Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright

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The subject of this article, Wright v. Universal Maritime Service Corp., was decided by Supreme Court on November 16, 1998. This article, predicting the result and arguing for the rationale actually adopted by the Court, was submitted to the Hofstra Labor & Employment Law Journal on July 29, 1998.

I. INTRODUCTION

When, if ever, does an arbitration provision in a collective bargaining agreement require an employee claiming that her employer violated an anti-discrimination statute to arbitrate her statutory claim? The Supreme Court may let us know in Wright v. Universal Maritime Service Corp., which was argued on October 7, 1998.

Gilmer v. Interstate/Johnson Lane Corp. created the issue. In Gilmer, the Supreme Court held that a broker who had signed a registration

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* Author's Note: I wish to express my appreciation to the student editors for their willingness to forego the usual editing and emendation of the text. I accept full responsibility for its errors. The editors have added the commentary, explanation and references in the footnotes. I take neither credit nor responsibility for them.


statement with the New York Stock Exchange providing for arbitration of all disputes with his employer required him to arbitrate his claim that the employer had violated the Age Discrimination and Employment Act ("ADEA").

*Gilmer* left a host of undecided questions. One question was whether the same principle applied to claims of violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended in 1991. All of the circuits, except the Ninth, that have addressed this question have now agreed that it does. A second question was whether the same rule applied where the arbitration agreement was contained in a collective bargaining agreement. All of the circuits, except the Fourth, have held

4. See *Gilmer*, 500 U.S. at 23; 29 U.S.C. §§ 621-634 (1994). The employee alleged that his employer discriminated against him in contravention of the ADEA. See *Gilmer*, 500 U.S. at 23-24. The Supreme Court ordered the employee to exhaust the grievance process contained in the employment agreement, and thus required him to arbitrate the claim rather than litigate it in a judicial forum. See id. at 35. The principle supporting this conclusion was that a claim of violation of the ADEA can be arbitrable. See id. at 26-35. The Court acknowledged that the ADEA was designed to further "important social policies," but enforcing agreements to arbitrate age discrimination claims that are contained in individual employment contracts would not impede furtherance of these policies. See id. at 27.


8. See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994) (holding that Title VII claims were subject to mandatory arbitration); Mago v. Shearson Lehman Hutton Inc., 956 F.2d 932, 934-35 (9th Cir. 1992) (holding that employee failed to establish that Congress, in passing Title VII, intended to preclude arbitration of Title VII claims, and requiring employee to arbitrate pursuant to employment application clause); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 229-30 (5th Cir. 1991) (holding that Title VII claims can be subjected to compulsory arbitration); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307, 310-12 (6th Cir. 1991) (subjecting sex discrimination claims to arbitration).

that it does not. The Supreme Court has now decided to address that issue.

It is usually not wise to predict the outcome of a pending Supreme Court case. I will, however, predict the result in Wright. The Fourth Circuit will be reversed. The only real question, in my view, is the rationale that it will offer for that result. On that, my crystal ball is cloudy. There are at least two possible methods of reaching the result I have just predicted, and it may be that the Court will utilize both, or more likely, divide on the rationale. My purpose in this Article is to separate out the arguments and to urge strongly for one of them.

II. THE BACKGROUND

The story begins in 1974, long before not only Gilmer, but also before what has been called the second arbitration trilogy—Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., Shearson/American Express, Inc. v. McMahon and Rodriguez de Quijas v. Shear-
Before that trilogy, the accepted doctrine had been expressed in Wilko v. Swan,19 which held that an agreement to arbitrate would not bar suit to enforce a non-waiveable statutory right for which Congress had provided a judicial remedy.20 The forum made a difference, and a private agreement to arbitrate could not be enforced to deprive a plaintiff of his right to directly use the judicial forum.21 That principle went out the window in the Mitsubishi trilogy.22 But while that principle was still in existence, the Supreme Court decided Alexander v. Gardner-Denver Co.23

Alexander has been cited repeatedly for the proposition that an employee cannot be required to utilize the arbitration procedure under a collective bargaining agreement rather than bringing suit for claimed violation of an anti-discrimination statute.24 That was not the issue in Alexander. The issue was whether an employee who had actually arbitrated and lost a claim of violation of a no-discrimination provision in a collective agreement was thereafter barred from bringing suit under Title VII.25 Given Wilko, it would have been clearly untenable to argue that the plaintiff was required to arbitrate under the collective bargain-


20. See Wilko, 346 U.S. at 438. The Court noted that the purpose of the 1933 Act was to protect investors, and that investors would be best protected if they were not bound to the Federal Arbitration Act in the arena of securities sales. See id. at 431, 438.

21. Thus, the Court refused to order the buyer to attempt to exhaust the grievance machinery. See id. at 438.

22. In fact, Wilko was expressly overruled in Rodriguez de Quijas. See Rodriguez de Quijas, 490 U.S. at 485.


25. See Alexander, 415 U.S. at 49.
The argument was the reverse. The plaintiff, it was argued, had two potential remedies: a lawsuit or arbitration. Having elected arbitration, he should therefore be bound by the result. And so the District Court held: “We cannot accept a philosophy which gives the employee two strings to his bow when the employer only has one.”

The Tenth Circuit affirmed per curiam. The Supreme Court reversed.

The plaintiff, the Court held, had indeed two strings. As the Court put it:

[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins. Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

In short, Alexander was not entitled to two bites of the apple. Rather, he had two apples and was entitled to one bite of each. The Court then went on to reject any deferral to the arbitrator’s decision. The Court asserted that “arbitral processes” were comparatively inferior to judicial processes in the protection of Title VII rights. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can begiven meaning only by reference to public law concepts.

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27. See Alexander, 415 U.S. at 49.

28. See id.


30. See Alexander, 415 U.S. at 43.

31. See id. at 60.

32. Id.

33. See id. at 56.

34. Id. at 57.
At the very end of the opinion, in a footnote, the Court added what I shall call Alexander's "furthermore": the union's exclusive control over arbitration.  

A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.  

Later, as we shall see, the "furthermore" has overwhelmed the opinion.  

The basic principle enunciated was applied in different contexts in two subsequent cases: Barrentine v. Arkansas-Best Freight System, Inc. and McDonald v. City of West Branch. In both, a grievance had been filed under a collective bargaining agreement and lost in arbitration, and the lower courts held that this barred a subsequent suit claiming a statutory violation. In both, the Supreme Court reversed on Alexander grounds. In McDonald, the Court summarized the rule of the three cases thusly: "Congress intended the statutes at issue in those cases to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims under those statutes." The Court offered three considerations to support that conclusion. First, the comparative lack of arbitrable expertise, second, the lack of arbitral authority to adjudicate statutory, as con-
trasted with contractual, issues, and third, the union’s control of the grievance procedure, citing footnote nineteen in Alexander.

