitration, which could be rebutted only by showing that Congress "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."\textsuperscript{53} In distinguishing \textit{Gilmer} from \textit{Alexander}, the Court clearly stated that statutory rights in a federal forum could not be waived where a collective bargaining agreement compelled arbitration.\textsuperscript{54}

Also, although Gilmer himself did not argue that the agreement to arbitrate was excluded from enforcement by section 1 of the

\begin{itemize}
  \item \textsuperscript{47} Several amici curiae offered the theory that, because the FAA does not cover "contracts of employment," it could not be applied to Gilmer's case.
  \item \textsuperscript{48} \textit{See Gilmer,} 500 U.S. at 35.
  \item \textsuperscript{49} \textit{See id.}
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{See id.; see also Brisentine v. Stone & Webster Corp., 117 F.3d 519 (11th Cir. 1997).}
  \item \textsuperscript{52} \textit{See Gilmer,} 500 U.S. at 35.
  \item \textsuperscript{53} \textit{Id.} at 26. "It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the Federal Arbitration Act." \textit{Id.}
  \item \textsuperscript{54} \textit{See id.}
\end{itemize}
FAA, several *amici curiae* did. The Supreme Court chose not to
decide that issue, holding that the registration agreement was not a
contract of employment.

### III. Controversy

Increasingly, parties to collective bargaining agreements are
including in their contracts provisions mandating arbitration of indi-
vidual statutory claims. Some courts continue to recognize *Alexander*
as controlling in cases where there is a collective bargaining
agreement, and some do not. The Third, Fourth and Sixth Circuits
have compelled arbitration of statutory claims under collective
bargaining agreements, while the Second, Seventh, Tenth and Elev-
enth Circuits have refused to do so.

Many questions have been raised concerning the voluntary
nature of such collectively bargained arbitration provisions, the ten-
sions between majority and minority rights within unions, the
nature of statutory rights and whether *Alexander* is still good law.
The following is an overview of the cases and issues in controversy.

#### The Courts Disagree About Alexander and Gilmer

In *Austin v. Owens-Brockway*, decided by the Fourth Circuit,
the plaintiff was a member of a bargaining unit whose union negoti-
ated a provision calling for mandatory arbitration.

The collective bargaining agreement contained an anti-discrimination

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55. See id.

56. See id.

57. See Martin v. Dana, 1997 WL 313054 (3rd Cir. June 12, 1997), *vacated and reh'g

58. See, e.g., Brisentine v. Stone & Webster Corp., 117 F.3d 519, 526 (11th Cir. 1997)
    (stating that *Alexander* should be applied to collective bargaining agreements instead of
    *Gilmer*); Martin, 1997 WL 313054, at *8 (stating that in specific situations where an individual
    employee can compel arbitration, *Gilmer*, not *Alexander*, should control).

59. See, e.g., Brisentine, 117 F.3d 519; Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th
    Cir. 1997); Martin, 1997 WL 313054; Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.
    1997); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996), *cert.
    1996); Wedding v. Univ. of Toledo, 89 F.3d 316 (6th Cir. 1996); Tran v. Tran, 54 F.3d 115 (2d
    Cir. 1995);

60. See Harrison, 112 F.3d at 1453 (adopting "the majority view ... that *Alexander* and
    its progeny remain good law and that statutory employment claims are independent of a
    collective bargaining agreement's grievance and arbitration procedures").

61. 78 F.3d 875.

62. See id. at 878.
clause subject to the contractual grievance and arbitration procedure.\textsuperscript{63} Because of this contract provision between the union and the employer, the court concluded that Austin had voluntarily agreed to submit her discrimination claims to the grievance procedure.\textsuperscript{64}

A more recent case in the Third Circuit, \textit{Martin v. Dana Corp.},\textsuperscript{65} also upheld a mandatory arbitration provision in a collective bargaining agreement.\textsuperscript{66} The plaintiff, a member of a bargaining unit, brought a Title VII claim against his employer.\textsuperscript{67} Dana moved to dismiss, on the grounds that its contract with the union provided that "[a]ny and all claims regarding equal employment opportunity provided for under this Agreement or under any federal, state or local fair employment practice law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement."\textsuperscript{68} Relying on \textit{Gilmer} and \textit{Austin}, and holding that \textit{Alexander} no longer controlled, the lower court found for the company and the Third Circuit affirmed the decision.\textsuperscript{69}

In another case concerning an anti-discrimination provision, the Sixth Circuit found a statutory claim arbitrable under the collective bargaining agreement.\textsuperscript{70} In \textit{Wedding}, a university employee filed federal statutory claims and a grievance where the contract called for the university to defer arbitration of the grievance until the federal claims were resolved.\textsuperscript{71} On appeal, the Sixth Circuit declined

\textsuperscript{63} See id. at 879-80.
\textsuperscript{64} See id. at 885.
\textsuperscript{65} 1997 WL 313054 (3d Cir. June 12, 1997) vacated and reh'g granted, 114 F.3d 428 (3d Cir. 1997).
\textsuperscript{66} See id. at *1.
\textsuperscript{67} See id.
\textsuperscript{68} Id.
\textsuperscript{69} The Third Circuit vacated its decision on July 1, 1997, and granted a rehearing, en banc. See Martin v. Dana, 114 F.3d 428 (3d Cir. 1997). On September 12, 1997, it remanded the case to the original panel. On Dec. 16, 1997, it reversed the lower court's decision without issuing a published opinion.
\textsuperscript{70} See Wedding v. University of Toledo, 89 F.3d 316 (6th Cir. 1996).
\textsuperscript{71} The contract provision stated:

The procedures described in this Article shall constitute the sole and exclusive method used for resolution of grievances. If a grievant seeks relief through a judicial or administrative forum outside of this grievance procedure for a subject matter covered by a grievance, the processing of the grievance shall be held in abeyance until the outside forum has issued a final determination or unless both the Employer and [the union] agree otherwise.
to decide whether arbitration of the statutory claims was mandatory, believing that to do so would be substituting its judgment for the arbitrator's. 72

The Seventh Circuit, on the other hand, decided that a grievance and arbitration procedure in the collective bargaining agreement did not make mandatory the arbitration of a federal discrimination claim, where only the union could take statutory claims to arbitration under the collective bargaining agreement. 73 The court recognized a tension between the need to allow unions and employers to establish a framework for resolving employment disputes and the interest and benefit in enforcing the statutory rights of minority groups. 74

Further evidence of a split amongst the circuits are the decisions in Varner v. National Supermarkets, Inc., 75 Harrison v. Eddy Potash, Inc., 76 Brisentine v. Stone & Webster Corp. 77 and Tran v. Tran. 78 In

Id. at 317.
72. See id.
74. See id. at 360. “The essential conflict is between majority and minority rights ... . An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit.” Id. at 362. “The union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement.” Id. at 363.
75. 94 F.3d 1209, 1213 (8th Cir. 1996) (citing Alexander, the court refused to compel arbitration because the jurisdictional prerequisites dictated in Title VII did not include exhausting grievance procedures under a collective bargaining agreement).
76. 112 F.3d 1437, 1453-54 (10th Cir. 1997). Citing Alexander, the court followed what it called “the majority view” and found in favor of the plaintiff. See id. It held that the context in which the agreement arises is most important and stated, “[a]lthough plaintiffs like the one in Gilmer at least have the ‘theoretical possibility of negotiating a separate deal with their employers’ that does not require arbitration, unionized employees have no such choice.” Id. at 1454 (quoting Martin Malin, Arbitrating Statutory Employment Claims in the Aftermath of Gilmer, 40 St. Louis U. L.J. 77, 87 (1996)). See also Randolph v. Cooper Indus., 879 F. Supp. 518, 521 (W.D. Pa. 1994) (“Nothing in Gilmer suggests that the Court abandoned its concern about the inherent conflicts between group goals and individual rights that exist in the give-and-take of the collective bargaining process.”).
77. 117 F.3d 519 (11th Cir. 1997). The court distinguished Alexander and Gilmer and concluded that,

a mandatory arbitration clause does not bar litigation of a federal statutory claim, unless three requirements are met. First, the employee must have agreed individually to the contract containing the arbitration clause—the union having agreed for the employee during collective bargaining does not count. Second, the agreement must authorize the arbitrator to resolve federal statutory claims—it is not enough that the arbitrator can resolve contract claims, even if factual issues
each of these cases, as in Pryner, the plaintiffs were union members subject to collective bargaining agreements which contained grievance and arbitration procedures. Each employer sought to dismiss the statutory claim on the grounds that the collective bargaining agreement made arbitration mandatory. In each of these cases, the court found for the plaintiff.

