LET THE GRAND EXPERIMENT BEGIN: *PYETT* AUTHORIZES ARBITRATION OF UNIONIZED EMPLOYEES' STATUTORY DISCRIMINATION CLAIMS

by
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In 14 Penn Plaza LLC v. Pyett, *the Supreme Court affirmed the ability of unions and employers to negotiate arbitration clauses that require unionized employees to arbitrate statutory claims. The academic response to this case will likely be that it is wrongly decided because arbitration, especially labor arbitration, is a poor substitute for litigation and unions' willingness to bargain away minority members' rights to the judicial forum is but one more sign of union bias against women and minorities. This paper contends that this response may be wrong on both counts. It is likely that litigants will achieve better results in labor arbitration than in traditional litigation because unionized arbitration involves repeat players on both sides of the arbitration and offers parties substantial opportunity to negotiate an arbitral process that best suits them. In addition, the presence of repeat players on both sides of the dispute offers protection against arbitrary decision-making. The process should also be cheaper for the employee than traditional litigation because the employee does not have to pay for a representative.*

The presumption that unions are biased against women and minorities may also be in error. Although this was true in the past, unions, to ensure their survival, have become staunch advocates of traditionally underrepresented groups as they recognize that it is members of those groups who form a large percentage of their newest and most supportive members.

Pyett *creates an opportunity for unionized employees and their advocates to take advantage of the arbitration process to resolve their discrimination claims more quickly and cheaply with results similar to or better than litigation. As unions search for a role in the twenty-first century workplace and employees face increasingly poor odds of success in litigating statutory discrimination claims, labor arbitration may be the best response to an increasingly dire landscape for unionized employees' statutory discrimination claims in federal courts.*

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I. INTRODUCTION

In *14 Penn Plaza LLC v. Pyett*,[1] the Supreme Court affirmed the ability of unions and employers to negotiate arbitration clauses that require unionized employees to arbitrate statutory discrimination claims. This 5-4 decision, which split along traditional liberal and conservative lines, reaches a result that will likely raise the ire of legal academics.[2] The traditional academic response will be that *Pyett* was wrongly decided. Many academics will undoubtedly contend that (1) arbitration, especially labor arbitration, is a poor substitute for litigation and that (2) unions' willingness to bargain away minority members' rights to the judicial forum is but one more sign of union bias against women and minorities. It is at least possible, and perhaps likely, that this account is wrong on both fronts.

Current empirical evidence does not support the view that arbitration provides second-class justice to unionized employees.[3] Recent empirical studies of employment arbitration demonstrate that arbitration provides greater access to dispute resolution than does litigation.[4] In addition, arbitration is cheaper and faster than its counterpart.[5] Win

[1] 129 S. Ct. 1456 (2009).

[2] Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 419–21 (2009) (identifying *Pyett* as one of the three most important employment discrimination cases of the Term and suggesting that the ruling pointed in the "conservative direction").

[3] *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1842–43 (2001); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 48, 50; David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1590–91 (2005).

[4] Eisenberg & Hill, *supra* note 3, at 53; Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RES. 559, 563 (2001).

[5] *See* HOYT N. WHEELER, BRIAN S. KLAAS & DOUGLAS M. MAHONY, WORKPLACE JUSTICE WITHOUT UNIONS 60 (2004) (reporting that, in 1998, arbitration took, on

rates in arbitration are also comparable to those achieved in litigation.[6] While the question whether litigants achieve the same monetary results in arbitration as in litigation is less clear, existing studies show that a more diverse group of litigants is successful in arbitration, even if the amount recovered by each litigant is not always as high as it might be in litigation.[7]

While there are fewer studies of labor arbitration, one would expect that empirical studies would reveal better results for litigants in labor arbitration than in employment arbitration for a number of reasons. First, because it involves repeat players on both sides, unionized arbitration offers parties substantial opportunity to negotiate an arbitral process that best suits the disputes likely to arise during the life of the collective bargaining agreement.[8] Second, the presence of repeat players on both sides offers considerable protection against arbitrary arbitrator decisions.[9] Third, the litigants on both sides of the dispute are experienced both with the arbitral process and the substantive issues under consideration.[10] Thus, advantages based on greater experience with the process or the issues are minimized.[11] Finally, the arbitration process should be considerably cheaper for the employee, because, in labor arbitration, the employee does not pay for his representative.[12] In light of these facts, the arbitration arrangement here is the least offensive type, and it seems surprising that many arbitration critics continue to object to these arrangements.[13]

The other major argument likely to be leveled against the *Pyett* result is that unions are biased against women and minorities. While

average, half the time of litigation); William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.–Dec.1995, at 40, 44.

[6] *See* Sherwyn, Estreicher & Heise, *supra* note 3, at 1569.

[7] *Id.* at 1574–76.

[8] *See, e.g.*, Crain & Matheny, *supra* note 3, at 1842–43 n.428; Ann C. Frost, *Explaining Variation in Workplace Restructuring: The Role of Local Union Capabilities*, 53 INDUS. & LAB. REL. REV. 559, 565 (2000).

[9] For discussion of the repeat player effect, see Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 234 (1998) [hereinafter Bingham, *On Repeat Players*]; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997) [hereinafter Bingham, *Employment Arbitration*].

[10] Crain & Matheny, *supra* note 3, at 1843; Frost, *supra* note 8, at 573.

[11] Frost, *supra* note 8, at 565.

[12] *See* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 753 (1997).

[13] *See* Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett: *Letting Discrimination Defendants Decide Whether Plaintiff May Sue Them,* OHIO ST. J. ON DISP. RESOL. (forthcoming 2010).

undoubtedly true in the past,[14] this argument seems no longer true today. To ensure their survival, unions have become staunch advocates of traditionally underrepresented groups as they recognize that members of those groups form a large percentage of their newest and most supportive members.[15] As a result of the changes in union membership and agendas in the past few decades, women and minorities should enjoy success in arbitration comparable to that achieved by traditional union members.

On a separate front, plaintiffs' attorneys will undoubtedly bemoan the increased possibility for arbitration in the employment discrimination context that *Pyett* presents. Their continued objection to the process, in spite of empirical evidence that strongly suggests that arbitration provides faster, cheaper, and equivalent or better results than litigation, suggests a not-so-hidden agenda. If arbitration actually improves the opportunity for many employees to achieve justice in their discrimination cases, why do plaintiffs' attorneys continue to object to its use? One possible explanation is that the interests of the plaintiffs' bar and of individual plaintiffs are not aligned. Evidence suggests that the judicial forum may represent a lottery system. Many litigants receive nothing, or are unable to access the forum, while one or two hit jackpots.[16] Arbitration, on the other hand, may be friendly to plaintiffs in terms of allowing some recovery, but without the prospect of any jackpots.[17] Plaintiffs' attorneys, with their broad portfolio of cases, may prefer the former system, even if their clients, on average, would prefer the latter.

Pyett creates an opportunity for unionized employees and their advocates to take advantage of the arbitration process to resolve their discrimination claims more quickly and cheaply with results similar to or better than litigation. Moreover, the *Pyett* decision creates an

[14] For a discussion of labor unions' historical discrimination against African-American workers, see generally Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313 (2002).

[15] *See, e.g.*, Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1956–59 (1994); Gregory DeFreitas, *Unionization Among Racial and Ethnic Minorities*, 46 INDUS. & LAB. REL. REV. 284, 300 (1993); Linda Briskin, *Feminisms, Feminization, and Democratization in Canadian Unions*, *in* FEMINIST SUCCESS STORIES 73, 73–75 (Karen A. Blackford, Marie-Luce Garceau & Sandra Kirby eds., Univ. of Ottawa Press 1999).

[16] Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*? 11 EMP. RTS. & EMP. POL'Y J. 405, 417 (2007) (Plaintiffs who view trial as "a high-risk, high reward process, with large variation in award amounts . . . may be willing to bring more marginal cases to trial even if the chance of winning is low, out of hope of winning a large verdict on the chance that they are successful.").

[17] *Id.* ("Conversely, simpler, faster procedures and resulting lower attorney fees may allow employees to bring lower value claims through arbitration than would be possible in litigation."). Colvin reports lower success rates for employees in arbitration but speculates that the arbitration process is more accessible to lower-paid employees. *Id.* at 418–19.

environment which may enable a change in attitude toward the use of labor arbitration to adjudicate statutory discrimination claims. Over the past 15 years, the Supreme Court has repeatedly signaled that arbitration is an appropriate forum for the adjudication of statutory discrimination claims. *Pyett* simply extends that philosophy to the labor arbitration context. As unions search for a role in the twenty-first century workplace and employees face increasingly poor odds of success in litigating statutory discrimination claims,[18] labor arbitration may be *the* response to an increasingly dire landscape for unionized employees' statutory discrimination claims in the federal courts.

This Article approaches the issue of union representation of individual employee discrimination claims in arbitration first by examining the Supreme Court ruling authorizing this practice and by addressing the objections raised to this approach. Next, this Article explains why the *Pyett* decision reflects an accurate view of arbitration practice today. Today's arbitrators are capable of interpreting the law, are experienced with discrimination claims, and are as accurate as judges in interpreting the law. Third, this Article addresses the primary concern of those who object to union representation of individuals with discrimination claims in arbitration—that the union might ignore or minimize the individual's interests in favor of the collective whole. Using existing empirical evidence, this Article seeks to explain why it might be that unions would favor the historically underrepresented groups both in negotiating the collective bargaining agreement and in arbitrating individual statutory discrimination claims. Then, this Article identifies legal avenues an individual employee might use to ensure that the union properly executes its role as representative, such as the duty of fair

[18] Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 245 (2001); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999); Vivian Berger, Michael D. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 105–08 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 701 (2005); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 514 (2003); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 894 (2006); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–61 (2001); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 2 (2006); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 23 (Am. Bar Found., Research Paper No. 08-04, 2008), *available at* http://ssrn.com/abstract=1093313.

representation, Title VII of the Civil Rights Act (Title VII), and the Age Discrimination in Employment Act (ADEA). Finally, this Article examines the available empirical evidence on arbitration and concludes that arbitration is the preferred venue for these claims based on win rates, speed, and amount of damages awarded. This Part of the Article also considers how cognitive psychology applies to union decision-making and concludes that employees may be better off delegating decisions about which forum to use and how to handle a discrimination case in arbitration to the union. Taking all of these factors together, this Article concludes that unionized employees and their advocates should embrace the opportunity *Pyett* affords and begin arbitration of statutory discrimination claims on a routine basis.

II. *14 PENN PLAZA LLC V. PYETT*

In 2003, Steven Pyett, Thomas O'Connell, and Michael Phillips, members of the Service Employees International Union (SEIU), worked as night lobby watchmen and in other positions in the 14 Penn Plaza Building in New York City ("14 Penn Plaza").[19] Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor, employed these men.[20] Under the Collective Bargaining Agreement for Contractors and Building Owners (CBA) between the Union and the Realty Advisory Board on Labor Relations, Inc. (RAB), the New York City real estate industry's multi-employer bargaining association to which Temco and 14 Penn Plaza belonged, union members were required to submit all employment discrimination claims to arbitration under the CBA's grievance and dispute resolution procedures.[21] The relevant provision stated:

> § 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code . . . . All such claims shall be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.[22]

[19] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009).