Then the legal landscape changed. In the Mitsubishi trilogy, the Court held that an agreement to arbitrate would be enforced pursuant to the Federal Arbitration Act (“FAA”) to preclude direct suit for claims of violation of the antitrust laws, the Securities and Exchange Acts of 1933 and 1934, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”). Wilko was overruled.

Finally, in Gilmer, this new rule was applied to claims of violation of the ADEA. Although Gilmer involved an individual employee’s agreement, it was argued on his behalf that Alexander and its progeny precluded requiring arbitration of employment discrimination claims. The argument was rejected. The Court reiterated the three bases for the Alexander rule and distinguished Gilmer from them (1) because enforceability of an agreement to arbitrate was a different question than preclusion of a subsequent statutory claim where the employees had not agreed to arbitrate the statutory claims and the labor arbitrators were not authorized to resolved such claims, (2) because the claimants were represented by their unions in arbitration and there was a potential tension between collective representation and individual rights, and (3) be-

44. See id.
45. See id. at 291 (citing Alexander, 415 U.S. at 58 n.19).
49. 15 U.S.C. §§ 78a-78ll (1994); see McMahon, 482 U.S. at 238.
52. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991). For more on employer requirements under the ADEA, see infra note 216.
53. See Gilmer, 500 U.S. at 23.
54. See id. at 33.
55. See id. at 33-35.
56. See id. at 35.
57. See id.
58. See Gilmer, 500 U.S. at 35.
cause those case were not decided under the FAA, which favors arbitration.60

The third distinction was without a difference. Section 301 of the Labor Management Relations Act ("LMRA"),61 which governs labor arbitration, is as favorable to arbitration as is the FAA.62 The first distinction would disappear if the collective bargaining agreement in fact authorized the arbitrator under a collective bargaining agreement to resolve statutory claims. In that event, only the second distinction, the footnote "furthermore" in Alexander,63 would appear to distinguish it from Gilmer, and the question would be whether it was sufficient.

That question at least appeared to present itself in Austin v. Owens-Brockway Glass Container, Inc.64 Suppose that a collective bargaining agreement did not simply contain an anti-discrimination provision, theo-

62. The Supreme Court has held that section 301 of the LMRA requires courts to enforce collective bargaining agreements' arbitration provisions unless "the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). Judicial review of arbitration awards is also severely limited. See United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593, 599 (1960) (announcing that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his."). Finally, employees must attempt to exhaust any existing grievance arbitration procedures embodied in a collective bargaining agreement before they may bring suit in court to enforce contractual rights. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965) (asserting that "there can be no doubt that the employee must afford the union the opportunity to act on his behalf in this situation."). For additional background regarding labor arbitration under section 301 of the LMRA, see G. Richard Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?, 68 TEX. L. REV. 509, 517-26 (1990).
64. 78 F.3d 875 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996). In Austin, the collective bargaining agreement did not simply contain an anti-discrimination provision, theoretically separate from the statutory provision, but actually incorporated various anti-discrimination statutes as terms of the collective bargaining agreement. See Austin, 78 F.3d at 879. Specifically, the provisions stated that "[t]he Company . . . will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status" as well as "the applicable provisions of the Americans with Disabilities Act." Id. The female employee asserted that her employer violated Title VII, see infra note 218, as well as the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), see infra note 216. See Austin, 78 F.3d at 877.
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retically separate from the statutory prohibition, but actually incorpo-
rated the statute as a term of the collective bargaining agreement. In *Republic Steel Corp. v. Maddox*, the Supreme Court had decided that a claim of violation of a collective bargaining agreement containing a grievance arbitration provision could not be sued upon, but must be arbitrated. If the agreement incorporated the statute as one of its terms, didn’t the *Maddox* rule apply? The Fourth Circuit said that it did, and therefore dismissed Austin’s statutory claim. Although the opinion contained language that seemed to suggest that the Court believed that *Gilmer* had overruled *Alexander*, the decision essentially relied on *Maddox* and the supposed incorporation of Title VII and the Americans with Disabilities Act (“ADA”) into the collective bargaining agree-
ment. The Supreme Court denied certiorari.

There followed cases in the Third, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits in which arbitration provisions

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67. See *Austin*, 78 F.3d at 885-86.
68. The Fourth Circuit stated:
70. See *Austin*, 78 F.3d at 885-86. That the incorporation theory was the basis for *Austin* was made clear by the Fourth Circuit in *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997).
In *Brown*, the collective bargaining agreement contained an anti-discrimination provision virtually identical to that in *Alexander*, but one which differed from that involved in *Austin* because the agreement did not refer in any way to the law. See *Brown*, 127 F.3d at 341-42. The Fourth Circuit held that the provision did not authorize arbitration of statutory claims and therefore was not a bar to the Title VII suit. See id. at 342.
72. See *Martin v. Dana Corp.*, 75 Fair Empl. Prac. Cas. (BNA) 871 (3d Cir. 1997). The decision has been marked by the court as “Not for Publication.” The circuit’s first decision was originally reported in the advance sheets at 114 F.3d 421 and unofficially at 73 Fair Empl. Prac. Cas. (BNA) 1803, but was unpublished when the court granted rehearing en banc at 114 F.3d 428. The court then vacated the en banc rehearing at 124 F.3d 590. However, the court did not reinstate the original opinion and instead issued a new one marked as “Not for Publication.”
73. See *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997).
74. See *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), cert. denied, 118 S. Ct. 295
in collective agreements were argued to require arbitration of claims involving violation of anti-discrimination statutes. In each case the argument was unsuccessful.

Among the earliest, and in my view the most significant of these cases, was the decision of the Seventh Circuit in Pryner v. Tractor Supply Co. Pryner was really two cases. In one, the plaintiff was Sobierajski. In the case, the agreement provided that "in accordance with applicable Federal and State law, neither the company nor the Union will discriminate against employees covered by this collective bargaining agreement in regard to any terms or conditions of employment on the basis of race, creed, religion, national origin, sex or age." In the other, Pryner, the no-discrimination provision in the collective agreement made no reference at all to the law. The Seventh Circuit, in an opinion by Judge Posner, treated the two provisions identically. The issue, as the court saw it, was whether Alexander or Gilmer controlled. Focusing directly on the possible tension between the claimant and the union, the court concluded that "on balance" the case was "closer to Alexander," and so arbitration was not required. Austin, the court acknowledged, was in conflict. The Supreme Court denied certiorari.