The Circuits Disagree About Whether Collective Bargaining Agreements are Enforceable Under the FAA

Section 1 of the FAA excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the jurisdiction of the Act, including enforcement of arbitration agreements. A question which has not been settled amongst the circuits is precisely which kind of employment contracts are meant to be excluded and whether collective bargaining agreements are among them. The Supreme Court sidestepped the issue in Gilmer and has not decided it yet. The majority interpretation of the Act is that employment agreements are included within the scope of the FAA, but collec-

arising from those claims overlap with the statutory claim issues. Third, the agreement must give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process. All three of those requirements were met in the Gilmer case, which is the latest word from the Supreme Court on the subject. None of the requirements were met in this case.

Id. at 526-27.

78. 54 F.3d 115 (2d Cir. 1995) (distinguishing Gilmer from Alexander and holding that compulsory arbitration under the terms of a collective bargaining agreement differs from arbitration under an individual contract); see also Gray v. Toshiba Am. Consumer Prods., Inc. 959 F. Supp. 805 (M.D. Tenn. 1997) (discussing that employee's unsuccessful effort to submit discrimination claim to arbitration did not preclude her from bringing statutory claims in federal court). In Tran, the statutory claim arose under the Fair Labor Standards Act. The court found, as the Supreme Court had in Barrentine, that the federal court should “reach the merits of the wage and hour claims.” Tran, 54 F.3d at 118.

79. See Brisentine, 117 F.3d at 519; Harrison, 112 F.3d at 1437; Varner, 94 F.3d at 1209; Tran, 54 F.3d at 115.

80. See Brisentine, 117 F.3d at 519; Harrison, 112 F.3d at 1437; Varner, 94 F.3d at 1209; Tran, 54 F.3d at 115.

81. See Brisentine, 117 F.3d at 519; Harrison, 112 F.3d at 1437; Varner, 94 F.3d at 1209; Tran, 54 F.3d at 115.


83. See id. (providing a fine discussion of this subject).

84. But see, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467 (D.C. Cir. 1997), in which Chief Judge Edwards noted,
tive bargaining agreements are not. The majority of circuits have held that the exclusion clause should be narrowly construed to apply only to workers who are involved directly in interstate transportation of goods. Therefore, most circuits have found that individual contracts of employment not involving workers directly engaged in the interstate transportation of goods are enforceable under the FAA.

A related question is whether collective bargaining agreements are subject to enforcement under the FAA. The Second Circuit, in a 1997 case, held that the FAA does not exclude collective bargaining agreements. The Seventh Circuit came to the same conclusion

the Supreme Court's interpretation of section 2 of the FAA in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995), strongly supports this narrow interpretation of section 1. . . . [A]lthough the Supreme Court did not address the issue of section 1's scope in Gilmer, the majority's decision suggests that the Court would be inclined to accept the narrow interpretation we adopt.


According to the majority opinion, Gilmer had signed a securities registration application which was not a contract of employment. Therefore, we do not know with any certainty whether managerial and non-represented employees who sign or are otherwise bound by employment agreements are required to arbitrate their statutory claims under the FAA. The Court, as it said, has left that "scope of exclusion" question "for another day." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). That day will arrive, and when it does it is altogether likely that the Court will select the narrow interpretation adopted by the overloaded courts below.

As Professor Matthew Finkin of the University of Illinois has convincingly demonstrated, both before and after Pryner, those courts are wrong in that they have completely misread the FAA's legislative history. See Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Employment Contracts Under the FAA — Reconsidered, 48 LAB. L.J. 329, 333 (1997). Nevertheless, our highest court, driven by policy considerations, will most probably agree with them.

Id.

86. See Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, 207 F.2d 450 (3d Cir. 1953), which was followed by most circuits. See, e.g., Asplundh, 71 F.3d at 597-99; Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971).
87. See, e.g., Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, 207 F.2d 450 (3d Cir. 1953), which was followed by most circuits; See also Asplundh, 71 F.3d at 597-99; Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1162 (7th Cir. 1984); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972); Dickstein v. DuPont, 443 F.2d 783, 785 (1st Cir. 1971).
88. See Maryland Cas. Co. v. Realty Advisory Bd., 107 F.3d 979, 982 (2d Cir. 1997).
in Pryner.\(^9\) The Ninth Circuit\(^9\) and the Eleventh Circuit\(^9\) have not decided whether collective bargaining agreements are subject to the FAA.

The Sixth Circuit still finds that collective bargaining agreements are outside the scope of the FAA,\(^9\) as does the Fifth Circuit.\(^9\) The Third Circuit recently reaffirmed its earlier decision in Tenney,\(^9\) in which it held that "the FAA's exemption of coverage . . . is limited to those employment contracts in the transportation industries and does not affect collective bargaining agreements in other areas."\(^9\)

The Fourth Circuit, in Austin, noted that "in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements."\(^9\)

Clearly, the Court has appellate jurisdiction under § 16(a)(2) of the Act. Section 2 of the Act makes all contracts entailing transactions in commerce subject to the Act. Although § 1 of the Act excludes coverage for 'contracts of employment of seamen, railroad employees, or any other class of employees engaged in foreign or interstate commerce,' that exclusion is not applicable in this case because, in our Circuit, section 1's exclusion is limited to workers involved in the transportation industries.

\(\text{Id.; see, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 84 F.3d 988, 993 (7th Cir. 1996), cert. denied, 117 S. Ct. 276 (1996); Erving, 468 F.2d at 1069.} \) Since collective bargaining agreements are contracts entailing transactions in commerce, the bargaining agreement in the instant case falls within the purview of the Act. . . ."

Maryland Cas. Co., 107 F.3d at 982.

89. See Pryner v. Tractor Supply Co., 109 F.3d 354, 356-58 (7th Cir. 1997).

90. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 934 (9th Cir. 1992) (noting that the FAA's application to employment contracts is unresolved, but the court will not reach issue because it is not raised below).

91. See Brisentine v. Stone & Webster Corp., 117 F.3d 519, 526 (11th Cir. 1997).

92. A district court may issue a stay upon a finding that a plaintiff was not "in default" in seeking to compel arbitration if the case arises under the Federal Arbitration Act, but the FAA does not apply to labor contracts. See Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311-12 (6th Cir. 1991); Bacashihua v. United States Postal Serv., 859 F.2d 402, 404 (6th Cir. 1988).

93. See Rojas v. TK Comm., Inc., 87 F.3d 745, 748 (5th Cir. 1996) ("[N]umerous other courts have addressed this very issue, the majority of which have determined that the exclusionary language present in § 1 is to be narrowly construed.").

94. See Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 226-27 (3d Cir. 1997).


This issue requires clarification. The Supreme Court pointedly decided *Gilmer* under the FAA,97 while finding *Alexander* to be controlling in cases involving labor disputes.98 If the Fourth Circuit does not apply the FAA to labor disputes, but other circuits do, there will be disagreement about whether so-called "voluntary" agreements to arbitrate statutory claims under collective bargaining agreements may be enforced under the FAA.

**Can Mandatory Arbitration Provisions in Collective Bargaining Agreements be Voluntary?**

A disturbing assumption made by the Third, Fourth and Sixth Circuits is that mandatory arbitration provisions in collective bargaining agreements are voluntary agreements made by individual employees.99 Because of this assumption, courts have enforced arbitration of individual statutory claims under collective bargaining agreements.100 Yet, how can an agreement made between the union and the employer be an agreement made voluntarily by the individual bargaining unit member?