[20] All three employees were over 40 years old and belonged to Local 32BJ of the SEIU. *Id.* at 1461–62 & n.3. Local 32BJ had a collective bargaining agreement with the Realty Advisory Board on Labor Relations, Inc. *Id.* at 1461.

[21] *Id.*

[22] *Id.*

In August 2003, 14 Penn Plaza contracted, with the Union's consent, with a different unionized security company to provide security services for the building.[23] Because the new firm was handling security, Temco transferred the employees to jobs as night porters and light duty cleaners in other parts of the building.[24] The employees objected to these reassignments because the positions paid less and were less desirable overall.[25]

At the employees' request, the Union filed grievances challenging the reassignments for a variety of reasons, including that the reassignments violated the CBA's prohibition on workplace discrimination.[26] After the initial arbitration hearing, the Union withdrew the employees' age discrimination claims from arbitration because it had consented to the introduction of the new security firm.[27] After the Union withdrew the employees' claims, the employees filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that 14 Penn Plaza violated the ADEA when it reassigned them to less desirable positions.[28] The EEOC dismissed the claims, explaining that its review of the dispute "fail[ed] to indicate that a violation ha[d] occurred."[29] The EEOC subsequently issued each employee a right-to-sue letter.[30] The employees filed suit in federal district court, and 14 Penn Plaza moved to compel arbitration.[31] The district court did not order arbitration, holding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."[32] The Second Circuit affirmed on similar grounds.[33]

On review, the Supreme Court considered three issues: (1) whether a union and employer may bargain for the submission of statutory employment discrimination claims to arbitration; (2) whether *Alexander v. Gardner-Denver Co.*[34] permits enforcement of the union-negotiated arbitration provision; and (3) whether the arbitration provision constituted a clear and unmistakable waiver of the individual employee's right to bring a statutory claim in court.[35]

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[23] *Id.* at 1462.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Arbitration on the employees' other claims (based on seniority and overtime provisions) continued. The claims were ultimately denied. *Id.*

[28] *Id.*

[29] *Id.* (alterations in original) (quoting Pyett v. Pa. Bldg. Co., 498 F.3d 88, 91 (2d Cir. 2007)).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1462–63.

[33] *Id.* at 1463.

[34] 415 U.S. 36 (1974).

[35] *See 14 Penn Plaza LLC*, 129 S. Ct. at 1469–73.

The Court dispensed quickly with the first issue, concluding that the Union and the RAB had statutory authority under the National Labor Relations Act (NLRA) to bargain for an arbitration clause covering employees' statutory discrimination claims and that the ADEA did not prohibit the parties from arbitrating claims brought under the statute.[36] Much more difficult was the question of whether the Court's 1974 decision in *Alexander v. Gardner-Denver Co.*[37] precluded the Union from waiving an employee's right to bring his statutory discrimination claims to court.

In *Gardner-Denver*, the issue was whether a unionized employee, who, as required by his union's collective bargaining agreement, had submitted his claim under the agreement's nondiscrimination clause to final arbitration, retained the right to bring a Title VII claim in federal court following the arbitration.[38] The Supreme Court determined that a unionized employee's right to a trial de novo on a Title VII claim is not precluded by prior submission of a claim to arbitration under a collective bargaining agreement's nondiscrimination clause.[39]

The *Gardner-Denver* Court confronted and resolved four separate issues in reaching its conclusion—all of which came up again in the *Pyett* case. The Court's first concern was whether a unionized employee's right to a trial de novo on his Title VII claim should be precluded because of his prior submission of the dispute to an arbitrator.[40] Second, the Court expressed reservations about the adequacy of the arbitral forum as a substitute for litigation.[41] Third, in a footnote, the Court raised the concern that the interests of the individual might be subordinated to those of the group if the union were permitted to waive an employee's right to select a forum.[42] Finally, the Court suggested that an employee's right to be free from racial discrimination is an individual statutory right that the union is not authorized to waive.[43]

The Court considered the first issue, that an employee's use of the arbitration process should preclude his subsequent use of the judicial

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[36] *Id.* at 1463.

[37] 415 U.S. 36 (1974).

[38] *Id.* at 43.

[39] *See id.* at 59–60.

[40] *See id.* at 52–53. This agreement required that any disputes between employees and the employer regarding the application of the agreement go through a grievance arbitration process. The grievance arbitration would then resolve the dispute by determining what the agreement means. *See* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) ("Put most simply, the arbitrator is the parties' officially designated 'reader' of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement.").

[41] *Gardner-Denver Co.*, 415 U.S. at 56.

[42] *Id.* at 58 n.19.

[43] *Id.* at 51–52.

forum, through an examination of the contract language requiring arbitration of the statutory discrimination claim. In *Gardner-Denver*, the collective bargaining agreement that covered the employee prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" and provided that "[n]o employee will be discharged . . . except for just cause."[44] The *Gardner-Denver* arbitration clause included a multi-step grievance procedure that culminated in arbitration for any differences arising between the parties "as to the meaning and application of the provisions of this Agreement."[45] The *Gardner-Denver* arbitrator ruled that the company discharged the employee for just cause.[46] The Court held that the arbitration did not preclude a subsequent suit in a judicial forum because the collective bargaining agreement language did not require the arbitration of statutory claims; it only mandated arbitration of contract-related claims.[47] The Court reiterated this view in *Wright v. Universal Maritime Service Corp.*, holding that unless parties clearly and unmistakably state in their collective bargaining agreement that they intend to arbitrate statutory discrimination claims, an employee can pursue such claims in court.[48] The *Pyett* Court confirmed this view, holding that *Pyett* and *Gardner-Denver* are distinguishable because of the difference in collective bargaining agreement language.[49] According to the Court, "*Gardner-Denver* and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims."[50]

The *Pyett* Court emphatically rejected the *Gardner-Denver* view on the second issue, that the arbitral forum is not an appropriate venue for resolution of statutory discrimination claims.[51] Noting that the Court rejected many of the outdated views about the arbitral forum in *Gilmer v. Interstate/Johnson Lane Corp.*,[52] the *Pyett* Court explained that arbitral tribunals are capable of handling the difficult factual and legal issues that might be raised in a discrimination claim, that there is no reason to believe that arbitrators will not follow the law, and that the less formal arbitration forum would not interfere with the fair resolution of employment discrimination claims.[53]

Perhaps the most intractable issue the employees raised was the concern that the union might subordinate an individual's interest for the

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[44] *Id.* at 39 & n.1 (alteration in original).
[45] *Id.* at 40 & n.3.
[46] *Id.* at 42.
[47] *Id.* at 55–56, 59–60.
[48] 525 U.S. 70, 79–80 (1998).
[49] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1468–69 (2009).
[50] *Id.*
[51] *Id.* at 1464–71.
[52] 500 U.S. 20 (1991).
[53] *Pyett*, 129 S. Ct. at 1471. For further discussion of these issues, see *infra* Part III.

collective interest of the union as a whole in handling an individual's discrimination claim.[54] For example, the union could refuse to bring an individual's claim or, if the union brought the claim, it would control the handling of that claim during the grievance process and might advocate less vigorously or make different choices than would the employee. The Court rejected this issue as a "judicial policy concern" that should be handled through Congress rather than the courts.[55]

Moreover, the Court noted, Congress, when it enacted the NLRA, balanced the needs of the individual against the benefits of participation in a collective enterprise.[56] To permit the employees to undermine the agreement of the union and the employer would amount to a "collateral attack on the NLRA."[57] Further, the Court stated, the union's duty of fair representation and its potential liability under the ADEA and the NLRA should create a strong incentive for it to avoid handling employee statutory claims in a less than vigorous manner.[58] Importantly, however, the Court emphasized that *Pyett* did not raise the issue of whether the arbitration clause would be enforceable if the union refused to bring an individual's statutory discrimination claim to arbitration, effectively precluding the employee from presenting the claim in any forum.[59] According to the Court, the issue was not fully briefed below and therefore could not be resolved.[60] In addition, the Court did not decide whether the parties "clearly and unmistakably" waived the individual's right to bring their discrimination claim to court.[61] The employees appeared to take the position, in the lower court, that the clause "clearly applied" to them.[62] Thus, the Supreme Court did not have the opportunity to explore the parameters of the clear and unmistakable waiver.

Therefore, the *Pyett* Court sanctioned the use of union-negotiated arbitration clauses that encompass statutory discrimination claims as long as the clause clearly and unmistakably provides for arbitration of those claims. Remaining unanswered questions include: (1) what are the parameters of the "clear and unmistakable" waiver, and (2) what happens if the union refuses to bring the statutory claim to arbitration?[63]

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[54] *Id.* at 1472.

[55] *Id.*

[56] *Id.* at 1472–73.

[57] *Id.* at 1473.

[58] *Id.*

[59] *Id.* at 1474.

[60] *Id.*

[61] *Id.* at 1473.

[62] *Id.* at 1473–74.

[63] Already, one court, since *Pyett* was decided, made clear its view that the Court would refuse to enforce the waiver if the union refused to take the individual employee's claim to arbitration. *See* Kravar v. Triangle Serv., Inc., 2009 WL 1392595 at *3 (S.D.N.Y. May 19, 2009) (mem.) ("In view of the Supreme Court's analysis in *Pyett* and *Gilmer* there is little question that if Ms. Kravar's union prevented her from

The response to the *Pyett* case from the management side was predictable. Numerous management-side law firms began advocating the inclusion of arbitration clauses similar to the one at issue in *Pyett* into their clients' collective bargaining agreements.[64] While the union side has said little about the result in *Pyett*, it would be surprising, given that all of the union amicus briefs lined up on the side of the *Pyett* group,[65] if the unions supported the Court's decision and/or concluded that these provisions are a good idea. Of course, not all unions think alike—

arbitrating her disability discrimination claims, the CBA's arbitration provision may not be enforced as to her." (citations omitted)).