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78. See Brissette v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997).
79. See Martin, 75 Fair Empl. Prac. Cas. (BNA) at 871 (involving claim of violation of Title VII); Penny, 128 F.3d at 409 (involving claim of violation of the ADA); Pryner, 109 F.3d at 355 (involving claims of violation of various federal anti-discrimination statutes); Doyle, 1998 WL 697395, at *1 (involving claims of violation of various federal anti-discrimination statutes); Harrison, 112 F.3d at 1439 (involving claim of violation of Title VII); Brissette, 117 F.3d at 521 (involving claim of violation of the ADA); Varner, 94 F.3d at 1211 (involving claim of violation of Title VII).
80. See Martin, 75 Fair Empl. Prac. Cas. (BNA) at 873; Penny, 128 F.3d at 414; Pryner, 109 F.3d at 365; Doyle, 1998 WL 697395, at *2; Harrison, 112 F.3d at 1454; Brissette, 117 F.3d at 526-27; Varner, 94 F.3d at 1212.
82. Pryner, 109 F.3d at 356.
83. See id.
84. See id.
85. See id. at 363-64.
86. Id. at 365.
87. See Pryner, 109 F.3d at 365.
The cases in the other circuits decided similarly, treating the issue as presenting the question of whether Gilmer overruled Alexander's "furthermore" and concluding, contrary to Austin, that the "furthermore" controlled. 9

III. WRIGHT'S CASE

A. The Wright Facts

Then Wright v. Universal Maritime Service, Corp. 90 came along. Cesar Wright was a longshoreman. 91 His employment was governed by a collective bargaining agreement between the South Carolina Stevedores Association and Local 1422 of the International Longshoreman's Association. 92 Wright suffered a work-related injury and filed a worker's compensation claim under the Longshoreman and Harbor Worker's Compensation Act, 93 claiming permanent and total disability. 94 The claim was settled. 95 Wright then recovered and received a medical clearance to return to work. 96 He was dispatched from the Union hiring hall, and for a few days, he was hired by several of the stevedoring companies. 97 The companies then discovered that Wright had accepted the worker's compensation settlement and refused to accept him when he was sent out of the hiring hall, stating in identical letters to the local union president that "once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind." 98 The local union president protested to the companies. 99

89. See, e.g., Brisentine, 117 F.3d at 526 (refusing to subject employee to compulsory arbitration on ADA claim); Martin, 75 Fair Empl. Prac. Cas. (BNA) at 873 (refusing to subject employee's Title VII claim to arbitration); Penny, 128 F.3d at 412-14 (refusing to force employee's ADA claim to go to arbitration); Harrison, 112 F.3d at 1452-54 (refusing to subject employee's Title VII claim to arbitration); Varner, 94 F.3d at 1213 (refusing to force employee to exhaust grievance procedure for her Title VII claim).
91. See Wright, 1997 WL 422869, at **1.
92. See id.
94. See Wright, 1997 WL 422869, at **1.
95. The claim was settled for $250,000. See id.
96. See id.
97. See id.
When this proved fruitless, he then advised Wright to retain counsel and pursue his rights under the ADA.\textsuperscript{100} Wright did so. He filed a charge with the Equal Employment Opportunity Commission and, after receiving a right to sue letter, filed suit against the stevedoring companies in January 1996.\textsuperscript{101}

The Fourth Circuit decided \textit{Austin} in March 1996.\textsuperscript{102} The stevedoring companies in Wright’s case then filed a motion for summary judgment relying on \textit{Austin}.\textsuperscript{103} Unlike \textit{Austin}, the collective bargaining agreement in Wright’s case did not contain any anti-discrimination provision,\textsuperscript{104} let alone one that arguably incorporated the ADA as a term of the agreement so as to bring into play the \textit{Maddox} principle.\textsuperscript{105} The agreement in \textit{Wright} did, however, differ from \textit{Austin} in another respect. It did not expressly limit its arbitration provision to disputes as to the proper interpretation or application of the terms of the agreement.\textsuperscript{106} It simply provided that “[m]atters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48 hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee” consisting of an equal number of union and employer members.\textsuperscript{107} Then the agreement provided that “[i]n the event the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case,” an arbitrator should be appointed.\textsuperscript{108} The agreement did contain a standard savings clause\textsuperscript{109} providing that “no provision or part of this Agreement shall be violative of any Federal or State Law.”\textsuperscript{110} The district court relied on that

\begin{thebibliography}{99}
  \bibitem{99} See Wright, 1997 WL 422869, at **1.
  \bibitem{100} See id. For more on employer obligations under the ADA, see infra note 216.
  \bibitem{101} See Wright, 1997 WL 422869, at **1.
  \bibitem{102} See \textit{Austin} v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).
  \bibitem{103} See \textit{Wright}, 1997 WL 422869, at **1.
  \bibitem{104} See id. at **2.
  \bibitem{105} See supra text accompanying notes 65-66.
  \bibitem{106} See \textit{Wright}, 1997 WL 422869, at **2.
  \bibitem{107} Petitioner’s Brief, \textit{supra} note 98, at *6-*7.
  \bibitem{108} Id. at *7.
  \bibitem{109} Recognition appears in numerous collective bargaining agreements that a law or court decision could potentially nullify a particular portion of the agreement. \textit{See Bureau of National Affairs, Inc., Collective Bargaining Contracts 251} (1941). A “savings clause” is a separability clause often inserted into a collective bargaining agreement stipulating that if any portion of the agreement is subsequently found to be invalid, the remaining provisions are to remain in full force and effect. \textit{See id.} To the same end, provisions of state and federal labor laws are written into some agreements by specifying that the agreement is to be subject to any applicable laws, or that no party is to be required by the agreement to take any illegal action. \textit{See id.}
  \bibitem{110} Petitioner’s Brief, \textit{supra} note 98, at *6.
\end{thebibliography}
and the presumption of arbitrability expressed in such cases as *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, as well as, under a collective bargaining agreement, *United Steelworkers of America v. Warrior & Gulf Navigation Co.* The district court concluded that the arbitration provision was easily "susceptible of an interpretation" that it covered Wright's disability discrimination claim, and so his suit should be dismissed.

Wright appealed, and the Fourth Circuit affirmed. In an unpublished opinion, it said that "under Austin the only issue in this case is whether there was an agreement to arbitrate ADA claims" in the collective bargaining agreement. There was such an agreement, the Court concluded, because the arbitration clause was "particularly broad," in that the agreement said that it was "intended to cover all matters affecting wages, hours, and other terms and conditions of employment." (This language was not in fact contained in the arbitration provision.) It was part of an entirely separate standard "zipper" clause whereby the union waived its right to bargain about matters not covered by the agreement during its term of operation. Claims of violation of the ADA, the court concluded, were therefore covered even though the agreement did not specifically address such claims.

A petition for certiorari was filed. The question presented in the petition was whether the court below was "correct in holding — contrary to [the] Court’s decisions in *Alexander v. Gardner-Denver Co.*, and other cases, and contrary to seven other circuits — that a general arbitration clause in a collective bargaining contract bars an employee

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111. 460 U.S. 1 (1983). In *Moses H. Cone*, a contractor sought arbitration of a dispute that arose with the employee. See *Moses H. Cone*, 460 U.S. at 7. The Supreme Court decided that the issue should be arbitrated, citing the FAA, which encourages ushering of disputing parties out of court and into arbitration as quickly and easily as possible. See id. at 22. Furthermore, the Court restated its healthy regard for the federal policy favoring arbitration. See id. at 23.