The Fourth Circuit, in *Austin*, decided that it need not be concerned about the possible tension between collective representation and statutory rights because Austin was "party to a voluntary agreement" and had explicitly agreed to the arbitration of her statutory complaint.101 Therefore, it found that the case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims.102 The court did not recognize that, although the agreement may have been voluntary on the part of the union, Austin was not a party to it.103 Nevertheless, the court found that it must enforce arbitration of Austin’s statutory claims because "[i]f we were to decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims cannot be the subject of required arbitration. We do not think that Congress intended to return to the old law."104

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98. See id.
100. See *Austin*, 78 F.3d at 880-81.
101. See id. at 885.
102. See id. at 880-82.
103. See id. at 887.
104. Id. at 882.
Unlike the Fourth Circuit, the Supreme Court made a distinction between voluntary agreements to arbitrate made by individuals and mandatory arbitration provisions in collective bargaining agreements between unions and employers. The law in Alexander is not that "statutory claims cannot be the subject of required arbitration," but that unions may not prospectively waive the rights of individual members to a judicial forum for those rights.\(^\text{105}\) The law in Gilmer is that voluntary agreements to arbitrate statutory claims are enforceable when they are made by individuals who knowingly and voluntarily waive their rights to a judicial forum.\(^\text{106}\) In fact, the Fourth Circuit disregards the Supreme Court's own holding that the Gilmer decision was not intended to overrule Alexander.\(^\text{107}\) The Supreme Court has never repudiated its holding in Alexander; instead, it recently reaffirmed Alexander, and distinguished it from Gilmer, in Livadas v. Bradshaw.\(^\text{108}\)

The Third Circuit, in Martin, cited Austin for the proposition that

\[\text{whether the dispute arises under a contract of employment growing out of [a] securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced.}\(^\text{109}\)

The Third Circuit recognized that neither the statutory language nor the Gilmer decision specifically addressed the situation found in Martin's case, in which both the individual and the union can com-

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\(^107\). See id.

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

Id. at 127 n.21 (citations omitted).

pel arbitration.\textsuperscript{110} It decided, however, that because Martin did not have to persuade the union to prosecute his grievance, the case lacked the same “tension between individual and group interests” and the “potential disparity in interests between a union and an employee” was no longer a matter of concern.\textsuperscript{111} Where the individual employee can compel arbitration, it concluded, “\textit{Gilmer, not Alexander, should control.”}\textsuperscript{112} What the court failed to consider is that, in order for \textit{Gilmer} to control, the agreement must have been made knowingly and voluntarily. Like Austin, Martin did not negotiate the waiver of his right to a judicial forum; therefore, it is \textit{Alexander} which must apply.\textsuperscript{113}

The Sixth Circuit’s case, \textit{Wedding}, illustrates, in a different context, a similar assumption about the voluntary nature of an agreement to arbitrate.\textsuperscript{114} There, the court reasoned that “when an employer and its employees agree to a [collective bargaining agreement] providing for arbitration of grievances arising under that CBA, they have bargained for the decision of an arbitrator, not of a court.”\textsuperscript{115} This is good law when grievances are based on disputes about collective rights granted to the bargaining representative on behalf of its members, but not so in cases involving the statutory rights of individuals.\textsuperscript{116} The erroneous underpinning of this decision is the court’s assumption that the parties to this collective bargaining agreement are the employer and its employees, not the employer and the employees’ bargaining representative.\textsuperscript{117} There was, in fact, an agreement to arbitrate, but it was made by the

\textsuperscript{110} See Martin v. Dana Corp., 114 F.3d 421, 425 (3d Cir. 1997).

\textsuperscript{111} \textit{Gilmer}, 500 U.S. at 35.

\textsuperscript{112} Martin v. Dana, 1997 WL 313054, at *8 (3d Cir. June 12, 1997).

\textsuperscript{113} See id. at *5. In fact, Martin’s attorney commented, in a conversation with the author, that Martin was a member of a racial minority in his union and that the union leadership was not disposed to bring his Title VII claims to arbitration through the grievance procedure. Although, under the terms of the contract, Martin could bring his grievance to arbitration himself, he would not be represented by the union or its counsel. \textit{Id.}

\textsuperscript{114} See Wedding v. University of Toledo, 89 F.3d 316, 319-20 (6th Cir. 1996).


\textsuperscript{116} See \textit{Wedding}, 89 F.3d at 317; see also \textit{Gilmer}, 500 U.S. at 35 (discussing “the differences between contractual rights under a collective-bargaining agreement and individual statutory rights . . . ”).

\textsuperscript{117} See \textit{Wedding}, 89 F.3d at 319.
union, not the plaintiff. Here, again, the plaintiff's right to a judicial forum was prospectively waived by the collective bargaining agreement and that waiver was enforced by the court.

An unvoiced assumption in these decisions may be that a collective bargaining agreement is voluntary on the part of individual union members because the membership has ratified it. If so, it presumes that all members of the bargaining unit have voted to ratify the contract, which is usually not the case. If not all members have voted to ratify an agreement to take statutory disputes to arbitration, then Martin, or Austin, or any other union member with a statutory claim, may not have made a voluntary agreement concerning mandatory arbitration. Therefore, it can never be assumed that any individual union member has made the kind of voluntary agreement which these courts find necessary to uphold mandatory arbitration under a collective bargaining agreement.

Mistaking Collectively Bargained Agreements for Individual Agreements to Arbitrate

Some courts have compelled statutory arbitration under collective bargaining agreements because they mistook them for individual, voluntary agreements that may be enforced under the FAA. It is difficult to understand the genesis of this misconception, since the "Gilmer" cases are easily distinguishable from those that involve collective bargaining agreements. In the former, there is no union and no collective bargaining agreements. In the former, there is no union and no collective bargaining agreement, just an individual who makes an agreement with an employer.

118. See id. at 317-18.
119. See, e.g., Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997).
   An agreement negotiated by the union elected by a majority of the workers in the bargaining unit binds all the members of the unit, whether they are part of the majority or for that matter even members of the union entitled to vote for union leaders — they need not be.
   Id. See also LaChance v. Northeast Publ’g Corp., 965 F. Supp. 177, 180 (D. Mass. 1997)
   [raising] some of the issues litigated in Gilmer, but in an entirely different setting - not an arbitration clause in an individual employment agreement, in which there is at least the fiction of individual bargaining, but in the context of an arbitration clause in a collective bargaining agreement, negotiated by a union representative, to which [the plaintiff] was bound solely by dint of membership in the union.
   Id.
   Not surprisingly, because traditional labor arbitration is so celebrated in the United States, it is easy for the uninitiated to fall prey to the suggestion that the legal
The error began in Austin. Each time that the Fourth Circuit cited precedential cases in its argument to compel arbitration, the cases it cited involved individuals who were not union members.\textsuperscript{121} Without distinguishing between individual agreements to arbitrate and agreements made by collective bargaining representatives, the Fourth Circuit assumed that Austin’s arbitration must be mandatory because she had not shown that Congress intended otherwise.\textsuperscript{122} This is a requirement for the enforcement of individual, voluntary arbitration agreements, but not for collectively bargained ones. Furthermore, in its argument concerning anticipatory agreements to arbitrate statutory claims, the court cited three securities industry cases in which a party sought to compel arbitration under an individual employment contract.\textsuperscript{123} In not one of these cases was the plaintiff compelled to arbitrate under a collective bargaining agreement.\textsuperscript{124}

By missing this first, most elementary distinction, the circuit court set down a path from which, logically, it can now compel arbitration in all cases. If a provision in an agreement bargained for by a union representative is indeed a voluntary agreement made by the plaintiff herself, and if this “voluntary” agreement thus becomes subject to the law as expressed in Gilmer and its progeny, then certainly there is no need to follow Alexander any longer and all statutory employment cases now in the circuit’s courts may be sent to arbitration.

A similar mistake was made in Almonte v. Coca-Cola Bottling Co.,\textsuperscript{125} where the district court based its decision to compel arbitration on the erroneous statement that, in Gilmer, “a CBA arbitration

\begin{itemize}
  \item precepts governing the enforcement and review of arbitration emanating from collective bargaining should be equally applicable to arbitration of all employment disputes. This is a mischievous idea, one that we categorically reject.
\end{itemize}

\textit{Id.}

\textsuperscript{121} For example, in discussing the Supreme Court’s support of arbitration as a forum, the Fourth Circuit quotes the passages in Gilmer in which the Court discussed arbitration of the commercial, statutory cases that arose under the FAA. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879 (4th Cir. 1996).

\textsuperscript{122} See id.

\textsuperscript{123} See id. at 882-83 (citing Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991)); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991).