[64] *See, e.g.*, Dean Schaner et al., *Supreme Court Holds that Employees Under Collective Bargaining Agreement Are Blocked from Going to Court on Age Discrimination Claims, Must Arbitrate Instead*, HAYES BOONE: LABOR AND EMPLOYMENT ALERT, Apr. 3, 2009, http://www.haynesboone.com/supreme_court_employees_under_collective_bargaining ("[A]n employer need only bargain for and include explicit language in the CBA stating that the grievance procedure covers statutory employment discrimination claims."); Nineveh Alkhas, *The Supreme Court Upholds a Collective-Bargaining Provision Requiring Arbitration of Age-Discrimination Claims as the Sole and Exclusive Remedy: Point for Employers*, NEAL, GERBER & EISENBERG LLP, Apr. 9, 2009, http://www.ngelaw.com/news/pubs_detail.aspx?ID=1035 ("[E]mployers with collective-bargaining agreements would be wise to review and, where appropriate, attempt to negotiate changes in their agreements to 'clearly and unmistakably' make discrimination claims subject to the agreements' grievance and arbitration procedures as the 'sole and exclusive' remedy for such claims."). *See also* JACKSON LEWIS LLP, *Supreme Court Holds Arbitration Provision in CBA May Bar Employee Federal Age Claims in Court*, LEGAL UPDATES, Apr. 2, 2009, http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1678; Douglas R. Christensen, *U.S. Supreme Court Enforces Agreement Compelling Unionized Employees to Arbitrate Discrimination Claims*, DORSEY & WHITNEY LLP, RESOURCES, Apr. 17, 2009, http://www.dorsey.com/supremecourt_christensen_09; John W. Polley & Daniel G. Wilczek, *Supreme Court Enforces Collective Bargaining Agreement Requiring Arbitration of Discrimination Claims*, FAEGRE & BENSON LLP, Apr. 20, 2009, http://www.faegre.com/showarticle.aspx?Show=9702; BAKER & HOSTETLER LLP, *Collective-Bargaining Agreement May Require Employees to Arbitrate Age Discrimination Claims, Supreme Court Rules*, EXECUTIVE ALERT, Apr. 15, 2009, http://www.bakerlaw.com/collective-bargaining-agreement-may-require-employees-to-arbitrate-age-discrimination-claims-supreme-court-rules-04-15-2009. Professor Ann C. Hodges has also made this observation. Ann C. Hodges, *Fallout from* 14 Penn Plaza v. Pyett: *Fractured Arbitration Systems in the Unionized Workplace*, J. DISP. RESOL. (forthcoming Spring 2010) (manuscript on file with author) ("The *Pyett* decision is likely to prompt more employer efforts to negotiate provisions requiring arbitration of statutory claims.").

[65] *See, e.g.*, AFL-CIO, AFL-CIO LEGISLATIVE GUIDE 7.4 (2009), http://www.aflcio.org/issues/legislativealert/upload/legilative_guide09.pdf (The guide concludes that *Pyett* was wrongly decided: "Congress should prevent employers from forcing workers to forfeit their right to bring federal civil rights claims to court."); Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win as Amici Curiae in Support of Respondents at 1, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581); Brief of the National Right to Work Legal Defense Foundation, Inc. as Amicus Curiae in Support of Respondents at 1–2, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581); Brief for the Service Employees International Union, Local 32BJ, as Amicus Curiae Supporting Respondents at 1, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009) (No. 07-581).

obviously some unions are negotiating these clauses.[66] Nevertheless, based on the amicus briefs filed and the vigorous attacks on these clauses leading up to the *Pyett* case in courts around the country, it is likely that the vast majority of union and employee advocates do not support the use of arbitration to resolve statutory discrimination claims for many of the reasons articulated in the Supreme Court's opinion.

The remainder of this Article elaborates on the reasons why the Court's decision was correct from a policy as well as from an empirical and normative perspective. With the exception of the situation in which a union refuses to take an employee's statutory claim to arbitration, there is little, if any, reason for union or employee advocates to object to the use of arbitration in this context. The following Part responds with both legal and empirical arguments to some of the traditional objections employee advocates raise to the use of arbitration to resolve statutory claims in the collective bargaining context and concludes that unions and employee advocates alike should embrace the opportunity to use the arbitration process in a mutually beneficial way.

III. WHY *PYETT* WAS RIGHTLY DECIDED

Arbitration's opponents frequently criticize the use of arbitration as a vehicle for the vindication of statutory antidiscrimination rights. In particular, opponents suggest that arbitrators are not qualified to resolve statutory claims.[67] Yet the Court clearly stated in *Gilmer*, and reiterated in *Pyett*, that it had long ago abandoned any skepticism of arbitrators' ability to decide statutory disputes.[68] This Section discusses the objections the

[66] Professor Hodges agrees that waivers "may prove hard for unions to resist" if the employers "offer incentives such as wage and benefit increases to obtain them." Hodges, *supra* note 64.

[67] Although arbitration's opponents are concerned with arbitrators' abilities, they also claim as problematic the structure of the arbitration process with its limited discovery and informal procedure. *See* Bales, *supra* note 12, at 754–57 (identifying four procedural rights arbitration does not provide: a jury trial, full discovery, rules of evidence and procedure, and the right to appeal). In labor arbitration, the structure and procedure issues are less of a concern. One of the benefits of using labor arbitration is that the parties, as repeat players, can negotiate a process that adequately addresses any procedural or structural concerns. *See infra* notes 199–205 and accompanying text. The one procedural device that unions and employers cannot negotiate for, however, is a jury trial. While this is an important factor, the increased access to arbitration likely outweighs the probability of the jackpot verdict that a jury might confer on the occasional litigant. As Professor Bales notes,

> A decision to enforce individual employment rights through litigation guarantees the availability of certain procedural rights, but at the expense of denying meaningful protection to employees who cannot afford litigation. . . . [W]here a union is available to ensure that the arbitral process is not mere window dressing . . . I believe that most employees would be better off having their statutory employment rights decided in arbitration.

Id. at 758.

[68] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 (2009).

unionized employees raised in *Pyett* and includes in response much of the empirical work that addresses, and in fact rebuts, the employees' claims that arbitrators are unqualified to resolve statutory antidiscrimination claims.[69]

To evaluate whether arbitrators are capable of resolving statutory disputes, one must first understand how the unionized workplace's grievance resolution process works. In the vast majority of collective bargaining agreements (CBAs), unions and employers agree to resolve disputes using a grievance process that culminates in binding arbitration.[70] The typical grievance process begins when a shop steward or aggrieved employee files a grievance with the employee's supervisor following a precipitating event. Often, the CBA specifies that the employer has only a few days to respond to the initial grievance filing. From that point, the grievance may go through anywhere from one to six steps, in an attempt to resolve the dispute before the employee submits the claim to arbitration.[71] CBAs also routinely include an arbitrator selection provision.[72] Most agreements do not, however, specify a particular arbitrator who will hear the grievance should it reach arbitration.[73] Although this ad hoc selection process may result in delay, it enables the parties to select an arbitrator with the expertise needed to resolve the particular dispute. Most agreements specify an entity responsible for governing the arbitrator selection process. Over half of the contracts specify an impartial agency, such as the Federal Mediation

[69] The Court first addressed the question of whether requiring the parties to use arbitration to resolve a dispute over alleged denial of statutory antidiscrimination rights was "tantamount to a waiver of those rights." *Id.* at 1469. This issue, which the Court resolved in *Gilmer* in 1991, is not one about which there is any empirical evidence one way or the other. The *Pyett* Court certainly follows the precedent set in *Gilmer*—that waiving the right to have one's claims heard in a particular forum does not amount to waiver of that right. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[70] Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 & n.11 (1988) (99% of sampled CBAs contain arbitration clauses); Bales, *supra* note 12, at 691; LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, ADR IN THE WORKPLACE 17 (2d ed. 2005) ("Ninety-nine percent of collective bargaining agreements provide for arbitration of at least some types of grievances."); ROBERT COULSON, LABOR ARBITRATION: WHAT YOU NEED TO KNOW 6 (rev. 5th ed. 2003) ("Grievance and arbitration procedures are found in most collective bargaining contracts.").

[71] COOPER, NOLAN & BALES *supra* note 70, at 17; FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 213 (Alan Miles Ruben ed., 6th ed. 2003) ("The grievance machinery usually consists of a series of procedural steps to be taken within specified time limits.").

[72] COOPER, NOLAN & BALES, *supra* note 70, at 18.

[73] This process, known as "ad hoc" selection, is the most common. Four percent of contracts appoint a permanent arbitrator for the life of the contract. Six percent designate an arbitration panel, which is a list of arbitrators who take turns presiding over grievance arbitrations as they arise. COULSON, *supra* note 70, at 18–19.

& Conciliation Services (FMCS) or the American Arbitration Association (AAA), as the arbitrator provider.[74]

Initially, labor arbitrators focused on resolving contractual disputes. Over the last 30 years, however, parties have expanded the scope of claims that labor arbitration covers, increasingly agreeing to use arbitration to resolve statutory claims as well as contractual ones. Following *Pyett*, which explicitly authorizes parties to include provisions permitting arbitration of statutory discrimination claims, one would expect to see an increase in the number of these provisions in CBAs throughout the country.

One of the major objections to the use of arbitration to resolve these statutory or external law disputes is that the existing pool of labor arbitrators is not competent to resolve such claims.[75] If arbitrators are not capable of analyzing and deciding statutory claims, the argument goes, it would seem improper to expand the arbitrator's role to include external law interpretation. Despite considerable historical support for this position,[76] the Court emphatically rejected this view in *Gilmer*, authorizing arbitrators to resolve exactly these questions when

[74] Nels E. Nelson and Walter J. Gershenfeld conducted a study in 1998 that found that AAA and FMCS provided arbitrators for 75% of the awards issued during 1998. Nels E. Nelson & Walter J. Gershenfeld, *The Appointment of Grievance Arbitrators by State and Local Agencies*, 52 LAB. L.J. 258, 262 (2001). Arbitrators working for state and local agencies issued the remaining 25% of awards. *Id. See also* Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 167 (2000) ("Parties employing arbitrators on an *ad hoc* basis typically contact the American Arbitration Association . . . or the Federal Mediation and Conciliation Service or a state mediation agency to obtain a list of available arbitrators and select an arbitrator from that list.").

[75] Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744–45 (1981) (extending the rule that unions cannot waive statutory rights under Title VII to FLSA and stating that, in labor arbitration, an arbitrator's role is to interpret and apply the law of the shop). *See also* David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L.J. 53, 70, 73 (1998) (arguing that the presumption of arbitrability for statutory claims should not exist when a collective bargaining agreement exists); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L. J. 77, 84–88 (1996) (emphasizing the difference between grievance and general arbitration).

[76] Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1484 (1996); Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1040 (2002) (arbitrators impose liability on a broker even when the law clearly does not support that result); Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003). *See also* Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 725 (1999) (arbitrators do not follow the law).

unrepresented employees and employers are involved.[77] In *Pyett*, the Court extended this analysis to the unionized workplace, stating that labor arbitrators are fully capable of resolving statutory claims.[78]

In this area, the Court is changing its view about the role of the labor arbitrator much more quickly than is the academy.[79] Some academic commentators continue to emphasize that arbitrators are experts in the "law of the shop" rather than the "law of the land."[80] For whatever reason, and without citing to any empirical evidence, academic commentators seem unwilling to adapt their views about arbitrators' roles and expertise to the Court's even though the Court has made it abundantly clear that it has faith in arbitrators' ability to interpret the law.[81] In refusing to move

[77] In *Gilmer*, the Court explicitly rejected the "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 n.5 (1991).

[78] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 (2009). Note that the classic debate about whether an arbitrator should apply external law is irrelevant when the parties authorize the arbitrator to use external law, as occurred in *Pyett*. *Id.* at 1461. *See In re* Alcoa Building Prods., 104 Lab. Arb. Rep. (BNA) 364, 367–68 (1995) (the parties stipulated that the arbitrator could decide the Americans with Disabilities Act issue). The external law debate in a *Pyett*-type case is whether the arbitrator understands and is capable of applying the law, not whether he is authorized to use external law. *See also*, ELKOURI & ELKOURI, *supra* note 71, at 488 ("The parties may expressly direct that the case be decided consistent with applicable law . . . .").