112. 363 U.S. 574 (1960). In *Warrior & Gulf*, the Supreme Court held that employees, who were distraught over their employer’s action in contracting out work, would be forced to exhaust the grievance process. See *Warrior & Gulf*, 363 U.S. at 575, 585.


114. See Wright, 1997 WL 422869, at **1-**2.

115. Id. at **2.

116. Id.


118. See id. For more discussion on “zipper” clauses, see 4 THEODORE KHEEL, LABOR LAW, § 16A.02[2] (1996).

119. See Wright, 1997 WL 422869, at **2.

covered by the contract from filing his own lawsuit under a federal anti-discrimination statute . . . ."121 The Supreme Court granted the petition.122

One can only guess as to why the Supreme Court granted review. It clearly was not to correct a misstatement of the law in the Fourth Circuit’s opinion that might lead other courts astray. There was no law in the opinion and it was unpublished. Furthermore, it is standard doctrine that the Court does not grant review of a case simply because it was wrongly decided.123 It appears that the Court, or at least four members, wants to say something in this area. And so it appeared to others once certiorari was granted. Amicus briefs were filed in support of Wright by the United States and the Equal Employment Opportunity Commission,124 the American Civil Liberties Union,125 and the AFL-CIO,126 among others. The United States Chamber of Commerce,127 the National Association of Manufacturers,128 the Equal Employment Advisory Council and the Labor Policy Association,129 and others filed briefs supporting the companies.

B. The Wright Question

The ground claimed for certiorari in Wright v. Universal Maritime Service Corp.130 did not in fact exist. There is no conflict between the

121. Petitioner’s Brief, supra note 98, at *1.
122. See supra note 120 and accompanying text.
123. “A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.” SUP. CT. REV. 10 (1997).
Fourth Circuit's decision and *Alexander v. Gardner-Denver Co.)*'s\textsuperscript{131} basic "two apple" holding, nor is there any conflict between the circuits on that question. *Alexander* and its two progeny, *Barrentine v. Arkansas-Best Freight System, Inc.*\textsuperscript{132} and *McDonald v. City of West Branch*,\textsuperscript{133} all involved a single issue: whether an adverse arbitral adjudication as to the meaning of a collective bargaining term comparable to a statutory protection barred a subsequent suit on the statutory claim.\textsuperscript{134} In *Alexander*, the substantive collective bargaining provision was a no-discrimination clause in the collective bargaining agreement; the statutory provision was Title VII's prohibition against discrimination.\textsuperscript{135} In *Barrentine*, the agreement provision was for the payment of overtime for hours worked beyond forty in the week; the statutory provision was the Fair Labor Standards Act's ("FLSA")\textsuperscript{136} similar requirement.\textsuperscript{137} In *McDonald*, the collective bargaining provision prohibited discharge except for just cause;\textsuperscript{138} the statutory provision prohibited against infringement by police of First Amendment rights.\textsuperscript{139} In all three cases, the Supreme Court held that an adverse adjudication of the collective bargaining agreement restriction on employer conduct, even though similar or parallel to a statutory restriction, would not bar a subsequent suit on a separate claim of violation of the statute.\textsuperscript{140}

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\textsuperscript{131} 415 U.S. 36 (1974).
\textsuperscript{132} 450 U.S. 728 (1981).
\textsuperscript{133} 466 U.S. 284 (1984).
\textsuperscript{134} See *McDonald*, 466 U.S. at 285; *Barrentine*, 450 U.S. at 729-30; *Alexander*, 415 U.S. at 43.
\textsuperscript{135} See *Alexander*, 415 U.S. at 39. Specifically, the agreement stated "that 'there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry.'" Id. Title VII similarly bars employment discrimination on the basis of "race, color, religion, sex, or national origin ...." 42 U.S.C. § 2000e-2(a)(1) (1994).
\textsuperscript{137} *Barrentine*, 450 U.S. at 730-31. The FLSA's similar requirement was that "[e]very employer shall pay to each of his employees who in any work-week is engaged in commerce .... wages ...." 29 U.S.C. § 206(a) (1994).
\textsuperscript{138} See *McDonald*, 466 U.S. at 286 n.2.
\textsuperscript{139} See 42 U.S.C. § 1983 (1994). The statute in pertinent part provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State .... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....
\textsuperscript{140} See *McDonald*, 466 U.S. at 292; *Barrentine*, 450 U.S. at 745; *Alexander*, 415 U.S. at 59-
Wright’s case was different. There was absolutely nothing in the collective bargaining agreement which could be said, even arguably, to parallel or duplicate the provisions of the ADA. Nor is there any inter-circuit conflict as to the continual vitality of the basic Alexander holding as to the effect to be given to the presence of an anti-discrimination provision in a collective bargaining agreement on the right of an employee to bring suit for violation of a comparable statutory prohibition.\textsuperscript{144} On that issue, all the circuits, including the Fourth, are in agreement. This is graphically illustrated by the Fourth Circuit’s decision, subsequent to \textit{Austin v. Owens-Brockway Glass Container, Inc.},\textsuperscript{142} in \textit{Brown v. Trans World Airlines}.\textsuperscript{143} The agreement in \textit{Brown} contained a no-discrimination provision that did not contain any reference to the law.\textsuperscript{144} The court therefore concluded that because there was no incorporation of the statute in the agreement, \textit{Alexander} rather than \textit{Austin} governed, and arbitration of the statutory claim was not required.\textsuperscript{145}

There is indeed an inter-circuit conflict. The conflict is not with Alexander’s “two apple” holding, but as to the effect of its “furthermore” footnote.\textsuperscript{146} The question is whether potential conflict between union and claimant prevents enforcement of an agreement to arbitrate statutory claims that would be enforceable except for that factor.\textsuperscript{147} On that question, the Fourth Circuit, in both \textit{Austin} and \textit{Wright}, is in disagreement with the other circuits.

\begin{footnotesize}
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\item[\textsuperscript{141}] See \textit{Alexander}, 415 U.S. at 59-60.
\item[\textsuperscript{142}] 78 F.3d 875 (4th Cir. 1996).
\item[\textsuperscript{143}] 127 F.3d 337 (4th Cir. 1997).
\item[\textsuperscript{144}] See \textit{Brown}, 127 F.3d at 342. The no-discrimination provision in the collective bargaining agreement specifically provided that the employer would not “discriminate against any employee... on account of race, color, creed, religion, sex (sexual harassment), age, handicap, national origin, or veteran status.... This paragraph reaffirms the long standing mutual practice of [the employer].” \textit{Id.} at 338.
\item[\textsuperscript{145}] See \textit{id.} at 341.
\item[\textsuperscript{146}] See \textit{Alexander}, 415 U.S. at 58 n.19.
\item[\textsuperscript{147}] Alternatively stated, the question is if the possibility that the union “might be inclined to sacrifice” the individual's rights in this situation should excuse the arbitration requirement. See Marshall W. Grate, \textit{Binding Arbitration of Statutory Employment Discrimination Claims}, 70 U. DET. MERCY L. REV. 699, 712 (1993). Why might a union do this? Perhaps “because of a possible conflict of interest. The claim may raise the specter of [the union’s] possible tolerance of discriminatory practices in order to maintain peace with the employer, or [to avoid] the union's own potential liability.” H. David Kelly, Jr., \textit{An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration}, 75 U. DET. MERCY L. REV. 1, 68 (1997).
\end{itemize}
\end{footnotesize}
C. The Wright Answer

The issue on which the circuits disagree needs to be resolved only if one assumes that, except for the “furthermore” issue, the collective bargaining agreement would be a bar to the direct suit by an employee claiming a violation of an anti-discrimination statute. That, in turn, requires the assumption that the collective agreement makes the statutory claim arbitrable. That is the critical question in Wright v. Universal Maritime Service Corp. The answer to that question, in my view, not only resolves Wright, but also resolves Austin v. Owens-Brockway Glass Container, Inc., Pryner v. Tractor Supply Co. and all of the cases in the other circuits that disagree with Austin.