\textsuperscript{124} See id. at 883-84 (citing Bender, 971 F.2d at 701; Alford, 939 F.2d at 229; Willis, 948 F.2d at 312).

\textsuperscript{125} 959 F. Supp. 569 (D. Conn. 1997).
clause was held to preclude the employee from bringing" his statutory claim, although Gilmer was not covered by a collective bargaining agreement. The court then noted that in Almonte, "[i]ke Gilmer, the arbitration clause in [the] CBA expressly includes claims of discrimination in violation of federal law." In finding arbitration mandatory, it decided to adopt a "more limited view of the Court's holdings in [Gardner-Denver and Barrentine]. Under this view," it held, "the exclusion of individual statutory claims from the collective-bargaining process would take the form of a rebuttable presumption rather than an absolute requirement: that is, the courts would assume that individual statutory claims were excluded from grievance procedures unless the collective bargaining agreement expressly provided otherwise." Following this novel theory, the court found that the plaintiff's statutory claim was precluded by the arbitration provision of the collective bargaining agreement because he had not shown affirmatively that Congress intended to preclude a waiver of judicial remedies for claims under section 1981 of the United States Code.

For the proposition that "the Court must resolve any doubt in favor of arbitration," the Eastern District of Virginia, in Bright v. Norshipco & Norfolk Shipbuilding, cited Dean Witter Reynolds v. Byrd, a case that concerns an individual employment contract in the securities industry, falls under the FAA and has nothing to do with labor relations, unions or collective bargaining agreements. Assiduously following Austin, the Bright court found that the plaintiff had been a voluntary party to a collective bargaining provision

126. See id. at 573.
127. Id. at 573-74.
128. Id. at 574 (quoting Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 147 n.6 (D. Conn. 1993)).
129. See Almonte, 959 F. Supp. at 574. This theory seems to import the Mitsubishi holding into a case in which there is a statutory employment claim under a collective bargaining agreement, and then grafts it to the holding in Gilmer. As noted above, however, neither Mitsubishi nor Gilmer were labor relations cases.
131. 470 U.S. 213 (1985). This case was cited by Gilmer, 500 U.S. at 24, for the proposition that the purpose of the enactment of the FAA was "to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Id.
132. See Dean Witter, 470 U.S. 213. This argument may have been intended to buttress the court's subsequent polemic concerning its desire to use arbitration to reduce the number of cases on its calendar.
mandating arbitration of his Title VII and ADA claims.\textsuperscript{133} Although it is true, as the district court reminds us, that there is a presumption of arbitrability enunciated in the \textit{Steelworkers Trilogy},\textsuperscript{134} that presumption applies to arbitration of traditional, contractual labor relations grievances, with which \textit{Bright} is not concerned.\textsuperscript{135}

In \textit{Jessie v. Carter Health Care Center, Inc.},\textsuperscript{136} the court also confuses cases of individual, voluntary agreements to arbitrate with those concerning arbitration provisions in collective bargaining agreements.\textsuperscript{137} In essence, the court cites securities industry cases involving individual contracts to arbitrate employment disputes, then transforms those inapposite cases into the basis for compelling arbitration of statutory rights through the grievance procedure of a collective bargaining agreement, with not even a nod to cases that are on point. In fact, the court disposes of \textit{Alexander} in one sentence, finding only that “[i]n \textit{Gilmer} the Supreme Court takes a very different tack to preclusion significantly departing from \textit{Alexander}.”\textsuperscript{138}

Similarly, the \textit{Martin} court cites eight cases for the proposition, central to the case, that, “[s]ince \textit{Gilmer}, courts have repeatedly held that Title VII claims, like ADEA claims, are subject to mandatory arbitration.”\textsuperscript{139} Of the cited cases that the court acknowledges, only \textit{Austin} “arose in the context of a collective bargaining agreement. The other cases all involved arbitration clauses in employment contracts and securities registration applications.”\textsuperscript{140} Without examining whether it should distinguish between the two kinds of cases, the court concluded that it should compel arbitration.\textsuperscript{141}

\begin{itemize}
\item \textsuperscript{133} See \textit{Bright}, 951 F. Supp. at 98-99.
\item \textsuperscript{134} See \textit{id}. at 98 (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)).
\item \textsuperscript{135} See \textit{id}. at 98 n.1.
\item \textsuperscript{136} 930 F. Supp. 1174 (E.D. Ky. 1996).
\item \textsuperscript{137} See \textit{Jessie}, 930 F. Supp. at 1176 (citing \textit{Gilmer} v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); \textit{Willis} v. Dean Witter Reynolds, Inc., 948 F.2d 305, 308 (6th Cir. 1991), to show that “it is permissible to enter into an agreement to arbitrate a claim based on a statutory right such as Title VII”).
\item \textsuperscript{138} \textit{Jessie}, 930 F. Supp. at 1177.
\item \textsuperscript{139} \textit{Martin} v. \textit{Dana}, 1997 WL 313054, at *6 (3d Cir. June 12, 1997), \textit{vacated and reh'g granted}, 114 F.3d 428 (1997).
\item \textsuperscript{140} \textit{Id}.
\item \textsuperscript{141} \textit{Id}.
\end{itemize}
What is the outcome when a court does recognize and follow the appropriate cases? This is what happened in Harrison, Pryner, Varner, and Tran, as well as in cases in other federal courts. The Eastern District of Texas decided a case in which the union and the employer had not agreed to arbitrate statutory claims. Nevertheless, the employer moved to dismiss the Title VII claims on the grounds that the issues had been raised in a prior grievance arbitration. Relying on Alexander, Barrentine, and McDonald, and distinguishing Gilmer, the court held that mandatory arbitration of Title VII claims under a collective agreement is invalid. It reasoned,

Gardner-Denver involved an arbitration clause contained in a collective-bargaining agreement, while Gilmer, in contrast, involved an arbitration clause contained in an individual employment contract between a stockbroker and his employer. Nothing in Gilmer suggests that a union through a CBA can waive an employee’s right to litigate a Title VII claim in federal court.

The Ninth Circuit reached a similar conclusion in a case which arose in the context of the Railway Labor Act, as did the District

142. See Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Varner v. National Supermarkets, Inc., 94 F.3d 1209 (8th Cir. 1996); Tran v. Tran, 54 F.3d 115 (2d Cir. 1995).
144. See id. at 1042.
145. See id. at 1043-44.
146. Id. at 1044 (italics in original); see also Foster v. Bechtel, 1996 WL 784506 at *5 (N.D. Cal. Nov. 5, 1996) (citing Pryner v. Tractor Supply Co., Inc., 927 F. Supp. 1140, 1147, 1148 (S.D. Ind. 1996)) in which the district court came to the same conclusion on similar facts. The court found Alexander to be controlling because

the existence of a possible remedy to the plaintiff under the collective bargaining agreement did not foreclose his right to pursue his ADA and Title VII statutory claims. Pryner held that neither the plaintiff’s prior arbitration under his collective bargaining agreement of the claims he brought in federal court, nor his failure to arbitrate said claims previously had any bearing upon his right to enforce the statutory rights he was asserting.

Foster, 1996 WL 784506 at *5.
147. See Felt v. Atchison, Topeka & Santa Fe Ry. Co., 60 F.3d 1416, 1419-20 (9th Cir. 1995) (involving an employee who filed a claim of religious discrimination, the court upheld his right to the judicial forum, finding that “[t]here is no doubt that Title VII rights, which the CBA never expressly references, ‘exist independent of the collective bargaining agreement.’” (quoting Hawaiian Airlines Inc. v. Norris, 12 U.S. 246, 260 (1994)). “Because Title VII and the RLA, as applied to this railway agreement, each provide a mechanism for resolving a claim of religious discrimination does not mean that the Title VII rights are ‘created or
Court of the District of Columbia when a nurse filed for both grievance arbitration and judicial resolution of her claim of discrimination.\textsuperscript{148}

\textit{The Tension Between Majority and Minority Interests Within the Union}

Those whom the statutes are designed to protect are often minority groups within unions, and at risk of not being heard or fairly represented by the majority. Because it is a union's job to represent the majority,\textsuperscript{149} minority, unpopular or dissident union members may find their unions unwilling to attempt to vindicate their statutory rights.\textsuperscript{150} It is not so farfetched to imagine a union, charged with getting the best deal it can for the majority of its members, agreeing not to take an individual's statutory claim to arbitra-

\textsuperscript{148} See Matuskey v. Medlantic Healthcare Group, 1997 WL 161952, at *43 (D.C. Cir. Apr. 3, 1997). "The fact that [the antidiscrimination clause] is contained in a collective bargaining agreement rather than in an individual employment contract defeats [the employer's] contention that plaintiff knowingly waived her statutory rights in favor of arbitration." \textit{Id.}


\textsuperscript{150} For example, the plaintiff in \textit{Bush} alleged that he had attempted to add his claims of racial discrimination to the grievance but was stopped by the union president. \textit{See Bush v. Carrier Air Conditioning}, 940 F. Supp. 1040, 1042 (E.D. Tex. 1996).
tion in return for the employer's promise of some benefit to the majority.