[79] The Supreme Court's view about arbitrator authority has evolved rather quickly—from *Gardner-Denver* to *Wright* to *Pyett*, the Court has moved from thinking that an arbitrator who applies external law is exceeding his authority to a view that a labor arbitrator asked to arbitrate application of a public law must do so. *Compare* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51–60 (1974), *with* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79 (1998), *and Pyett*, 129 S. Ct. at 1474. Some academic commentators, notably Professor Marion Crain, advocate for an expanded role for the union in statutory rights cases. Professor Crain emphasizes, though, the importance of enhancing the statutory controls on unions if additional power is to be conferred upon them. *See* Crain & Matheny, *supra* note 3, at 1839–41.

[80] Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 202 (2005). The EEOC takes this position, too. *See* Brief of the EEOC as Amicus Curiae Supporting Plaintiff-Appellee at 11, Rogers v. N.Y. Univ., 220 F.3d 73 (2d Cir. 2000) (No. 99-9172). The National Employment Lawyers Association's Amicus Brief takes the same position. Brief of Amicus Curiae for the National Employment Lawyers Association/New York in Support of Plaintiff-Appellee, Rogers v. N.Y. Univ., 220 F.3d 73 (2d Cir. 2000) (No. 99-9172). *See also* Steven C. Bennett, *Arbitration of Employment Discrimination Claims: Impact of the* Pyett *Decision on Collective Bargaining*, 42 TEX. TECH. L. REV. 23, 31 (2009) ("[L]abor arbitrators generally rely on 'the practices of the industry and the shop' as guidance in determining cases." (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–82 (1960))).

[81] Some unions are warming to the idea that an arbitrator may resolve statutory discrimination claims if the parties have empowered him to do so. Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win, *supra* note 65, at 9 ("[W]here an individual employee-grievant has requested that the union arbitrate his statutory discrimination claim through the collectively bargained grievance procedure, we can see no reason why the arbitrator's decision of that statutory claim should not be given the same binding effect on the individual

forward, these commentators are limiting the potential of labor arbitration to provide a much needed and efficient solution for employees with statutory claims.[82]

Importantly, too, many of the continuing criticisms of labor arbitrators' ability to interpret external law are misplaced. Arbitrators have struggled with the question of how to use external law since the dawn of the labor arbitration era.[83] Yet, over time, arbitrators became more comfortable with external law application and, today, such application is routine.[84] And, as statutory claims have become commonplace in arbitration, the pool of arbitrators has expanded to include more lawyers and more individuals with expertise in employment discrimination.[85] As a result, it is hard to say that a modern arbitrator

employee who requested the arbitration as an arbitration award issued pursuant to the sort of individual arbitration agreement sanctioned by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).").

[82] Not all commentators agree. Professor Marty Malin recently declared that the debate over whether labor arbitrators should apply external law has been resolved in favor of allowing external law application. *See* Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 3, 26–29 (2008). Professor Malin notes that courts routinely give great weight to labor arbitrator awards in subsequent litigation on related legal issues. *Id.* at 28. Numerous arbitrators are willing to use external law to resolve statutory claims in labor arbitration. *See* ELKOURI & ELKOURI, *supra* note 71, at 499–509.

[83] Malin & Vonhof, *supra* note 80, at 200 ("Since the earliest days of the profession, labor arbitrators have been grappling with the problem of how external law should be applied to the resolution of grievances under collective bargaining agreements."). Professor Malin notes that in the first published volume of National Academy of Arbitrators' Papers, Archibald Cox published a paper entitled: *The Place of Law in Labor Arbitration. Id.* at 200 n.5 (citing Archibald Cox, *The Place of Law in Labor Arbitration*, *in* THE PROFESSION OF LABOR ARBITRATION: SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1948–1954, at 76–89 (Jean T. McKelvey ed. 1957)).

[84] ELKOURI & ELKOURI, *supra* note 71, at ch. 10 (describing arbitrator application of external law in labor arbitration). *See, e.g.*, Malin, *supra* note 82, at 25–26.

[85] In a review of the BNA Labor Relations Reporter, Directory of Arbitrators, I discovered that of the 805 arbitrators listed (Westlaw search, BNA-LRR database, "arbitrator", performed May 17, 2010), at least 315 have J.D.s (Westlaw search BNA-LRR database, "J.D.", performed May 17, 2010) and another 69 have LL.Bs. (Westlaw search, BNA-LRR database, "LL.B", performed May 17, 2010). Thus, over 50% of available labor arbitrators in this database are lawyers or have significant legal training. All of the major arbitrator providers (AAA, Conflict Prevention & Resolution (CPR), and National Arbitration Forum) identify arbitrators by subject matter expertise. It is relatively easy to identify arbitrators with the appropriate background to evaluate employment discrimination claims. CPR's Employment Disputes Panel is staffed entirely by lawyers—the vast majority of whom have extensive employment discrimination law experience. *See* International Institute for Conflict Prevention & Resolution, CPR Employment Disputes Panel, http://www.cpradr.org/tabid/377/q/Employment%20Disputes%20Panel/cod/1/default.aspx.

AAA's National Rules for Employment Arbitration and Mediation 12(b) requires that an arbitrator have experience in employment law in order to be qualified to arbitrate an employment discrimination case. AMERICAN ARBITRATION ASSOCIATION

cannot capably interpret statutory claims.[86] Furthermore, arbitrators for labor arbitration and private employment disputes are drawn from the same pool, typically the AAA or other major providers. Thus, there is no reason to think that the arbitrator who resolves disputes between the unrepresented employee and his employer is any less qualified to resolve the identical dispute when a represented employee raises it.

More specifically, concerns regarding arbitrators' ability to interpret antidiscrimination statutes are also outdated. After reviewing thousands of labor arbitration cases, Frank Elkouri and Edna Asper Elkouri, authors of the primary treatise in the labor arbitration field, concluded that labor arbitrators handle statutory claims as well as, or in some cases even better than, courts.[87] Other leaders in the field agree. For example, Judge Harry Edwards suggested that that labor arbitrators are as qualified as judges to interpret antidiscrimination statutes.[88] Similarly, Professor Susan FitzGibbon concluded that since *Gardner-Denver*, "labor arbitrators have developed experience and expertise in the course of deciding numerous arbitration matters involving statutory claims."[89] Professor Christine Cooper agreed: "Arbitrators can now decide cases as well as judges and

(AAA), EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES (2009), http://www.adr.org/sp.asp?id=32904#12. The Due Process Protocol that AAA follows also requires that arbitrators, "should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment." Employment Due Process Protocol (C)(1), *in* ARBITRATION 1995 NEW CHALLENGES AND EXPANDING RESPONSIBILITIES: PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS app. B, at 300 (Joyce M. Najita ed., 1996).

[86] In an interesting recent study, Professor Malin and his co-author, Monica Biernat, asked members of the National Academy of Arbitrators to resolve four grievances involving discipline or discharge of an employee where the event precipitating the discipline was a conflict between the employee's work and home responsibilities. In rendering their decisions, the arbitrators were to determine whether the grievant's sex or marital status affected the outcome. Martin H. Malin & Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. PA. J. BUS. L. 175, 178 (2008). The study concluded that grievant gender did not impact the outcome but that grievant marital status did. The authors concluded that a particular type of arbitrator did not tend to have more or less bias than another, based on the arbitrator's characteristics. *Id.* at 211. While arbitrator characteristics sometimes predicted decision making, other features of the case, such as the grievant's sex or the workplace issue, as well as the arbitrator's experience and attributes, affected the outcome. *Id.*

[87] *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 376 (4th ed. 1985).

[88] Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 681 (1986); Devine v. White, 697 F.2d 421, 438–39 (D.C. Cir. 1983). *See also* Stuart L. Bass, *What the Courts Say About Mandatory Arbitration*, DISP. RESOL. J., Nov. 1999, at 24, 30 ("The more recent experience of labor arbitrators in the federal sector suggests that the interpretation and application of law may not be outside the competence of arbitrators.").

[89] Susan A. FitzGibbon, *After* Gardner-Denver*,* Gilmer *and* Wright*: The Supreme Court's Next Arbitration Decision*, 44 ST. LOUIS U. L.J. 833, 844–45 (2000).

arbitration is an adequate substitute for the litigation of statutory claims."[90] Thus, it would seem that arbitrators do have the requisite ability to interpret and apply antidiscrimination statutes.[91]

The argument that arbitrators are qualified to decide statutory disputes is especially compelling in the employment discrimination context, where cases most often turn on factual rather than legal issues.[92] Thus, in employment cases, an arbitrator's failure to understand the statute is unlikely to have significant impact.

Of course, if external legal issues are raised in a grievance, it is likely to be beneficial to both parties if the selected arbitrator is a lawyer or former judge with experience in employment law. Because parties control the choice of arbitrator in labor arbitration, parties may also draft an agreement that arbitrators who consider grievances based on employment discrimination statutes have certain qualifications. One of the developments that we might expect to see following *Pyett*, then, is an increase in the designation of arbitrator qualifications in the CBA.

In addition, judicial review of the arbitration award is always possible.[93] Opponents may object to the limited review standard currently

[90] Christine Godsil Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 212 (1992).

[91] *See* Bass, *supra* note 88, at 25. Of course the question whether arbitrators are capable of resolving disputes by interpreting external law and whether they should be resolving such disputes is a matter of great debate. The Supreme Court in *Gilmer* seems to have resolved that debate, concluding that arbitration can be an appropriate forum for these disputes and that arbitrators are capable of resolving them despite the parties' limited access to judicial review following an arbitral decision. After studying "thousands" of arbitration opinions, the Elkouris conclude that arbitrators are not only capable of understanding and applying external law, but that "this capability probably equals and sometimes exceeds that of many courts, including some federal courts." ELKOURI & ELKOURI, *supra* note 87, at 376.

[92] *See* Malin, *supra* note 75, at 104 ("Most employment disputes are fact-based and not likely to raise the kind of legal issues that would call for significant judicial review."). A study conducted in the 1980s found that discrimination claims involve factual issues 84% of the time. Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, ARB. J., Sept. 1984, at 49, 53.