The rules governing substantive arbitrability under section 301 of the LMRA are well established. First, unless the parties explicitly provide otherwise, substantive arbitrability is a question for a court, not the arbitrator. Second, as the Supreme Court held in United Steelworkers of America v. Warrior & Gulf Navigation Co., “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”

These principles, if applicable, would appear to support the Fourth Circuit’s decision in Wright. The first principle — that arbitrability must be determined by the court — is clearly applicable. The real issue in Wright is whether the second principle — the presumption of arbi-

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149. 78 F.3d 875 (4th Cir. 1996).
150. 109 F.3d 354 (7th Cir. 1997).
152. See AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986). “[T]he question of arbitrability — whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance — is undeniably an issue for judicial determination.” Id. Thus, the Seventh Circuit erred when it ordered the employer and union to “arbitrate the arbitrability question,” specifically the question of if a grievance regarding the employer’s layoff practices was arbitrable. See id. at 651-52.
154. Warrior & Gulf, 363 U.S. at 582-83. In Warrior & Gulf, grievances regarding management function could not be arbitrated according to the collective bargaining agreement. See id. at 576. However, an issue arose if the decision to contract out work was a management function. See id. at 583-84. The Court felt that the presumption of arbitrability required the issue to be decided by the arbitrator rather than a court. See id. at 585.
tractability — also applies. It is my thesis that it should not and that the Fourth Circuit should be reversed on that ground rather than on Alexander v. Gardner-Denver Co.'s "furthermore" caution about the potential tension between the union and claimants. 156

The presumption of arbitrability under section 301 of the LMRA is explicitly based upon considerations which are simply inapplicable where the question is whether an arbitration provision encompasses claims not based on the contract but on a statute not incorporated in the contract. In Warrior & Gulf, the Supreme Court, in announcing the presumption, said in justification that "[t]he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts." 157 As the Court repeated in AT&T Technologies, Inc. v. Communications Workers of America, 158 the "presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements . . . ." 159 That presumption is simply inapplicable where the question is not the interpretation of the substantive provisions of a collective bargaining agreement, but rather the interpretation and application of a statute. Applying statutory law, not the collective agreement or the common law of the shop, is not the normal practice of labor arbitrators; further, they are not normally chosen for their expertise in the law. 160 Indeed, many labor arbitrators are not lawyers. 161

More fundamentally, invocation of the presumption of arbitrability, when it is urged as a bar to an employee suit based on a statute, has far

156. See Alexander, 415 U.S. at 58 n.19.
159. AT&T, 475 U.S. at 650.
160. "Arbitrators are not to determine whether a grievant's statutory rights have been violated." Charles J. Coleman & Gerald C. Coleman, Toward a New Paradigm of Labor Arbitration in the Federal Courts, 13 Hofstra Lab. L.J. 1, 64-65 (1995). For more on the "common law of the shop," see infra note 220.
161. "[S]ome of the most renowned arbitrators, with the sharpest legal minds, are not members of the bar." Shalu Tandon Buckley, Note, Practical Concerns Regarding the Arbitration of Statutory Employment Claims: Questions That Remain Unanswered After Gilmer and Some Suggested Answers, 11 Ohio St. J. On Disp. Resol. 149, 174 (1996) (citing to Arnold Zack, President of the National Academy of Arbitrators). An arbitrator, who is "usually well-qualified," typically has "advanced academic degrees—normally a J.D. or Ph.D., is over fifty years of age, has more than twenty years of experience in labor arbitration on top of a previous career in the labor-management arena, and has decided several hundred cases." Coleman & Coleman, supra note 160, at 62-63.
different consequences than when it is invoked between the parties to
the agreement in a suit to compel, or resist, arbitration. Consider, for
example, Warrior & Gulf, the case in which the presumption was an-
nounced.\textsuperscript{162} The claim in that case was that the employer violated the
collective bargaining agreement by contracting out work.\textsuperscript{163} There was
no provision in the agreement about contracting out work, but the un-
ion’s grievance claimed that the employer action violated an implicit
restriction.\textsuperscript{164} The Supreme Court held that, since the claim was based on
the agreement, the issue as to whether the agreement in fact covered the
dispute was for the arbitrator,\textsuperscript{165} even if, as in United Steelworkers of
America v. American Manufacturing Co.,\textsuperscript{166} the claim might appear to a
court to be frivolous.\textsuperscript{167} It was then for the arbitrator to decide whether,
as a matter of interpretation of the agreement, the dispute was
“arbitrable” in the sense that the agreement implicitly limited the em-
ployer’s right to contract out its work.\textsuperscript{168}

Where arbitrability is posed as a bar to an employee’s suit claiming
a violation of a statute, there is no such second stage. Suppose, for ex-
ample, that in Wright’s case, the omission of the usual language limiting
the arbitrator to questions of interpretation and application in the
agreement was simply inadvertent, and that it could be proved that the
parties intended to make only questions of interpretation and application
of the agreement arbitrable.\textsuperscript{169} If the union sought to compel arbitration

\begin{footnotesize}
\item 162. See United Steel Workers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583
(1960).
\item 163. See id. at 575-76.
\item 164. See id. at 584-85.
\item 165. See id. at 585.
\item 166. 363 U.S. 564 (1960). In American Manufacturing, an injured worker settled a work-
men’s compensation claim on the basis of a twenty-five percent permanent partial disability. See
American Manufacturing, 363 U.S. at 566. The employer rejected the employee’s application for
reinstatement. See id. Regardless of the notion that the union’s subsequent grievance was
“frivolous,” as the Sixth Circuit opined, the Court ordered the grievance to be processed, for
“[w]hen the judiciary undertakes to determine the merits of a grievance... it usurps a function
which under [the grievance procedure of the collective bargaining agreement] is entrusted to the
arbitration tribunal.” Id. at 566, 569.
\item 167. In Warrior & Gulf, the Court stated that “[i]t is clear that under both the agreement in
this case and that involved in [American Manufacturing]... [that] the question of arbitrability is
for the courts to decide.” Warrior & Gulf, 363 U.S. at 583 n.7.
\item 168. See id. at 584-85.
\item 169. That in fact is not unlikely. The agreement on its face appears to be a pastiche assembled
from other agreements with some obvious omissions. The timeliness limitation, for example, says
that the union must appeal an adverse employer’s decision within forty-eight hours of “such dis-
cussion.” But there is no added antecedent for the “such.” There is no provision for the discussion
of grievances or any description of what they may have concerned. The agreement explicitly pro-
\end{footnotesize}
of a statutory claim, and the court relied on the presumption of arbitrability to order arbitration, all of these matters could be brought forward before the arbitrator in order to determine whether in fact he had the authority to enforce the provisions of the ADA. However, where the arbitrability of the statutory claim is set up as a bar to the individual suit, there is no second stage. The trial court must resolve the question of arbitrability finally and in litigation in which there is a reversal of the usual roles.