A union has broad discretion as to whether to prosecute a grievance.

It may take into account tactical and strategic factors such as its limited resources and consequent need to establish priorities . . . as well as its desire to maintain harmonious relations among the workers and between them and the employer. Corresponding to this expansive and ill-defined discretion, the scope of judicial review of its exercise is deferential. The result is that a worker who asks the union to grieve a statutory violation cannot have great confidence either that it will do so or that if it does not the courts will intervene and force it to do so. While the grievance machinery could in principle offer the worker a cheaper alternative to suing, it seems unlikely that the union would be any more willing to prosecute a marginal case than a lawyer asked to handle it on a contingent-fee basis. Indeed, the union might for strategic reasons decline to prosecute a claim that would have enough merit to enable the worker to retain a lawyer on a contingent-fee basis were the worker not bound to the union.  

Conflict between majority and minority interests is illustrated in Breech v. Alabama Power. The plaintiff was a member of a religious group that will not work on Saturday. The company and the union met with him many times to try to resolve the conflict between his religious beliefs and the work schedules bargained for by the company and the union. Although the union brought Breech's grievance to arbitration, it "never agreed to waive or modify any provision of the CBA with regard to the scheduling of employees or any other provision of the CBA as it related to

151. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997) (citations omitted); see, e.g., Brisentine v. Stone & Webster Corp., 117 F.3d 519, 525 (11th Cir. 1997). In Brisentine, the Eleventh Circuit observed that the IBEW advised Brisentine to file a complaint with the EEOC rather than file a grievance. That advice is some indication that the union was at least unenthusiastic, and perhaps unwilling, to pursue Brisentine's claim to arbitration . . . . Moreover, the union, not Brisentine, would be obligated to bear half the cost of arbitration, which gave it an incentive against . . . tak[ing] a claim to arbitration. That same conflict of interest existed in Alexander but was absent in Gilmer.

153. See id. at 1450.
154. See id. at 1452.
Breech and other employees . . . .” It could not do so without putting other members of the bargaining unit at a disadvantage.

Furthermore, a union and its membership may themselves be the targets of a Title VII action. Consider the case in which a female employee alleged a variety of egregious discriminatory practices based on gender. Most of the offensive conduct allegedly was perpetrated by employees who were members and officers of the union, including its President and Vice-President, and the local and international unions were named as defendants in the statutory suit. When the employer and the unions moved to compel arbitration of the claim, the court found that they had “contracted amongst themselves to waive [the] plaintiff['s] rights and to submit . . . [her] claims against them to binding arbitration” and were essentially seeking to enforce their own agreement against the plaintiff. In such cases, the union cannot act without at least the appearance of bias, and it is questionable whether it can vigorously prosecute the plaintiff’s grievance. Yet proponents of mandatory arbitration clauses in collective bargaining agreements would have unions as the sole proprietors of the statutory rights of their members, even in cases in which the unions themselves may be defendants.

155. See id. at 1454.
156. See id. at 1451-52.
157. See Woods v. Graphic Communications, 925 F.2d 1195, 1200-03 (9th Cir. 1991) (holding that the union may be liable under Title VII for refusing to process grievances of African American members alleging racial discrimination, and acquiescing in a racially discriminatory work environment); Local Union No. 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24-25 (5th Cir. 1966) (involving a union that refused to process grievances by African American members concerning segregated plant facilities).
159. See id. at 442-44.
160. See id. at 450.
161. See id. at 450.
162. The employer in Krahel argued that the plaintiff could bring a charge of breach of the duty of fair representation against the union-defendant if she was dissatisfied with its representation. See Krahel, 971 F. Supp. at 451. The court noted that the Supreme Court had found that argument unpersuasive. See id. (citing Alexander, 415 U.S. at 58 n.19). “[H]ere the plaintiff is given no option: she must accept the Union as her representative without regard to any conflict of interest.” Krahel 971 F. Supp. at 451.
The unions' duty of fair representation first arose because of an historical lack of adequate representation of minorities within the labor movement. It cannot be assumed that unions will be sensitive to the interests of minorities, "which are the interests protected by Title VII and the other discrimination statutes, and will seek to vindicate those interests with maximum vigor." Giving the power to enforce minority rights to the majority is not "consistent with the policy of these statutes or justified by the abstract desirability of allowing unions and employers to cut their own deals."

There is, of course, precedent for such dual claims in "hybrid § 301" actions where the employee brings an action against the employer for breach of the collective bargaining agreement along with an action against the union for breach of its duty of fair representation. See, e.g., Clayton v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, 451 U.S. 679, 101 S. Ct. 2088, 68 L.Ed.2d 538 (1981); Vaca, 386 U.S. at 186, 87 S.Ct. at 914-15; Dushaw, 66 F.3d 129. In such cases, however, the rights in question arise under the collective bargaining agreement, which also establishes the exclusive remedy for violations of that agreement. Ordinarily there would be no recourse to the courts. Consequently, it is incumbent upon the employee to establish the existence of extraordinary circumstances that justify invocation of a judicial remedy. Krahel, 971 F. Supp. at 452. Defendants in these cases may also claim that § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), allows a plaintiff to pursue a grievance independently of the Union. "While § 159(a) gives plaintiff a right to 'present' her grievances to her employer, it apparently does not compel Owens to meet with plaintiff, let alone to take any action on her grievances." Krahel, 971 F. Supp. at 451. The Seventh Circuit also rejected that argument by an employer. See Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997).

This raises the specter of three suits to enforce a statutory right — the suit against the union to force it to grieve and if necessary arbitrate the grievance, the arbitration proceeding, and the resumed district court proceeding if the workers' rights under the collective bargaining agreement are more limited than their statutory rights.

Id.


164. Pryner, 109 F.3d at 362-63. See also LaChance v. Northeast Publ'g, Inc., 965 F. Supp. 177, 184 (D. Mass. 1997). ("Where the arbitration agreement only agrees to arbitrate claims arising from rights provided in the CBA, an employee cannot be precluded from bringing separate statutory claims, even when two claims arise out of the same factual scenario."). The court notes that Congress extended the Americans with Disabilities Act to protect employees against unions as well as employers. Id. "This provision no doubt reflects the labor movement's 'long history' of mistreatment of minority workers." Id. at 188 n.21.

165. Pryner, 109 F.3d at 363. An example of the possible conflict of interest created by such mandatory arbitration provisions is the following clause contained in the collective bargaining agreement in Bynes v. Ahrenkiel Ship Management Inc., 944 F. Supp. 485 (W.D. La. 1996). In a contract containing an antidiscrimination clause, Article II § 4(m) of the grievance and arbitration procedure provides:
May Unions Bargain with Individuals’ Rights?

The Austin court thinks so. It found that “a union has the right and duty to bargain for the terms and conditions of employment,” and “[t]here is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate.”166 Does a union own its members’ statutory rights, and can it use those rights as a bargaining chip?