[93] The standard for judicial review of grievance arbitration decisions is quite deferential. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960). Yet this deference is not unlimited. According to *Enterprise Wheel*, "[w]hen the arbitrator's words manifest an infidelity to this obligation [to interpret the collective bargaining agreement], courts have no choice but to refuse enforcement of the award." *Id.* at 597. While this standard does not provide much opportunity for review of an arbitrator's decision, in its language and intent it is quite similar to the Federal Arbitration Act (FAA)'s deferential standard for judicial review. The FAA permits reversal of the arbitrator's award when the arbitrator has shown manifest disregard of the law or has engaged in some type of egregious misconduct demonstrating fraud, corruption, or partiality. 9 U.S.C. § 10(a) (2006). When the parties have agreed to resolve their disputes using external law in the collective bargaining context, the standard of review of the arbitrator's award would look remarkably similar. The main inquiry would be whether the arbitrator manifestly

available to evaluate arbitration awards. Two potential solutions exist. First, Congress could legislate a change to the existing deferential standard of judicial review. In fact, it may be sensible to alter the reviewing process in such cases because the deference courts use when reviewing awards was based on the assumption that the arbitrator merely interprets the parties' contract.[94] Second, the parties could agree to expand judicial review of an arbitration award when it involves a statutory claim, but it is less likely that courts will enforce these agreements after *Hall St. Assoc., L.L.C. v. Mattel, Inc.*.[95]

As an empirical matter, an individual employee should be indifferent to whether an arbitrator or judge resolves her discrimination claim. Despite frequent historical allegations that arbitrators are "lawless," i.e., that they do not follow the law because they do not have to, the limited empirical evidence available reveals that arbitrators intend to apply the law and interpret the law correctly at least as often as do judges.[96]

disregarded the applicable external law. *Gilmer* declared that the FAA's system of judicial review was sufficiently protective of employee's statutory rights. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). Thus, it would seem logical to hold that *Enterprise Wheel*'s system of judicial review is equally appropriate for review of statutory disputes resolved in grievance arbitration.

[94] The debate about judicial review of arbitration awards in the labor arbitration context is not new. Some commentators advocate that courts should continue to give deference to an arbitrator's factual findings and contract interpretation but review more critically the arbitrator's public law interpretation. Martin H. Malin, *Privatizing Justice—But by How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 627 (2001); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L. J. 1187, 1238 (1993). Others suggest that courts should determine whether arbitrators are applying the law using a good faith standard under the FAA. Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L. J. 547, 548 (2005).

[95] 128 S. Ct. 1396, 1399 (2008) (The Court held that parties cannot agree to expand judicial review of arbitration awards; review may be limited to bases identified in § 10 of the Federal Arbitration Act.).

[96] Shortly after the *Gardner-Denver* decision, Michele Hoyman and Lamont Stallworth conducted an empirical study considering how frequently arbitrator decisions about individual statutory discrimination claims were overturned by courts compared to reversal rates for administrative agencies deciding the same type of claim. This comparison made sense because, after *Gardner-Denver*, courts did not have to defer to arbitrators' decisions about the resolution of statutory discrimination claims. The survey of practitioners revealed that 1761 discrimination grievances were heard after *Gardner-Denver*. The EEOC or a similar state agency heard 484 of these cases, and 307 of the cases were relitigated in court. The EEOC reversed almost 16% of those cases it reviewed; the court reversed about 7% of those cases that were relitigated. By contrast, administrative agencies overturned only about 4.5% of the arbitration awards, and courts reversed only 1.2%. Hoyman & Stallworth, *supra* note 92, at 49, 54–55. One could argue, based on these statistics, that arbitrators are right more often than the courts. Additional studies include: Jonathan S. Monat & Angel Gomez, *Sexual Harassment: The Impact of* Meritor Savings Bank v. Vinson *on Grievances and Arbitration Decisions*, ARB. J., Dec. 1986, at 24, 26–27 (survey of sexual discrimination cases found that most arbitrators based finding of sexual harassment

Professor Chris Drahozal reviewed the existing empirical studies in 2006 and found that arbitrators, when surveyed, reveal the same philosophy about following the law when rendering a decision as do judges.[97] Drahozal's research also revealed some interesting new information that supports the theory that employees are no worse off, in terms of decision maker, when they are in arbitration as compared to court. Drahozal reported that judicial reversal rates of arbitration awards, even when reviewed de novo, are remarkably similar to appellate court reversal rates for lower court decisions.[98] Thus, it would seem inappropriate to conclude that arbitrators understand the law any less than other potential decision makers.[99]

IV. SELLING OUT

One of the most contentious issues in *Gardner-Denver*, *Wright*, and *Pyett* was that the union, as labor's exclusive representative, might use its power to bargain to the detriment of the interests of a certain employee or group of employees.[100] The theory is that unions might sacrifice individual or protected groups' preferences in order to obtain benefits

on application of standards contained in EEOC guidelines and resolved questions raised in *Meritor*); W.B. Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, ARB. J., Dec. 1985, at 55, 56, 61–62 (review of published arbitral cases from 1982–1985 involving sexual harassment revealed that arbitrators apply similar criteria and reach similar conclusions as courts do in these cases); Deborah R. Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, *in* ARBITRATION 1986: CURRENT AND EXPANDING ROLES 101, 120 (Walter J. Gershenfeld ed., 1987); Margaret Oppenheimer & Helen LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, ARB. J., Mar. 1979, at 12, 13 (survey of 86 awards involving discrimination demonstrated that arbitrators cited EEOC guidelines or federal or state law in at least 60% of the cases).

[97] Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 214 (2006).

[98] *Id.*

[99] Drahozal also reported on a study conducted by Patricia Greenfield, which reviewed 106 cases decided between 1980 and 1985 where at least one party had filed an unfair labor practice charge with the National Labor Relations Board (NLRB). *Id.* at 195. Greenfield found in her study that although half of the arbitrators cited external law in their opinions, most of the arbitrators' analysis of external law was cursory or conclusory. *Id.* at 196. Greenfield's study would seem to be of limited value given its age and focus on unfair labor practice charges. Further empirical studies, particularly of labor arbitration awards, would be helpful in assessing whether or not arbitrators follow the law, particularly when statutory discrimination claims are at issue.

[100] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991); Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n.19 (1974); Pryner v. Tractor Supply Co., 109 F.3d 354, 362–63 (7th Cir. 1997). Commentators also recognize this possibility. *See* Crain, *supra* note 15, at 1908; Mayer G. Freed, Daniel D. Polsby & Matthew L. Spitzer, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 466 (1983) (Once a union becomes the exclusive representative, it "has the power to conclude bargains detrimental to the interests of a particular employee or group of employees").

for the majority. By definition, exclusive representation involves individual employee sacrifice.[101] It is theoretically possible that, as a large entity, the union might have prejudices or, at the least, be more interested in responding to and satisfying the needs of the majority. Moreover, as an elected entity, the union may recognize that if it is able to increase the number and type of claims it handles, it will become more powerful.[102] The union's desire to increase its importance to the employees and thereby become indispensable may contribute to its motivation to give away the rights of individuals too easily. The question then is whether the union's ability to disregard or bargain away protected groups' interests should invalidate a collectively bargained agreement to arbitrate statutory discrimination claims.

The *Pyett* Court described this issue as a "judicial policy concern" that was not an appropriate basis upon which to introduce a qualification to the ADEA.[103] In addition, the Court stated that the "conflict-of-interest argument also proves too much."[104] While it may be true that labor unions sacrifice some individual interests in favor of collective interests when negotiating collective bargaining agreements, this attribute does not "justify singling out an arbitration provision for disfavored treatment."[105] In other words, Congress was aware that unions might need to balance individual and collective interests when negotiating and that the Court should not reject the union-management balancing in the absence of a statutory mandate. Moreover, the Court said nothing is particularly special about the arbitration clause that requires different treatment.[106] In addition, the Court cited the potential liability of the union under its duty of fair representation as well as under the ADEA and the NLRA as reasons why the union would have every reason to act in the best interests of each individual as well as the collective whole.[107]

Putting aside for a moment the concern that might arise if the union refused to take a grievant's discrimination claim to arbitration,[108] the

[101] *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 333 (1944) (recognizing that the union is the exclusive bargaining representative for all the employees within the appropriate bargaining unit); *Pryner*, 109 F.3d at 362 ("An agreement negotiated by the union elected by a majority of workers in the bargaining unit binds all members of the unit . . . .").

[102] In a grievance procedure, the union represents the aggrieved employee. *See* MARTIN H. MALIN & LORRAINE A. SCHMALL, INDIVIDUAL RIGHTS WITHIN THE UNION 384 (1988).

[103] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1472 (2009).

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1473.

[108] Kravar v. Triangle Serv., Inc., 2009 WL 1392595 at *3 (S.D.N.Y. May 19, 2009) (mem.) (CBA arbitration provision cannot be enforced against grievant if union refuses to bring her claim to arbitration). To ensure access to a forum for vindication of statutory rights, an individual employee would have to have the opportunity to take control of her case from the union if the union refuses to pursue it. A procedural

Court's conclusion on the question of union motivation was correct for several reasons. First, it may well be that the unions, who historically acted in racist and sexist ways, now favor the interests of those protected by antidiscrimination statutes.[109] Second, the existing structure of the collective bargaining process, in which the union members vote on the contract, would seem to limit any effort on the union's part to undermine the interests of a minority group. Finally, existing legal limitations imposed on the union, including potential liability for breaching the duty of fair representation or various federal statutes, would appear to provide sufficient safeguards to protect an individual employee from exploitation.

A. Empirical Evidence Suggests that Unions Do Not Compromise Protected Group Interests

Historically, unions were thought of as racist and sexist institutions interested in protecting the power of the traditional white male constituency. Many scholars emphasize this history of exclusion of women and minorities as a justification for continued distrust of unions or, at least, a healthy skepticism about union claims that they support civil rights in the workplace.[110] This thin conception of unions as hotbeds of racism and sexism, though, may be a holdover from an earlier time. It may no longer account for the way unions address the interests of women and minorities in the workplace. Continued antipathy toward unions and their ability to negotiate for benefits for women and minorities is not consistent with what unions are actually doing. The decline in union membership, together with a changed national consciousness about equality of women and minorities, gave unions sufficient incentive to

device would need to be created to prevent employees from vetoing the union's decision in a run of the mill grievance—certainly, the claim would need to involve a statutory claim and the individual employee would have to pay for her own representation in the arbitral process. *See* Bales, *supra* note 12, at 759 (advocating this type of plan and noting that even when a unionized employee pays for representation, overall costs for that employee should still be lower than if the employee pursued her claim in litigation).

[109] Crain, *supra* note 15, at 1956 ("Unions are painfully aware that they must attract women workers if they are to survive. Given the demographic changes in the workforce, the shrinking manufacturing sector and growing female-dominated service sector, and the dwindling union membership in the private sector, the time is ripe for change."). Professor Crain emphasized that recent research (e.g., that by Professor Kate Bronfenbrenner, see *infra* notes 156, 158–59) "offers further hope." She notes that studies confirm that women are more receptive to organization and that minority women are the most organizable of all workers. *Id.* at 1956–57. *See also* 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, 600–02 (1997) (explaining that under public choice theory, protected minority groups might receive more attention and representation from unions than the majority).

[110] Crain & Matheny, *supra* note 3, at 1845.

turn toward women and minorities to form the basis of the union of the twenty-first century.[111] Evidence of women and minorities' strong interest in unionization provides further support to the belief that modern unions might be responsive to the interests and needs of women and minorities rather than dismissive.

Existing empirical evidence about unions bolsters this theory. On their website, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) touts the benefits of union membership for women and minorities: "Latino union workers earn 50 percent more than their nonunion counterparts. Union women earn 34 percent more than nonunion women. For African-Americans, the union advantage is 29 percent. The union advantage for white male workers is 21 percent. For Asian American workers the union advantage is 4 percent."[112] Research in the retail food industry confirms similar numbers.[113] SEIU provides similar statistics and lists as number three of their five reasons for joining the union that unionization dramatically increases salary for women and minorities.[114] On the website of the American Federation of State, County and Municipal Employees

[111] DeFreitas, *supra* note 15, at 284 ("[T]he potential importance of these groups [minorities] to the future of unionism can no longer be overlooked.").