In the usual case in which the presumption of arbitrability is invoked, the parties to the litigation are the employer and the union.\(^\text{170}\) In most such cases, as in Warrior & Gulf, the union seeks to compel arbitration against the opposition of the employer.\(^\text{171}\) In others, such as Drake Bakeries Inc. v. Local 50, American Bakery & Confectionery Workers International, AFL-CIO\(^\text{172}\) and Atkinson v. Sinclair Refining Co.,\(^\text{173}\) the employer seeks damages from the union for breach of the no-strike clause,\(^\text{174}\) and the union argues that the claim must be arbitrated.\(^\text{175}\) But, where the claim of arbitrability is made to defeat the employee's

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\(^\text{170}\) See, e.g., Warrior & Gulf, 363 U.S. at 575 (involving petitioner-union and respondent-employer).
\(^\text{171}\) See id. at 577.
\(^\text{172}\) 370 U.S. 254 (1962).
\(^\text{174}\) A no-strike clause is a common provision inserted into a collective bargaining agreement whereby a union exchanges its promise not to strike in return for the employer's promise to agree to a binding arbitration clause. See N.L.R.B. v. Tomco Communications, Inc., 567 F.2d 871, 879 (9th Cir. 1978). A no-strike clause is a mandatory subject of bargaining, and although grievance arbitration clauses and no-strike clauses usually go hand-in-hand, there is no requirement that a party insisting upon the inclusion of one of these clauses also acquiesce for insertion of the other. See 48A Am. Jur. 2D. Labor & Labor Relations § 3043 (1994).
\(^\text{175}\) In Drake, the employer sued the union because it allegedly encouraged its members to strike outright or to refrain from attending work, with either act being violative of the no-strike clause contained in the collective bargaining agreement. See Drake, 370 U.S. at 256. The agreement provided for compulsory and binding arbitration of all complaints, disputes or grievances involving questions of interpretation or application of any provision in the agreement. See id. at 257-58. The issue presented was "whether... the employer's claim was an arbitrable matter under the contract." Id. at 255.

The employer's claim in Atkinson was essentially the same as the employer's claim in Drake. In Atkinson, the agreement provided for compulsory arbitration of employee grievances regarding wages, hours and working conditions. See Atkinson, 370 U.S. at 242-43. In return for the arbitration clause, the union promised not to strike in response to disputes involving these matters. See id. at 239. Again, the issue presented was whether the union's claim related to an arbitrable matter. See id. at 240.
suit, the employer being sued, rather than defending against a union claim that the arbitration provision covers the dispute, is in the position of arguing for a broad interpretation of the arbitration provision and the union is simply absent. The employee is placed in the position of having to argue that the arbitration provision must be narrowly construed, and must do so in the absence of the union, and possibly contrary to its interests. It is here that the potential tension between the employee and the union, the “furthermore” in Alexander, becomes relevant, not to deny enforceability of the agreement to arbitrate, but to make inappropriate the presumption of arbitrability.

These considerations argue for the proposition that where an arbitration provision in a collective agreement is urged as a bar to a suit by a covered employee for violation of an anti-discrimination statute, the Warrior & Gulf presumption should not be applicable. Indeed, the presumption should be its precise opposite. Statutory disputes should not be found to be arbitrable under the agreement so as to bar an employee suit unless it can be said with positive assurance that the arbitration clause covers it. The principle can also be stated in the same terms as those used by the Supreme Court in dealing with the similar question: whether a court should read an agreement as giving an arbitrator the authority to decide arbitrability. In First Options of Chicago, Inc. v. Kaplan, the Court stated that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” Paraphrasing this statement, in cases brought under an anti-discrimination statute, courts should not assume that parties to a collective bargaining agreement agreed to arbitrate individual public law claims not covered by the contract unless there is clear and unmistakable evidence that they did so. In First Options, the Supreme Court said that courts should “hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force

176. See generally Natasha Wyss, Comment, First Options of Chicago, Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz, 72 Tul. L. Rev. 351, 352-53 (1997) (examining the question of whether arbitrators have the power in particular cases to rule on their own jurisdiction, that is, if they have “competence of competence”).
178. First Options, 514 U.S. at 944. First Options involved disputes concerning a “workout agreement” which governed the working out of debts owed by respondents to petitioner. See id. at 940. Respondents did not sign the workout document which contained the arbitration agreement. See id. at 941. Thus, when petitioner submitted the claim to arbitration, respondents filed objections with the panel, denying that the disagreement was arbitrable. See id.
unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” This is even more true when the question of arbitrability of a statutory claim is raised as a defense in an employee’s suit because the consequence is not arbitration at all, but, as in Wright’s case, the death of the claim because the time for filing a grievance has expired.

If the Supreme Court adopts the principle just set forth, it would resolve Wright’s case. There is no explicit incorporation of statutory law in the agreement between union and the stevedoring companies. The arbitration provision is ambiguous. It simply says that disputes not resolved in undefined discussions between the parties should be decided by arbitration. In the absence of affirmative evidence that the parties intended all disputes involving statutory claims to be arbitrable, the motion to dismiss should have been denied.

IV. THE RIGHT ANSWER

The same principle would also resolve the cases in the other circuits alleged to be in conflict with Wright. In none of them was an arbitrator explicitly given the power not only to decide whether an anti-discrimination statute was violated but also the authority to provide the remedies provided for in the statutes being sued upon. In Varner v. National Super Markets, Inc. and Harrison v. Eddy Potash, Inc., the claim of arbitrability was based upon a general arbitration provision not explicitly providing that statutory claims could be arbitrated. Pryner v. Tractor Supply Co. and Brisentine v. Stone & Webster Engineering

179. Id. at 945. For further analysis of the Court’s reasoning in First Options, see generally Kevin Michael Flowers, Comment, First Options of Chicago Inc. v. Kaplan, 12 OHIO ST. J. ON DISP. RESOL. 801 (1997).