In Jessie v. Carter Health Care Center, Inc. for example, the court finds that a union is under a statutory duty to bargain on behalf of its employees and, in so doing, may waive certain rights.167 The difference between arbitrating a statutory claim and taking it to court, the Jessie court says, is merely a matter of a choice of forum and choice of forum is a right like any other, one which can be made part of the bargain by the union and, thus, waivable.168 Therefore, Jessie must take her statutory discrimination claim through the grievance and arbitration procedure provided in the collective bargaining agreement.169 This holding by a district court is in striking contrast to the Supreme Court’s holding in Alexander that, while a union is entitled to bargain with “statutory rights related to collective activity, such as the right to strike,” it may not do so with the “individual’s right to equal employment opportunities,” and that “rights conferred [on an individual by Title VII] can form no part of the collective-bargaining process . . . .”170

The findings of these courts wrongly reduce the question of whose rights are being bargained away, settling for the simpler conclusion that the union has merely waived choice of forum. By so

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No Covered Person shall have the right to demand arbitration under the provisions hereof, such right to arbitration being limited to the Union and the Company; and no Covered Person shall have the right to institute any action based upon this Agreement for wrongful discharge or because of any breach of this Agreement, such right of action being limited to the Union and the Company; and if any claim is made at any time by any of the Covered Personnel against the Company or the Union under the provisions of this Agreement, any agreement or adjustment made by or between the Union and the Company with respect to such dispute shall be final and binding upon the Covered Personnel.

Bynes, 944 F. Supp. at 486 (emphasis added). The court, following Alexander, refused to compel arbitration of the statutory claims.

168. See id.
169. See id.
doing, they have avoided grappling with larger issues of union rights and duties. Where there is a collective bargaining agreement, the "choice of forum" argument is seriously flawed. The judicial forum, which these courts believe may be bargained away by a union on behalf of its members, gives a plaintiff an absolute right to pursue Title VII claims individually, without the cooperation or permission of the union. The plaintiff's case would be decided by a jury or a federal judge, not a panel selected exclusively by the employer and union, one or both of whom would be defendants in a statutory case.

Other individual rights bargained away by the union along with the choice of forum may be the right to a longer limitation period and certain remedies available to the plaintiff under Title VII and other statutes. When arbitration of statutory claims is mandatory under a collective bargaining agreement, it is the union and employer who decide how long a plaintiff may wait to bring a claim. Also, under Title VII, an employee may recover compensatory and punitive damages and legal fees, but an arbitrator under a collective bargaining agreement has no such explicit authority to grant these recoveries.

Although the parties to a labor contract might put these rights back into the agreement, it would be done at their pleasure and not because the grievant had a right to them, as the grievant would

171. The statute of limitations in a Title VII action is 300 days, 42 U.S.C. § 2000e-5(e)(1) (1994), and evidence of earlier incidents may be admissible to prove a continuing violation. See Krahel v. Owens-Brockway, 971 F. Supp. 440, 452 (D. Or. 1997) (citing Varner, 94 F.3d 1209, 1214 (8th Cir. 1996)). That is not the case with most collective bargaining agreements. A shorter limitation period may be suitable for the types of claims that commonly arise under a collective bargaining agreement. In statutory cases, however, it may not be a particular isolated act that gives rise to the claim, but a pattern of conduct. See Krahel, 971 F. Supp. at 452-53.

172. A number of cases have concluded that there is no right to punitive damages. See generally International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979) (denying punitive damages); Association of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541, 551 (9th Cir. 1992) (citing this policy as rationale for denying award of attorney fees to prevailing party); Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277, 284 (3d Cir. 1962) (Biggs J., concurring) ("It is the general policy of the federal labor laws... to supply remedies rather than punishment."); see, e.g., Moore v. Local Union 569, 989 F.2d 1534, 1542 (9th Cir. 1993); United Transp. Union, 881 F.2d 282, 286 (6th Cir. 1989); Williams v. Pacific Maritime Ass'n, 421 F.2d 1287, 1289 (9th Cir. 1970); Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491, 498 (D. Or. 1977). But cf., Woods v. Graphic Communications, 925 F.2d 1195, 1204-05 (9th Cir. 1991) (awarding punitive damages against union for racial discrimination against member).
under a statute. Therefore, contractual rights and remedies can never be substantially equivalent to those available to the plaintiff in the judicial forum. Indeed, it is questionable whether the plaintiff could "effectively vindicate" those rights in a process in which all rights are controlled by the union and the employer.

Unions stand in place of their members only in certain circumstances, those in which an individual's right is extinguished and transferred to the union so that it may represent the collective interests of its members in matters concerning labor relations. This principle is at the heart of the decision in Alexander. Rights derived by individuals from employment statutes are not the kind of rights that reside in a union; therefore, a union cannot bargain or in any other way negotiate with them.

173. See Hammontree v. NLRB, 925 F.2d 1486, 1498, 1502 (D.C. Cir. 1991) (en banc) (discussing that whereas the National Labor Relations Act created waivable group and individual rights, "Title VII established nonwaivable individual rights, redressable in federal court . . . ") (Edwards, C.J., concurring). "[T]he Supreme Court has flatly rejected arguments suggesting that statutory rights may be waived by an agreement to arbitrate disputes arising under a collective bargaining agreement." Id. at 1502.


176. See also Krahel, 971 F. Supp. at 452

177. The National Labor Relations Act, authorizing unions to represent employees in the creation and administration of collective bargaining agreements with employers, together with the correlative duty of fair representation, however, is limited to the collective bargaining process. See Foust, 442 U.S. at 46; Vaca, 386 U.S. at 182; Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 350, 357-38 (1953); Steele, 323 U.S. at 204; Freeman v. Local Union No. 135 Chauffeurs, 746 F.2d 1316, 1321 (7th Cir. 1984) ("If . . . a particular form of redress is not relegated to the exclusive domain of the union, an individual employee is free to seek that avenue."); Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965). "[W]aivers of statutory rights in collective bargaining agreements are not in the same class as individual, knowing contractual waivers. [E]ven if [the grievance and arbitration provision of a collective bargaining agreement]were interpreted as an attempt to waive the plaintiff's statutory rights, it would be ineffective," because these rights do not
Are Statutory Employment Claims Really Labor Disputes?

In deciding Austin, the Fourth Circuit starts with and relies on "the well-recognized federal labor law favoring arbitration of labor disputes"178 to compel arbitration of statutory claims under collective bargaining agreements. Is a statutory employment claim a labor dispute? Both Alexander and Gilmer clearly say it is not. If it is not, then the reasoning behind Austin and those cases decided in its image is faulty from inception.

If a dispute arises from the collective bargaining agreement and also concerns a collective right held by the union on behalf of its members, then the grievance can be considered a labor dispute. If the source of the claim to be arbitrated is a statute which the employer and the union are bound by law to obey, and the right in question is held by the individual and is not related to collective interests, the complaint can be considered an employment dispute.

Remembering the history of arbitration of statutory and industrial disputes helps to put the difference between labor and employment disputes into focus. Arbitration of commercial, not statutory, claims was first proposed by Congress in 1925.179 Arbitration of contractual labor grievances was endorsed by the Supreme Court, beginning in 1957.180 Neither the FAA, nor enforcement of grievance arbitration under section 301 of the Taft-Hartley Act, contemplated the arbitration of statutory claims.181 In 1974, the Alexander decision reminded unions and employers that individual employees had statutory rights to judicial forums that could not be subsumed by a collective bargaining agreement.182 In the 1980's, the Supreme

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Court began to accept arbitration of statutory claims in a commercial setting. In 1991, the Court in *Gilmer* enforced agreements to arbitrate contained in individual employment contracts, as long as the waiver of the judicial forum was knowing and voluntary and arbitration did not undermine the intent of the relevant statute. Then, in 1994, the Court reminded us that it had distinguished *Gilmer* from *Alexander*. Throughout, the Supreme Court has been careful to distinguish among arbitration of labor disputes, commercial disputes, statutory claims and employment claims under individual contracts and collective bargaining agreements.

The Fourth Circuit, however, did not make such a distinction. It simply assumed that Austin's employment claim was a labor dispute and, as such, subject to arbitration under the contract. Since Austin's claim was not a labor dispute, but an employment claim as clearly distinguished by the Supreme Court, the cases cited by the Fourth Circuit concerning federal policy favoring arbitration do not apply and its fundamental assumption about the arbitrability of the claim has no legal precedent.

The Fourth Circuit also raised a related issue, finding that Austin was bound to arbitrate her Title VII and ADA claims because "the collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration." Importing "non-discrimination" language into a collective bargaining agreement does not automatically convert the agreement into a statute from which separate, individual rights may be derived. That

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183. See, e.g., *Rodriguez de Quijas*, 490 U.S. at 483 (enforcing an agreement to arbitrate claims arising under section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77f(2)); *McMahon*, 482 U.S. at 238, 242 (enforcing an agreement to arbitrate claims under civil provisions of the Racketeer Influenced and Corrupt Organizations Act and section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b)); *Mitsubishi Motors Corp.* 473 U.S. at 629 (enforcing agreement to arbitrate antitrust claims under the Sherman Antitrust Act).