[112] AFL-CIO, Unions Raise Wages—Especially for Women and Workers of Color, http://www.aflcio.org/joinaunion/why/uniondifference/uniondiff4.cfm. The Bureau of Labor Statistics confirms the AFL-CIO's numbers. Bureau of Labor Statistics, U.S. Dep't. of Labor, Labor Force Statistics from the Current Population Survey, Median weekly earnings of full-time wage and salary workers by union affiliation and selected characteristics, *available at* http://www.bls.gov/cps/cpsaat41.pdf. According to the Bureau's Union Affiliation Data for 2009, median weekly earnings for unionized women are on average 34% greater than those for nonunion women. Another study demonstrated that these gains remain significant even in studies where researchers control for differences in education, training, and occupation. ROBERTA SPALTER-ROTH, HEIDI HARTMANN & NANCY COLLINS, WHAT DO UNIONS DO FOR WOMEN? 4, 39 (1994).

[113] VICKY LOVELL, XUE SONG & APRIL SHAW, INST. FOR WOMEN'S POLICY RESEARCH, THE BENEFITS OF UNIONIZATION FOR WORKERS IN THE RETAIL FOOD INDUSTRY vi (2002), *available at* http://www.iwpr.org/pdf/c352.pdf. According to the authors, who conducted an empirical study of wages and benefits in the retail food industry, the "union wage premium is 31 percent for the retail food industry overall, and even higher for part-timers (33 percent), non-supervisory workers (45 percent), and cashiers (52 percent)." Moreover, the authors found, unionization improves women's wages by one-third and doubles the likelihood that women will have health insurance through their job. *Id.*

[114] Service Employees International Union, How Can a Union Help?, http://www.seiu.org/a/ourunion/how-can-a-union-help.php. The SEIU website states: "For people of color and women workers, the union impact is even greater. Women workers who are union members earn nearly $9,000 a year more than their non-union counterparts. For African-American workers, the union differential is also about $9,000, and for Latino workers the yearly advantage is more than $11,000."

(AFSCME), the union identifies "women" as one of their major focus issues.[115]

Women join unions at a much faster pace than do white males. According to the AFL-CIO, "women have outpaced men as new members of unions, and organizing campaigns in which women are a majority of the workforce are more likely to succeed. Working women make up 43 percent of union members but *55 percent of newly organized workers.*"[116] If women continue to join unions at the same rate that they have joined over the past 25 years, women will form the majority of unionized workers by 2020.[117]

A number of academic commentators are optimistic that women's embrace of unionization will result in greater equality for women in the workplace. Feminist authors such as Linda Briskin[118] and Rosemary Warskett[119] explain that numerous unions developed bargaining practices that address the needs of women members as women. These authors believe that increased attention to women in the unionization process increases the democratization of the unions and, in addition, creates the right environment for the resurgence of unionism.[120] Moreover, this evidence supports the theory that unions are likely to be more responsive to women's interests.

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[115] AFSCME Women, http://www.afscme.org/issues/77.cfm. Among other things, the website includes strategies for increasing representation of women in union leadership and how the Employee Free Choice Act will improve the status of women and minorities in the workplace through increased unionization.

[116] AFL-CIO, OVERCOMING BARRIERS TO WOMEN IN ORGANIZING AND LEADERSHIP, REPORT TO THE AFL-CIO EXECUTIVE COUNCIL (2004), *available at* http://www.aflcio.org/issues/civilrights/upload/overcomingbarrierswomen.pdf (emphasis in original).

[117] JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, UNIONS AND UPWARD MOBILITY FOR WOMEN WORKERS (2008), *available at* http://www.cepr.net/documents/publications/unions_and_upward_mobility_for_women_workers_2008_12.pdf (author reviewed census bureau's recent Current Population Survey to reach conclusion; also found that unionization increased womens' pay and benefits much more than would a four-year college degree).

[118] Briskin, *supra* note 15, at 73–91; Linda Briskin & Janice Newson, *Making Equity a Priority: Anatomy of the York University Strike of 1997*, 25 FEMINIST STUD. 105, 107 (1999); Linda Briskin, *Equity Bargaining/Bargaining Equity* (York Univ. Ctr. for Research on Work and Soc'y, Working Paper Series 2006-01, 2006), *available at* http://www.arts.yorku.ca/sosc/lbriskin/pdf/bargainingpaperFINAL3secure.pdf (arguing that innovative union initiatives have turned discrimination against women, pay equity, and employment equity into collective bargaining issues and make collective bargaining an "equity tool," and "[t]he public sector unions have pushed demands for maternity leave, flexible work hours, and anti-discrimination provisions in collective bargaining in response to their female-dominated membership").

[119] Rosemary Warskett, *The Politics of Difference and Inclusiveness Within the Canadian Labour Movement*, 17 ECON. & INDUS. DEMOCRACY 587 (1996).

[120] *Id.*; Briskin, *supra* note 15, at 73–91; Briskin & Newson, *supra* note 118, at 107; Briskin, *supra* note 118. *See also* JON PEIRCE, CANADIAN INDUSTRIAL RELATIONS 259–60 (2d ed. 2003).

Minorities are also enamored with the union experience.[121] According to the AFL-CIO, African-Americans think more highly of unions than do other members of the public, and unionized minority workers earn more than their non-unionized counterparts.[122] African-Americans, Latinos, and Asian Pacific Americans represent 29% of the union membership and the "vast majority" of new union members, organized through National Labor Relations Board (NLRB) elections, are women and minorities.[123] Unions are also more successful in unionization when women and minorities make up a majority of the workforce. Election win rates average 35% in units with a majority of white men, but are "53 percent in units with a majority of workers of color and 56 percent in units with at least 75 percent workers of color."[124]

Finally, a review of union websites makes abundantly clear that unions strongly encourage women and minorities to join.[125] In addition to efforts to improve leadership opportunities for women and minorities, unions emphasize the importance of membership to those traditionally underrepresented groups because they are subjected to discrimination and exploitation; conditions which, the unions believe, can be overcome through the process of collective action and bargaining.[126]

In the modern era, unions have, perhaps primarily for practical reasons, become the natural allies of the civil rights and women's movements.[127] The decline in union membership prompted unions to seek different ways to enhance their power in the workplace. The current political and social climate creates an incentive for unions to voluntarily participate in efforts to enhance opportunities for women and minorities in the workplace. Thus, it seems unlikely that the unions would attempt to undermine their efforts on behalf of women and minorities by adopting or implementing a policy that might harm them. By negotiating for arbitration of individual statutory claims, unions may be assuming the task of enforcing antidiscrimination norms on behalf of workers, a job which, until now, has fallen most heavily on the shoulders of individual workers (who would seem least capable of protecting themselves). In light of unions' existing interests in increasing membership, together

[121] DeFreitas, *supra* note 15, at 284 (African-Americans demonstrate a markedly higher demand for unionization than comparably situated whites.).

[122] *See* AFL-CIO, OVERCOMING BARRIERS TO PEOPLE OF COLOR IN UNION LEADERSHIP, REPORT TO THE AFL-CIO EXECUTIVE COUNCIL (2005), *available at* http://www.aflcio.org/issues/civilrights/upload/overcomingbarriers.pdf.

[123] *See id.*

[124] *Id.*

[125] AFL-CIO, AFL-CIO LEGISLATIVE GUIDE (2009), http://www.aflcio.org/issues/legislativealert/upload/legislative_guide09.pdf; Service Employees International Union, Fast Facts, http://www.seiu.org/a/ourunion/fast-facts.php; American Federation of State, County and Municipal Employees, http://www.afscme.org/.

[126] *Id.*

[127] *See* JOHN J. SWEENEY, AMERICA NEEDS A RAISE: FIGHTING FOR ECONOMIC SECURITY AND SOCIAL JUSTICE 22 (1996).

with unions' repeated claims to support the interests of women and minorities in the workplace, it would seem reasonable to allow unions the opportunity to show workers that the approach *Pyett* approves may actually improve the status of those protected by antidiscrimination statutes.

B. Legal Rules Prohibit Discrimination Against Protected Groups

Although unions' current approach to increasing membership through recruitment of women and minority members provides striking evidence that unions are no longer pursuing a racist or sexist agenda, it may be comforting to unionized workers to know that they are also legally protected from a union attempt to prefer majority interests at the expense of protected groups in the negotiation of the CBA's arbitration clause. Two alternative legislative enactments provide protection against union abuse of the power. Both the duty of fair representation and Title VII of the Civil Rights Act of 1964[128] ensure that the union's increased power to include statutory claims in the arbitration process will not be accompanied by an increase in discrimination against protected groups.[129]

1. The Duty of Fair Representation

The duty of fair representation (DFR) obligates the union, as the exclusive representative of all of the unit employees, to represent fairly all members of the bargaining unit and to process grievances in good faith, without hostility or discriminatory intent.[130] The union's duty extends both to the negotiation and grievance processes. During negotiations, the union has a statutory responsibility to represent the interests of all bargaining unit members as fairly as possible.[131] The responsibility to provide fair representation in negotiations and grievances is necessary because the representative, like a legislature, has the power to "deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty

[128] 42 U.S.C. §§ 2000e to 2003e-17 (2006).

[129] In *Pyett*, the Supreme Court noted that a union is also subject to liability under the Age Discrimination in Employment Act (ADEA) if the union discriminates against its members on the basis of age. 129 S. Ct. 1456, 1473 (2009) (citing Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987)).

[130] *See* Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 75–78 (1991); Metro. Edison Co. v. NLRB, 460 U.S. 693, 705 (1983); Vaca v. Sipes, 386 U.S. 171, 177 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330, 330 (1953).

[131] Typically, unions expect to receive input from employees and shop stewards about what should be discussed during the bargaining process. Unions also obtain input from other locals in similar industries. In addition, the union has its own institutional goals, such as "union security and dues check-off." *See* THOMAS R. COLOSI & ARTHUR ELIOT BERKELEY, COLLECTIVE BARGAINING: HOW IT WORKS AND WHY 94–95 (2d ed. 1994).

equally to protect those rights."[132] While courts recognize that the bargaining representative may negotiate contracts that have unfavorable impact on some members, they emphasize that contracts may not discriminate based on irrelevant or invidious considerations, such as race.[133]

While courts give unions fairly wide latitude in negotiating agreements and resolving grievances, in order to avoid liability for breaching the DFR, the union must provide a legitimate and rational explanation for its conduct.[134] In determining whether the union's decision is reasonable, courts consider the basis for the union's decision. If the union's decision is based on "impermissible" or "invidious" factors, the union is held to be in breach of its duty.[135] "Impermissible factors" include the member's race, sex, national origin, political positions or status as a union member.[136] To the extent that most nondiscrimination clauses in CBAs have been expanded to include other protected statuses, union decisions that relied upon such information would likely be considered a breach as well.[137]

With respect to grievances, unions may not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion."[138] Yet, employees do not have an absolute right to have their claims taken through the grievance process.[139] Following these rules, lower courts have found that a union is not obligated to process a grievance if the chance of success on the merits is small.[140]

Courts hold that the DFR imposes on labor unions both the duty not to discriminate and an "affirmative duty to take corrective steps to ensure compliance with Title VII."[141] Thus, the fair representation duty, at least in the context of members' discrimination claims in contract negotiation

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[132] Steele v. Louisville & Nashville R.R., 323 U.S. 192, 198 (1944).