181. See id.


183. See, e.g., Pryner v. Tractor Supply Co., 109 F.3d 354, 356 (7th Cir. 1997) (noting that the collective agreement did not even refer to federal or state law).

184. 94 F.3d 1209 (8th Cir. 1996), cert. denied, 117 S. Ct. 946 (1997).

185. 112 F.3d 1437 (10th Cir. 1997), cert. granted and remanded on other grounds, 118 S. Ct. 2364 (1998).

186. See Harrison, 112 F.3d at 1451-52; Varner, 94 F.3d at 1213.

involved claims that an anti-discrimination provision in the agreement required arbitration, but without any suggestion that the arbitrator was given authority to enforce the statutory provisions involved.\(^{199}\)

It is quite common for collective agreement anti-discrimination provisions to make reference to the law.\(^{199}\) But that is far different from providing that the arbitrator under the agreement has all of the powers, remedial and procedural, that the law gives to the courts in anti-discrimination statutes. The Seventh Circuit was therefore correct in *Pryner* in ignoring the fact that in one of the two cases, Sobierajski, the anti-discrimination provision referred to the law, and in the other case, *Pryner*, it did not.\(^{191}\)

Only two of the circuit court cases present any problem — *Austin v. Owens-Brockway Glass Container, Inc.*\(^{192}\) in the Fourth Circuit and *Martin v. Dana Corp.*\(^{193}\) in the Third Circuit. In both of these cases there was an agreement provision requiring that any claims of violation of an anti-discrimination statute be subject to the grievance procedure.\(^{194}\) But in neither of these cases is there any indication that the arbitrator was specifically given authority to decide the statutory question and the authority to provide the statutory remedies.\(^{195}\) It is important, for the purpose of applying the presumption I have argued for, to distinguish between the grievance procedure and the arbitration provision. Many collective agreements do, indeed, make all disputes eligible for processing in the grievance procedure.\(^{196}\) But they usually expressly limit arbitration to disputes involving the interpretation or application of the collective bargaining agreement.\(^{197}\) Because in neither of these cases was
the courts' attention directed to the terms of the arbitration provision, it is impossible to ascertain, without having access to the agreements, whether the parties explicitly gave the arbitrator the power to adjudicate statutory disputes and to provide statutory remedies. In the absence of such explicit authority, the presumption would equally decide them.

A collective agreement may, of course, explicitly incorporate a statute and explicitly provide for arbitration of a claim arising under a statute. An example is the contract provision proposed in 1975 by the then General Counsel of the International Union of Electrical, Radio and Machine Workers ("IUEW"), expressly giving the arbitrator under a collective bargaining agreement the authority to apply Title VII and other anti-discrimination laws as well as the authority to award any remedy which could be granted by a court, including such changes in the agreement as necessary to comply with the statutes. Where there is such a provision, there is no need for any presumption, and a court would require arbitration of a statutory claim if the union demanded it. The question of whether such a provision should bar direct access to the courts by an individual employee depends on whether the Supreme Court accepts the argument of the Petitioner and the Solicitor General in Wright v. Universal Maritime Service Corp.

The Petitioner in Wright, and the Solicitor General for the United States and the EEOC argued for reversal on different grounds than the presumption of non-arbitrability. Alexander v. Gardner-Denver and its progeny, they argued, controlled. Although note is made of the absence of any anti-discrimination provision in the collective agree-

198. "In these agreements, the parties agree that the arbitrator will apply 'external law' — the same law a court would apply if it were resolving the dispute" rather than the arbitrator. Sarah Rudolph Cole, A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 612 (1997). "Thus, it is no longer true that grievance arbitration is a forum solely for the resolution of contractual claims." Id.; see also FRANK EKLOURI & EDNA ASPER EKLOURI, HOW ARBITRATION WORKS 543-51 (5th ed. 1997) (describing how arbitrators "act in respect to consideration or application of specific statutes").


ment, the brunt of Petitioner's argument is that under Alexander a collective agreement can never waive a covered employee's right to resort to the courts. The Solicitor General is even more emphatic. He argues that there is "an inherent conflict between the union's collective responsibilities and the employee's highly individual federal statutory rights."

'Tain't necessarily so, particularly where the union has successfully negotiated a provision fully incorporating statutory rights. And not so in this case. Wright's union has been assiduous in supporting his ADA claim. Believing that his claim was not encompassed by the collective agreement, the local union president urged him to sue. When the arbitration provision was held to bar his suit, the union has attempted, so far unsuccessfully, to arbitrate his ADA claim.

Second, and more important, resolving tensions between represented employees is one of the most important functions a union performs. John Dunlop has observed, collective bargaining requires the union to resolve conflicting interests among the union's constituency. For example, older workers' interests in pensions conflicts with younger workers' interests in using part of an economic settlement to extend medical insurance protection to family members; higher paid and skilled workers prefer percentage increases in wages, while lower paid

203. See Petitioner's Brief, supra note 202, at *12.
205. See Wright, 1997 WL 422869, at **1.
206. The sequence of events is as follows. Wright was originally refused work in January 1995. See id. at **1. Austin was decided by the Fourth Circuit on March 12, 1996. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). On June 14, a magistrate judge recommended that the suit be dismissed on Austin grounds. See Wright, 1998 WL 422869, at **1. Then, in July 1996, the union again dispatched Wright from the hiring hall, and the companies again refused to hire him. This time the union filed a formal grievance for him based on the second refusal. The employers refused to process the grievance on the ground that the filing was an attempt to re-litigate the original refusal to hire Wright. Eventually, the union brought suit to compel arbitration of the ADA claim, and the suit was dismissed as untimely. The union appealed, and the appeal is currently pending before the Fourth Circuit. International Longshoremen's Ass'n v. South Carolina Stevedores Ass'n, No. 98-1296 (4th Cir.).
207. "During collective bargaining, unions constantly balance conflicting interests among employees." Dennis O. Lynch, Incomplete Exclusivity and Fair Representation: Inevitable Tensions in Florida's Public Sector Labor Law, 37 U. MIAMI L. REV. 573, 644 (1983). The union's "balancing function is one of the major policy justifications for collective bargaining, and unions play the same role in contract administration." Id.
and less skilled workers prefer across-the-board increases.\textsuperscript{210} The union’s function in collective bargaining is to achieve reconciliation between these interests in presenting its position in bargaining with the employer.\textsuperscript{211} But that is not the case once agreement is reached. The union’s function then is to enforce the agreed upon balance.\textsuperscript{212} There are potential conflicts in many arbitration cases: the conflict between the employee who gets a promotion and the employee who the union contends was entitled to it; and the conflict between a discharged employee whose grievance the union supports and the employee who has replaced him. Unions must, and do, deal with these conflicts on a principled basis, subject to the duty of fair representation.\textsuperscript{213} It may certainly be true that some unions may resolve against discriminatees the potential conflict among employees that is implicitly involved in enforcing statutory protections against discrimination. But that is clearly not the case where the union and the employer agree to incorporate the statutory protections in the collective agreement, authorize the arbitrator to go beyond the usual remedies for violation of the agreement, and let the arbitrator deploy the full panoply of statutory remedies.