186. See *Gilmer*, 500 U.S. at 34-35; *Alexander*, 415 U.S. at 49-50. See also *Lividas*, 512 U.S. 107 (1994) (holding that California law was inconsistent with federal law when arbitration agreements precluded claims pursuant to statutory law).


188. See id. at 879 (interpreting arbitration agreements of labor disputes without first analyzing and determining whether the claim was a labor dispute).

189. See *Alexander*, 415 U.S. at 60 ("[C]ourts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims."). Austin's claim was for discrimination. See id. at 42.

190. *Austin*, 78 F.3d at 885-86.
would be analogous to including criminal statutes in a contract and allowing an arbitrator to impose a sentence, depriving an employee of liberty or property. The court upholds what it sees as arbitration of a labor relations grievance, thus finding that the authority to arbitrate derives from the contract. However, Austin's rights were independent of the contract and derived from the statutes passed by Congress.

The Argument About Congressional Intent

In *Alexander*, the Supreme Court expressed a concern that "waiver of these [statutory employment] rights would defeat the paramount congressional purpose behind Title VII." The Fourth Circuit paid attention to this concern, finding that it had been obviated by *Gilmer* and the language of the statutes itself. In that court's view, *Gilmer* laid to rest, forever and with regard to all statutes, the argument that arbitration is inconsistent with Congress's purpose in enacting such statutory rights. Therefore, it finds, the burden is on [the plaintiff] to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes.

To support its argument, the court cited language added to Title VII, the ADEA and the ADA in 1991 that stated that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title." The Fourth Circuit's lead was followed enthusiastically by the Third Circuit, in *Martin v. Dana Corp.*, and several lower courts. The new language in the statutes encouraged the

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191. See id.
192. See id. at 881.
194. See *Austin*, 78 F.3d at 880-81.
197. 1997 WL 313054 (3rd Cir. June 12, 1997).
Third Circuit to find that the amendment "certainly undermines
the portion of the Supreme Court's Alexander opinion expressing a
mistrust of the arbitral process." 199

However, other courts have found differently. In two similar
cases, the courts expressly rejected the contention that this lan-
guage abrogates the holding in Alexander. 200 The Seventh Circuit
also found this argument to be inconsistent with the legislative his-
tory of the amendments. 201 "It would be at least a mild paradox," it
said, "for Congress, having in another amendment that it made to
Title VII in 1991 conferred a right to trial by jury for the first
time, 202 to have empowered unions, in those same amendments, to
prevent workers from obtaining jury trials in these cases." 203

The Jessie court relied on the Austin version of the ADA’s legisla-
tive history to compel arbitration of a claim under that statute. 204
Closer scrutiny of that legislative history might have yielded a dif-
ferent result. Harvey S. Mars, writes, for example:

Even though the ADA's legislative history indicates that arbitra-
tion is considered the preferable method of dispute resolution, see 136 Cong. Rec. H4582, H4606 (daily ed. July 12, 1990), it was
not meant to supplant federal rights created under the statute. As
was noted in the Judiciary Committee Report on the ADA, arbitra-
tion of an ADA claim was not meant to waive an individual's
entitlement to sue under the Act. The Judiciary Committee
pointed out that "any agreement to submit disputed issues to
arbitration, whether in the context of a collective bargaining

199. Martin v. Dana, 1997 WL 313054, at *6 (3d Cir. June 12, 1997). The court was
paraphrasing Gilmer, where the Supreme Court stated that its historical mistrust of
arbitration as a forum had been "undermined" by its subsequent decisions. The circuit court,
however, failed to take into account the fact that the Gilmer Court's treatment of arbitration
of individual, voluntary agreements was based on different principles than the Alexander
Court's concern about agreements to arbitrate found in collective bargaining agreements.

200. See Pryner v. Tractor Supply Co., 109 F.3d 354, 363-64 (7th Cir. 1997); Krahel v.

201. Pryner, 109 F.3d at 363. In addition, the legal responsibilities imposed on employers
under the ADA often directly conflict with the interests of the union. See Harvey S. Mars,
Collective Bargaining Under the Americans with Disabilities Act, Title I, 66 N.Y. St. B.J. 36,
37 (1994); Rose Daly-Rooney, Note, Reconciling Conflicts Between the ADA and the NLRA
to Accommodate People with Disabilities, 6 DePaul Bus. L.J. 387, 392-393 (1993). For
example, an accommodation may involve transferring a disabled employee to a light work
duty position, which may violate seniority rights collectively established by the union.


Congress has shown no intention of endorsing arbitration of statutory employment claims as an exclusive forum, nor has it addressed the concern raised in Alexander about waiver of statutory rights. The “Congressional intent” arguments of those courts that compel such arbitration under collective bargaining contracts are, therefore, unpersuasive.

IV. A SIMPLER SOLUTION . . . .

There has been much ado about Alexander and Gilmer in the context of compelling arbitration of statutory employment claims under collective bargaining agreements.206 The courts have examined, or ignored, the issues of jurisdiction under the FAA, the voluntary nature of the agreement, individual versus collective rights, Congressional and judicial intent, and the history of arbitration as a forum.207 The multiplicity of issues and criteria for decision-making has produced a profusion and confusion of differing holdings and pronouncements.208

There is a simpler way to decide when, and whether, to enforce an arbitration agreement. Only one question need be asked, and that is: “who made the bargain?” Answering that question at the outset determines whether the agreement should be enforced. If an individual who is not covered by a collective bargaining agreement signs an agreement to arbitrate, then, according to Gilmer and its progeny, it is an agreement made knowingly and voluntarily and is enforceable by the Federal Arbitration Act.209 If, on the other

206. See Jessie, 930 F. Supp. at 1176-77.
207. See id.
208. See Krahel v. Owens-Brockway Glass Container, Inc., 971 F. Supp. 440, 444 (D. Or. 1997) (stating, “[w]hether an employer and labor union may agree between themselves to arbitrate or otherwise limit an employee’s civil rights claims has long been the subject of controversy.”); Pryner v. Tractor Supply Co., 109 F.3d 354, 363-64 (7th Cir. 1997).
209. Admittedly, there is some incongruity between the holdings in Alexander and Gilmer. As a practical matter, an arbitration clause inserted in a personal employment contract may be no more ‘voluntary’ than one inserted in a collective
hand, a union and an employer make a bargain for mandatory arbitration of statutory claims that automatically waives the statutory rights of individual unit members, then Alexander controls and the agreement may not be enforced.

V. . . . AND LOOKING BEYOND ENFORCEMENT

Asking the right question is the simple solution to the problem of distinguishing between Gilmer and Alexander and, thereby, deciding whether to enforce an arbitration agreement. Union members cannot be compelled to waive, involuntarily or without knowledge, statutory rights to judicial forums, nor may a union prospectively waive or bargain with these rights on behalf of its members. However, unions and employers would like to use arbitration to resolve what we might characterize as “statutory grievances.” There are many ways to approach the challenge of finding the fairest way to proceed when a bargaining unit member asserts a statutory claim under a collective bargaining agreement. What follows is a discussion of possibilities and consequences. How have unions become involved in statutory disputes between employers and employees? The common thread that runs through all of the cases considered here is a contract provision that bars discriminatory conduct on the part of the employer. It is this contractual language that has caused the confusion; having agreed to the contract provision, the parties are bound to arbitrate the statutory grievances arising from it, but cannot, because such an agreement is unenforceable. This puts the union in an untenable position, at risk of a claim of a breach of the duty of fair representation and yet unable, because of the concerns expressed in Alexander and its progeny, to agree to a pre-dispute mandatory arbitration scheme on behalf of its members.