[133] *Id.* at 207.

[134] *See O'Neill*, 499 U.S. at 72; Ryan v. N.Y. Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451, 455 (2d Cir. 1979); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 285 (1st Cir. 1970).

[135] Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 LAB. LAW. 183, 183–84 (1996).

[136] *Id.* at 184.

[137] *Id.* at 185.

[138] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[139] *Id.*

[140] Williams v. Sea-Land Corp., 844 F.2d 17, 21 (1st Cir. 1988) (refusal to proceed with grievance is not a DFR breach because union believed issue was resolved during previous arbitration).

[141] Harper, *supra* note 135, at 187 (citing Donnell v. General Motors Corp., 576 F.2d 1292, 1300 (8th Cir. 1978)). *See also* Crain & Matheny, *supra* note 3, at 1838 (stating that even negligence or passivity on the part of a union does not violate duty of fair representation and advocating for a strengthened duty of fair representation so that unions can take responsibility for actively encouraging a workplace free of discrimination).

and administration, imposes a significant burden on the union to avoid even the appearance of discriminatory decision-making.

Some commentators criticize judicial analysis of the DFR, suggesting that the courts' limited judicial review of challenges to the duty render it ineffective.[142] According to critics, the DFR is meaningless because it is based on a principle of "fairness" that is extremely difficult to judge.[143] Thus, in their view, the DFR rarely results in the second-guessing of union decisions.[144] Although these concerns are well-meaning, numerous commentators have also noted that the expanding law of fair representation has increasingly induced unions, for better or worse, to take nearly every grievance to arbitration rather than suffer the expense of defending federal litigation under section 301 of the Labor Management Relations Act (LMRA).[145]

While the effectiveness of judicial enforcement of the DFR remains a question, the case in which a breach of the DFR is most likely to be found is one where the union's actions result in discrimination against a discrete group. Where a union relies on "invidious factors" such as those articulated in Title VII, courts are quick to find a DFR violation.[146] Moreover, judicial understanding of the nature and scope of the

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[142] *See* Freed, Polsby & Spitzer, *supra* note 100, at 466.

[143] *See id.*

[144] In that sense, critics' complaints about the DFR sound very similar to critics' complaints about the business judgment rule in corporate law. The business judgment rule is a specific application of a directorial standard of conduct to the situation where a business decision is made by disinterested and independent directors on an informed basis with a good faith belief that the decision will benefit the corporation. Should the shareholders sue the directors on the basis that their decision was illegitimate, the court examines the decision only to the extent necessary to verify the presence of a business decision, disinterestedness and independence, due care, good faith and the absence of an abuse of discretion. If these elements are present—and they are presumed to be—the court will not second guess the merits of the decision. *See generally* 1 DENNIS J. BLOCK, NANCY E. BARTON & STEPHEN A. RADIN, THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS (5th ed. 1998).

[145] *See, e.g.*, Seymour M. Waldman, *A Union Advocate's View*, *in* THE CHANGING LAW OF FAIR REPRESENTATION 109, 111–12 (Jean T. McKelvey ed., 1985); Stanley J. Schwartz, *Different Views of the Duty of Fair Representation*, 34 LAB. L.J. 415, 420–26 (1983); Robert J. Rabin, *The Impact of the Duty of Fair Representation upon Labor Arbitration*, 29 SYRACUSE L. REV. 851, 858 (1978). In *Pyett*, the Supreme Court identified the duty of fair representation as one of the avenues of redress employees have against a union's discriminatory behavior. 14 Penn Plaza LLC v. Pyett, 129 S. Ct 1456, 1473 (2009). *See* THE DEVELOPING LABOR LAW 1416 (Patrick Hardin et al. eds., 1992) (section 301 of the LMRA confers jurisdiction on a federal court over fair representation/breach of contract actions).

[146] Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)(c) (1994). *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944) (holding that a union could not deprive blacks of membership without breaching its duty of fair representation); Miranda Fuel Co., 140 N.L.R.B. 181, 190 (1962) (holding that discrimination against blacks is a breach of the duty of fair representation).

"invidious" categories makes it easy for courts to find a DFR breach.[147] Thus, concerns that union decisions are rarely struck down on the principle of distributive fairness should not affect the vitality of the DFR claim as a means to limit discrimination against protected classes, at least in cases where the union's decision would be based on an invidious factor. Instead, in those cases, whether occurring in negotiations or in the processing of grievances, the good faith duty stands as a bar to the union's ability to prefer majority interests.

2. Title VII Protection

If the DFR was insufficient to ensure that the union did not discriminate against any of its members, Title VII provides overlapping protection to employees against union discrimination on the basis of race, color, religion, sex, and national origin.[148] While the union is still occasionally a defendant in a Title VII action instituted by an employee,[149] more often the union's role has been as an active player in the effort to eliminate unlawful employment discrimination in the workplace. Many labor unions advocate vociferously for the elimination of sexual discrimination,[150] disability discrimination, and fetal protection policies.[151] When the union has discriminated, courts do not hesitate to impose liability under Title VII.[152] Courts also emphasize that Title VII

[147] Discrimination on the basis of an individual's race, sex, color, religion, or national origin is considered "invidious" discrimination. *See, e.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944); Conley v. Gibson, 355 U.S. 41, 42 (1957); Carter v. UFCW, Local No. 789, 963 F.2d 1078, 1082 (8th Cir. 1992) (discriminating against female workers was invidious and a violation of the union's duty of fair representation).

[148] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)(c) (1994). The *Pyett* Court notes that the ADEA also provides protection to employees when the union engages in discriminatory behavior. A labor union may be held liable under the ADEA for discriminating in negotiation of the CBA or inducing the employer to discriminate. *Pyett*, 129 S. Ct. at 1473. *Pyett* also mentions that employees may file age discrimination claims with the EEOC and the NLRB. *Id.*

[149] *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 659 (1987); Daniels v. Pipefitters' Ass'n Local Union No. 597, 945 F.2d 906, 909 (7th Cir. 1991); Alexander v. Local 496, Laborers Int'l Union of N. Am., 778 F. Supp. 1401, 1404 (N.D. Ohio 1991).

[150] *See* AT & T Corp. v. Hulteen, 129 S. Ct. 1962, 1967 (2009); Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 718 (7th Cir. 1986); Am. Fed'n of State, County & Mun. Employees (AFSCME) v. Washington, 770 F.2d 1401, 1403 (9th Cir. 1985); Am. Fed'n of State, County & Mun. Employees (AFSCME) v. County of Nassau, 609 F. Supp. 695, 697 (E.D.N.Y. 1985).

[151] *See* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 208 (1991).

[152] For example, in *Goodman*, the Court held a union liable under Title VII for its knowing refusal to pursue grievances of black members who complained of racial discrimination and harassment by their employer. 482 U.S. at 669. Similarly, in *Daniels*, the Court found a union liable for its back door hiring hall policies, which disproportionately excluded blacks from job referrals. 945 F.2d at 910.

not only imposes a duty on unions to avoid active discrimination but also to eliminate existing discriminatory practices.[153]

This is not to suggest that unions have resolved the dilemma of responding to majority needs while still protecting minorities or that unions are never guilty of racial discrimination. Yet, it would seem that in light of the severe penalties that can be imposed for discriminatory behavior, unions would have little incentive to negotiate an agreement to arbitrate statutory claims if such an agreement could be considered discriminatory. As Samuel Estreicher noted, under current law, an employee claiming inadequate union representation may disregard the CBA's finality provisions and go directly to court.[154] Consequently, the union will be forced to defend its decision to negotiate a clause or to process a grievance in front of a jury at its own expense. If a breach is ultimately found, the union will have to pay damages. Because unions are organizations with limited resources, it would be surprising if they did not attempt to avoid the risk of trial on a DFR or Title VII claim even if the consequence was overprotecting protected classes.[155]

C. Arbitration Provides Greater Opportunity for Employees to Vindicate Their Claims

Setting aside the legal and policy disputes surrounding the *Pyett* case, from a practical perspective, there are two reasons why employees and their advocates should embrace grievance arbitration for resolution of statutory claims. First, because of the power that comes from their collective representation, unions are in a much better position to negotiate equitable arbitration provisions that protect workers' rights than are the individual workers themselves.[156] Second, arbitration presents employees with their best opportunity to have their case heard. Without the union, an employee may be unable to access the forum at

[153] The Fifth Circuit held that both the union's DFR and Title VII were violated when it failed to take "every reasonable step" to eliminate a discriminatory seniority system. Terrell v. U.S. Pipe & Foundry Co., 644 F.2d 1112, 1121 (5th Cir. 1981). Both the Seventh and Eleventh Circuits have imposed an affirmative duty on unions to eliminate discriminatory contractual provisions during negotiations. *See, e.g.*, Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1357–58 (11th Cir. 1983); Wattleton v. Int'l Bhd. of Boilermakers, Local 1509, 686 F.2d 586, 593 (7th Cir. 1982); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1014 (11th Cir. 1982).

[154] *See* Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 844 (1996).

[155] *See id.*

[156] In fact, unions may be the only hope for women and minority employees. Professor Kate Bronfenbrenner observed that, "[a]lthough many women had great hopes that the antidiscrimination legislation enacted in the 1970s and 1980s would result in major gains for women in all sectors of the economy, it has become increasingly clear that labor unions are the only major U.S. institution equipped to help women overcome these barriers in the workplace." Kate Bronfenbrenner, *Organizing Women: The Nature and Process of Union-Organizing Efforts Among U.S. Women Workers Since the mid-1990s*, 32 WORK AND OCCUPATIONS 441, 442 (2005).

all, much less vindicate his or her statutory rights. These next two Sections focus on the union's ability to negotiate a reasonable arbitration clause and discuss how the union's presence provides greater access to the arbitral forum. Unions' ability to negotiate a fair clause, together with nonunionized employee success in arbitration, suggest two compelling reasons for both employers and unions to embrace the *Pyett* holding.

1. Union Negotiation of Arbitration Clauses

The diverse workplace of the twenty-first century demands that unions expand their interests to include protecting vulnerable workers from discrimination. The union of the twenty-first century is expanding its focus from guardian of employees' economic interests to proponent of civil rights in the workplace.[157] The increase in workplace diversity prompts the pragmatic union to embrace women and minorities—both because their presence in the workforce is increasing dramatically and because they have shown much greater interest in being organized.[158] Because these groups are the ones to look to antidiscrimination statutes for protection against workplace discrimination, unions must take on the role of advocate for these workers, even if that advocacy is inconsistent with the goals of the traditional white male membership.[159] *Pyett* gives the

[157] *See* Crain & Matheny, *supra* note 3, at 1820 (unions' future effectiveness depends both on attracting new membership from diverse employees and proving to other social justice groups that they are committed to issues important to those groups). John Dunlop, a leading policy-maker and commentator, said, "Unions have made many valuable contributions in the political area, such as civil rights, work and family issues, and so on. But if unions are to survive, and for the leaders to get re-elected, they have to stay in pretty close contact with what is going on at the workplaces and with the aspirations of their members." Bruce E. Kaufman, *Reflections on Six Decades in Industrial Relations: An Interview with John Dunlop*, 55 INDUS. & LAB. REL. REV. 324, 339 (2002).