Binding arbitration provides a real advantage in those situations where the union and the employer, either by virtue of an agreement such as that proposed by the then General Counsel of the IUEW or by stipulation in a particular case, have agreed to it.\textsuperscript{215} In addition to the usual arbitration advantages of speed, flexibility and confidentiality, there is the delicate and intricate relationship between the requirements of anti-discrimination statutes and the requirements of a collective bargaining agreement. This relationship is particularly acute where there is a conflict between the reasonable accommodation requirement of the ADA\textsuperscript{216}

\begin{thebibliography}{9}
\bibitem{210} See id. at 114.
\bibitem{211} See id. at 77-79.
\bibitem{212} See id. at 219-21.
\bibitem{213} See id. at 79-80.
\bibitem{214} The Supreme Court has defined the union’s “duty of fair representation” owed to those it represents as “a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” Vaca v. Sipes, 386 U.S. 171, 177 (1967). This duty extends to the union’s processing of grievances. See id. at 185-86.
\bibitem{215} Benefits from using arbitration rather than litigation might include reduced costs and quicker resolution of disputes. See ELKOURI & ELKOURI, supra note 198, at 10-13. Other potential advantages include confidentiality, ability to select the decision maker and increased predictability, for the parties have knowledge of the arbitrator’s past experiences, decisions and reputation. See Michele L. Giovagnoli, Comment, To Be or Not to Be? Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena, 64 UMKC L. Rev. 547, 582-83 (1996).
\bibitem{216} Under the ADA, no employer “shall discriminate against a qualified individual with a

http://scholarlycommons.law.hofstra.edu/hlelj/vol16/iss1/2
and the seniority provisions of a collective bargaining agreement. 217 It is also true of the requirements of Title VII 218 and the ADEA. 219 Knowl-
edge about the realities of the relationships and practices in the workplace — the "common law of the shop" if you will — is important for the proper implementation of the statutory prohibitions and provision of remedies that will in fact work. Arbitrators chosen by the parties are in a far better position to accomplish that objective than are the courts where the union and the employer authorize such action by their agreement.\footnote{221}

The best solution from the viewpoint of an individual employee would be to have an option: the right to choose as each dispute arises an arbitration forum fully equivalent to the judicial one, or the judicial forum itself. But that ideal may be unachievable. There is no reason to believe that unions and employers would agree to a fully-equivalent arbitrable forum if each employee retains the option to ignore the forum and if, following Alexander to the fullest, an individual employee who loses in arbitration could then begin again in court.\footnote{222}

Finally, adoption of the rationale argued for by the Petitioner and the Solicitor General in \textit{Wright} might produce an anomaly. Although

\footnote{219. Under the ADEA, it is unlawful for an employer: (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with [the Act].}

\footnote{220. Professor Cox defined the "common law of the shop" as being made up of the "practices, assumptions, understandings, and aspirations of the going industrial concern." Archibald Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1499, 1500 (1959).

\footnote{221. See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (noting that even the "ablest judge" cannot be expected to have a jointly-selected arbitrator's "experience and competence to bear upon the determination of a grievance, because [the judge] cannot be similarly informed"). Arbitrators may tailor their decisions to the peculiarities of the workplace because they are generally unfettered by precedent, unlike a judge. See Tia Schneider Denenberg & R.V. Denenberg, The Future of the Workplace Dispute Resolver, 49 Disp. Resol. J. 48, 52 (1994).

\footnote{222. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974) (instructing the federal district court to consider the employee's statutory claim \textit{de novo}).}
much criticized, the prevailing view is that under *Gilmer v. Interstate/Johnson Lane Corp.*, employees can be required as a condition of employment to agree to arbitrate their statutory claims, and that such an agreement bars direct access to the courts. Adoption of the Alexander position proposed by the Petitioner would mean that a union and an employer could not agree to a result that an employer could impose unilaterally in the absence of a union.

For these reasons it seems to me that a good argument can be made that where a collective agreement incorporates statutory protections against discrimination and provides for a fully equivalent arbitrable remedy, the rule of *Republic Steel Corp. v. Maddox* should apply and require an individual employee to utilize arbitration and to be bound by the result, subject, as in any other case, to claims based on a union's failure to fairly represent, and also subject to whatever standard of review is developed for statutory arbitration. The standard for review of an arbitrator's decision in a non-union situation is presently uncertain. But that standard, whatever it may ultimately turn out to be, should apply whether the arbitration is pursuant to a unilaterally imposed requirement or by virtue of a collective bargaining agreement.

As I have said, this is an entirely hypothetical question. None of the cases so far reported have dealt with a collective agreement which would overcome the presumption of non-arbitrability of statutory claims. Discussion of the hypothetical case is important, however, because a decision in *Wright* based on Alexander would in effect predetermine the result in such a hypothetical case. A decision by the Su-

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225. See *Maddox*, supra note 194, at 595 (referring to an agreement requiring “an employee, as a condition of employment, to sign a predispute arbitration agreement foregoing all access to jury trials” as a “*Gilmer* agreement”); see also Carol-Teigue J. Thomas, Comment, *Gilmer v. Interstate/Johnson Lane Corporation: When is an Employee’s Right to a Judicial Forum Precluded by an Arbitration Agreement?*, 27 NEW ENGL. L. REV. 791, 822-23 (1993) (concluding that “at the present time it is certain that for the employee who challenges a boilerplate clause precluding his or her right to a judicial forum, the outlook is grim”).


227. See *Maddox*, 379 U.S. at 652.


The Supreme Court on the basis of the presumption described in this Article, pretermittting the Alexander question, would resolve in a simple and direct fashion all of the cases reported so far in which arbitration under a collective bargaining agreement has been set up as a bar to a direct suit by an employee claiming violation of an anti-discrimination statute, leaving open for later consideration the question of what the result should be where a collective agreement explicitly incorporates statutory protection against discrimination and authorizes arbitrators to provide the full complement of remedies.

VI. CONCLUSION

The Supreme Court has granted review in a case in which it is tolerably clear that the decision below will be reversed. There appears to be little reason to grant to affirm an unreported opinion. The only real issue is the ground for reversal. It may be, although no party or amicus has argued the question, that the Court has second thoughts about Gilmer v. Interstate/Johnson Lane Corp. and will use Wright v. Universal Maritime Service Corp. to modify or overrule it. More likely, the Court will accept the argument of the petitioner and the Solicitor General based on Alexander v. Gardner-Denver Co. that a collective agreement can never serve to bar an individual employee's right to bring suit directly on a claim of violation of an anti-discrimination statute. For the reasons given, it would be far better to base the decision on the proposition that a collective agreement should not be assumed to require arbitration of statutory claims unless it expressly so provides and gives the arbitrator the authority to provide the full panoply of statutory remedies.

233. See Alexander, 415 U.S. at 59-60.