One way around this problem, is simply to remove nondiscrimination clauses from collective bargaining agreements. Individuals would bring statutory claims without the assistance of the union,
most likely in judicial forums. Unions would avoid potential conflicts of interest and suits for breaches of the duty of fair representation; in fact, unions would need only point the way to the nearest EEOC office. Individuals and employers would spend more money and time in litigation and the courts' calendars would be unmanageable. Or, employers might require unionized employees to sign mandatory pre-dispute arbitration agreements as individuals which would be enforceable, according to Gilmer, under the FAA.\textsuperscript{211}

On the other hand, if unions and employers wish to continue to include nondiscrimination language in their contracts, is it possible to create a system in which the union can take such a statutory grievance to arbitration on behalf of a member without running afoul of Alexander? It would require a plan by which statutory rights are preserved, the needs of all parties are considered, and the individual employee does not contend alone and unarmed with the mightier employer and union.

In a paper presented at the 1996 New York University Conference on Labor and Employment, Max Zimny, General Counsel of U.N.I.T.E., proposed such an arbitration system.\textsuperscript{212} It contains suggestions for discovery, selection and training of arbitrators, and the form of the eventual award, and includes a number of safeguards for arbitration of statutory employment claims made by bargaining unit members.\textsuperscript{213} Zimny suggests:

The complaining employee should have the right to make a voluntary, post-dispute decision to submit a statutory discrimination claim either to binding arbitration or to the courts. The employee should be specifically advised to contact either union counsel or other counsel of choice and be permitted a reasonable period of time to do so before electing the forum for determination of the claim. The election should be offered by the employer after the union has investigated the grievance and decided to pursue it to arbitration.

The election document should explain the legal rights of the employee in clear, understandable language. The document should also advise the employee to file a timely charge with the

\textsuperscript{212} See Max Zimny, Arbitration of Statutory Employment Disputes Under Collective Bargaining Agreements, in PROCEEDINGS OF NYU ANNUAL CONFERENCE ON LABOR 175, 178 (Samuel Estreicher, ed., 1996).
\textsuperscript{213} See id.
appropriate administrative agency even if an election is made to arbitrate the dispute in order to preserve his or her rights in the event the case is not settled or an award does not issue. The election document should be signed by both the employee and the union as well as the employer.

The election procedure should provide that the employer may request employee election within 30 days of receipt of the demand for arbitration. If the employer fails to serve the election document or the employee or union declines to sign it, the employer should be precluded from raising the arbitration provision as defense to a court action alleging discrimination.\(^\text{214}\)

Although there is something for everyone not to like in this proposal, it takes into account the needs of all the parties. It also raises new questions but, before they can be considered, it is necessary to clarify whether we are discussing a claim arising under a statute or a statutory grievance arising from the collective bargaining agreement. In other words, if the union takes a statutory grievance to arbitration, what happens to the employee's other, independent claim that arises from the statute rather than the contract? The proposed arbitration plan speaks of one claim but, as long as there is a nondiscrimination clause in the contract, there will always be two.

It is possible that each claim would survive and be brought separately. This may be what Zimny is alluding to when he proposes that "[t]he document should also advise the employee to file a timely charge with the appropriate administrative agency even if an election is made to arbitrate the dispute in order to preserve his or her rights in the event the case is not settled or an award does not issue."\(^\text{215}\) Alternatively, as is the case with unfair labor practices, the claims might be maintained separately but the statutory claim could be deferred until the statutory grievance is resolved in arbitration.\(^\text{216}\) It might also be possible to merge the claims and treat them as one, or to eliminate one or the other altogether by a waiver that would satisfy the Court's concerns in Alexander.\(^\text{217}\) If an individual were to waive the right to a judicial forum, however, there

\(^{214}\) Id.

\(^{215}\) Id.

\(^{216}\) This approach was rejected in Alexander v. Gardner-Denver Co, 415 U.S. 36, 56 (1974).

\(^{217}\) See id.
would have to be a binding assurance that the union would prosecute the statutory grievance and strict sanctions would follow if it failed to do so.

Assuming that we are only discussing the statutory grievance, other issues arise. Who will counsel the employee when he is deciding which forum to choose? Who will pay the cost of such counsel? Who will pay for prosecuting the claim if the employee elects to take it to court? These questions implicate issues raised in the context of the tension between majority and minority interests within the union. There may be instances when the interests of the majority or the officers of the union are incongruent with the interests of the individual unit member. It may be that the individual member is in a minority by virtue of ethnicity or gender, or is unpopular. Perhaps the individual member is also suing the union and its officers or is running on an insurgent slate. It may be a sensitive issue or bad timing. Because situations such as these will arise, the union might provide independent counsel for the member who has a statutory grievance and elects to take it to court. That counsel could be a plaintiff's advocate who is retained by the union, or by the union and the employer jointly, to advise the individual. In order to avoid conflicts or the appearance of impropriety, it might also be advisable for independent counsel to represent the union member at arbitration.

Then there is the issue of financial responsibility for prosecuting the claim.\textsuperscript{218} The D.C. Circuit's decision in \textit{Cole} addressed this issue in the context of an individual's statutory claim.\textsuperscript{219} Its conclusion bears repeating here: "[b]ecause public law confers both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated, we find that employees cannot be \textit{required} to pay for the services of a 'judge' in order to pursue their statutory rights."\textsuperscript{220} That principle should also hold in cases where the individual claimant is covered by a collective bargaining agreement. Perhaps, if our society is serious about endorsing arbitration as a cheaper, easier and faster method of dispute resolution, we might consider funding arbitration in the same way that we now

\textsuperscript{218} See \textit{Cole v. Burns Int'l Sec. Servs.}, 105 F.3d 1465, 1468 (D.C. Cir. 1997).
\textsuperscript{219} See \textit{id}.
\textsuperscript{220} \textit{Id}.  
fund our court system. I do not advocate this solution, but offer it as a stepping-off point for further thought and discussion.

VI. CONCLUSION

Congress and the Supreme Court have demonstrated a preference for subjecting individual statutory employment claims to arbitration if the arbitration agreements are entered into voluntarily, if rights to a judicial forum are knowingly waived only by the individual claimant, and if the agreement does not contravene the intention of the relevant statute. Recently, there has been confusion amongst the circuits about whether, and under what circumstances, to compel arbitration of statutory employment claims.

Where courts have enforced mandatory arbitration under collectively bargained agreements, they have done so by incorrectly following the holding in Gilmer, rather than Alexander. They have not distinguished the circumstances of these cases from those in which the arbitration agreements were contained within individual employment contracts. They have also sidestepped the questions of whether the agreement was made voluntarily by the claimant and whether the union prospectively waived the statutory rights of individual members.

In considering whether to enforce mandatory arbitration agreements within collectively bargained contracts, consideration must be given to the tensions between majority and minority interests within a union. If a union has the sole right to bring an individual’s statutory employment claim to arbitration, that claim may be sacrificed for the interests of the majority or ignored because the individual member is part of a minority within the unit, or is unpopular or a dissident. The claimant may even be suing the union. It is also questionable whether a union has the right to bargain with statutory rights that belong to individual members.

Some courts that have enforced arbitration under collective bargaining agreements have based their decisions on an assumption of Congressional intention to waive the judicial forum that is not

222. See, e.g., Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (9th Cir. 1997); Martin v. Dana Corp., 1997 WL 313054 (3rd Cir. June 12, 1997), vacated and reh’g granted, 114 F.3d 421 (1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Varner v. National Supermarkets, Inc., 94 F.3d at 1209 (8th Cir. 1996); Tran v. Tran, 54 F.3d 115 (2d Cir. 1995).
backed by the legislative history of the statutes.\footnote{223} They have also cited historical precedents for presumption of arbitrability that pertain to labor disputes, but not to employment disputes.\footnote{224}

A simpler way to look at this issue is to ask: “who made the bargain?” The answer to that question will determine whether \textit{Gilmer} or \textit{Alexander} should apply and, consequently, whether the arbitration agreement should be enforced.

Giving a unionized employee the choice of taking a claim either to arbitration or to court is one suggestion for resolving the question of what to do about statutory employment claims in a union setting. A procedure needs to be in place to ensure fairness for all parties. This article presents a few proposals and questions for creating such a procedure.

\footnote{223} See \textit{Austin v. Owens-Brockway Glass Container Inc.}, 78 F.3d 875, 879 (1996); see \textit{generally Gilmer}, 500 U.S. at 26-29 (discussing the legislative history of select statutes relative to arbitration).

\footnote{224} See \textit{Austin}, 78 F.3d 875; \textit{Gilmer}, 500 U.S. 20.