[158] *See* Bronfenbrenner, *supra* note 156, at 442 ("[O]rganizing victories—through both certification elections and voluntary recognition campaigns—continue to be disproportionately concentrated in bargaining units where women predominate."); Kate Bronfenbrenner & Robert Hickey, *Changing to Organize: A National Assessment of Union Strategies, in* REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 17, 36–37 (R. Milkman & K. Voss eds., 2004), *available at* http://digitalcommons.ilr.cornell.edu/articles/54 ("Consistent with earlier research, win rates increase substantially as the proportion of women and people of color increases. The highest win rates are 82 percent for units with 75 percent or more women workers of color, while win rates are lowest in units where women (31 percent) or workers of color (40 percent) constituted a minority of the unit."); This information is consistent with Professor Bronfenbrenner's earlier work. Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy, in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 32 (Kate Bronfenbrenner et al. eds., 1998) (unions are more successful at organizing when the prospective bargaining unit has a majority of women and/or minorities).

[159] As Professor Bronfenbrenner concludes in *Organizing Women: The Nature and Process of Union-Organizing Efforts Among U.S. Women Workers Since the mid-1990s*, "With these newly organized women workers comes an opportunity to broaden labor's agenda to include issues of discrimination, comparable worth, job advancement,

keys to the union to do just that. The question is, how will the unions use this newly discovered power?

At least one way unions could and should exercise this new power is to ensure that arbitration is an adequate substitute for litigation of statutory discrimination claims.[160] Many of the criticisms leveled at employment arbitration can be studiously avoided by a union capable of negotiating the arbitration process.[161] As Ken Matheny and Professor Marion Crain (a noted labor law expert) explained, "Unions traditionally negotiate for and obtain many of the protections absent in unilaterally imposed individual predispute arbitration agreements, including written opinions, scope of arbitral authority, expanded remedies, precedential effect of decisions, and choice of arbitrators."[162] Other potential tools a union might negotiate for include greater discovery[163] (since, in employment discrimination cases, the employer has most of the important factual information) and availability of transcripts (if the party might be interested in challenging the award). Written opinions are valuable because they force the arbitrator to analyze the case and ensure arbitrator accountability for the result. With the opportunity *Pyett* creates, a union should make every effort to negotiate a process that may prove

hours of work, and a host of other social and family concerns." Bronfenbrenner, *supra* note 156, at 461.

[160] Reviewing previous empirical studies, Perry Zirkel and Andriy Krahmal found that grievance arbitration has experienced a "creeping legalism" over the last 30 years—labor arbitrations take more time, involve more post-hearing briefs and, to a slightly lesser degree, more use of transcripts. Perry A. Zirkel & Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 OHIO ST. J. ON DISP. RESOL. 243, 258–59 (2001). The AAA formerly maintained a newsletter that charted an increase in the use of attorneys during labor arbitration as well as increased use of briefing and transcripts. *See id.* at 248–49 & n.25 (documenting that these newsletters demonstrated a steady increase by both unions and employers of representatives during labor arbitration as well as substantial increase in use of briefs and transcripts).

[161] *See* Crain & Matheny, *supra* note 3, at 1842–43 (concerns that the informal arbitration process may result in second class justice need not be an issue when unions negotiate the arbitration clause). Empirical evidence supports the belief that unions are in a better negotiating position than a one-shot player to negotiate. *See* Frost, *supra* note 8, at 559 ("Four union capabilities—the ability to access information, to educate and mobilize the membership, to communicate with management at multiple levels, and to access decision-making at multiple points—appear to have been critical to two locals' success in negotiating with management over workplace restructuring in ways that benefited themselves, their members, and their firms.").

[162] Crain & Matheny, *supra* note 3, at 1843 n.428.

[163] Hodges, *supra* note 64 (manuscript at n.155). Professor Hodges suggests a separate statutory procedure for arbitration of legal claims to ensure that issues such as discovery, statutes of limitation, class actions and damages are addressed. *See generally id.*

"at least equal, and potentially far superior to the existing statutory fora and remedies."[164]

2. Access to Court v. Access to Arbitration

Some advocates and academics claim that litigation is the gold standard for resolving statutory employment claims or, frankly, any claims.[165] To send a case to arbitration to resolve these claims may yield imperfect justice for the parties or no justice at all. The argument that arbitration is not an appropriate forum for resolution of statutory claims seems more powerful in the nonunionized workplace, where the parties on either side of the agreement have unequal bargaining power as well as different experience with, and knowledge about, the arbitration process. Even in this context, where a repeat player negotiates with and eventually arbitrates against a one-shot player, strong arguments exist that arbitration may provide better results for many employees, particularly those who are lower-paid. Removing the one-shot player concerns would make even more powerful the argument in favor of using arbitration, rather than litigation, to resolve statutory disputes.

Access to a forum so that one's claim can be heard is one of the most important elements at issue in a statutory rights dispute. A number of empirical studies, as well as less sophisticated inquiries, establish that an employee (whether unionized or not) is much more likely to have his claim heard if he has an arbitration clause in his contract than if he can take his claim to litigation.[166] How can this be? The reality is that employment lawyers take few cases (as a percentage of the whole). Of those cases, lawyers are more likely to take the cases of higher paid employees because the potential payout is greater.

Professor Theodore St. Antoine, a noted labor and employment law professor, reports that experienced plaintiffs' attorneys estimate that only approximately 5% of those with an individual employment claim can find counsel to take their case.[167] In a conversation with "[o]ne of Detroit area's top employment specialists," Professor St. Antoine learned that the lawyer took only one out of every 87 persons who wished to obtain representation.[168]

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[164] Crain & Matheny, *supra* note 3, at 1844. The authors also emphasize that this new system may offer considerable assistance to those at the very bottom of the class hierarchy for whom "freedom of contract" frequently proves illusory. *Id.* at 1843 & n.429.

[165] One of the more famous alternative dispute resolution (ADR) articles focusing on this issue comes from Owen Fiss. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[166] *See, e.g.*, Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008); Eisenberg & Hill, *supra* note 3, at 44; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 419 (2007).

[167] St. Antoine, *supra* note 166, at 790.

[168] *Id.* at 790–91.

Other empirical studies reach the same conclusions. John Donohue and Peter Siegelman suggested that a case is only worth a lawyer's time if the employee makes more than $450 per week.[169] Lewis Maltby, an opponent of arbitration, reported in 1995 that plaintiff's lawyers would not take a case unless the employee's back pay claim was at least $60,000.[170] Quite recently, Theodore Eisenberg and Elizabeth Hill found that for employees who earn less than $60,000 per year, arbitration, not litigation, is their only realistic dispute resolution option.[171]

Professor Samuel Estreicher, using an evocative metaphor, explained that, in a world without employment arbitration, there would be a "Cadillac" system for a few and a "rickshaw" system for the many.[172] Like Professor St. Antoine, Professor Estreicher noted that private lawyers do not find most employees' claims attractive because the "stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources."[173] An arbitration system, by contrast, could provide "Saturns" to a larger percentage of those employees who have potential claims—it could deliver "accessible justice for average claimants" and seems a preferable alternative.[174] Similarly, Professor Richard Bales discussed a "comprehensive-arbitral approach" that would give employees access to a "meaningful adjudicatory forum" because "one of the principal failings of the litigation system is that it is too expensive."[175] Labor arbitration solves the costs issue because it is cheaper than litigation and union members can "spread the costs among themselves through union dues."[176]

Considerable empirical literature compares arbitration and litigation win rates and damages received in arbitration to those obtained in litigation.[177] While that review will not be repeated in this Article, it is worthwhile to take a moment to summarize the findings of these studies. If employees find success in employment arbitration comparable to or

[169] John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1008 (1991). The authors of this study reviewed an American Bar Foundation survey of employment discrimination cases filed between 1972 and 1987.

[170] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003).

[171] Eisenberg & Hill, *supra* note 3, at 48, 50.

[172] Estreicher, *supra* note 4, at 563.

[173] *Id.*

[174] *Id.*

[175] Bales, *supra* note 12, at 753.

[176] *Id.*

[177] Alexander Colvin reviewed 2763 employment arbitration cases administered by AAA between 2003 and 2006. Colvin, *supra* note 16, at 408.

better than their likelihood of success in litigation, it is probable that unionized employees would be as successful, if not more so.[178]

While some questions are closer than others, studies reveal that employment arbitration is cheaper than litigation of employment claims.[179] All of the studies also confirm the widely held belief that arbitration is faster than litigation.[180] Studies also confirm that the cost of bringing a claim to arbitration is less than the cost of bringing a claim in court. For example, in 1995, William Howard found that the average cost to defend an arbitration was $20,000, while the average cost of defending a case in employment litigation was $96,000.[181]

One of the more difficult questions to answer is whether employees are as successful in arbitration as they would be in litigation. The studies generally indicate that employees enjoy success in employment arbitration, at least when compared with litigation. Yet, estimates based on some of the existing empirical research show considerable variance. In a study by Hoyt N. Wheeler, Brian S. Klaas, and Douglas M. Mahony, the authors found that employers win in arbitration over 60% of the time.[182] In that study, the authors also compared employment arbitration cases involving a federal discrimination statute and court cases involving

[178] Estreicher, *supra* note 4, at 564; Maltby, *supra* note 170, at 317; Eisenberg & Hill, *supra* note 3, at 48; Howard, *supra* note 5, at 40; Sherwyn, Estreicher & Heise, *supra* note 3, at 1569.

[179] Alexander Colvin reviewed 2763 employment arbitration cases administered by AAA between 2003 and 2006. Colvin, *supra* note 16, at 408. Colvin found that in 96.6% of the cases, the employer paid 100% of the arbitrator fees. He found that the practice of imposing arbitrator fees on an employee is "relatively rare." Colvin's data also revealed that employment arbitration is faster than litigation. *Id.* at 424–25. Others have confirmed this finding. *See, e.g.*, Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 CONFLICT MGMT. 1, 10 (2003) (stating that, in securities industry employment arbitration, median time to judgment was 16.5 months with a mean time of 20.5 months compared to median time of 25 months and mean time of 28.5 months in employment discrimination cases in the Southern District of New York); Eisenberg & Hill, *supra* note 3, at 51 (finding that time to arbitration hearing was about three times faster than time to final disposition).

[180] WHEELER, KLAAS & MAHONY, *supra* note 5, at 60 (stating that arbitration takes, on average, half the time of litigation).

[181] Howard, *supra* note 5, at 44.

[182] Wheeler, Klaas, and Mahony reviewed employment arbitration and labor arbitration awards, as well as federal district court awards. They found that employees won in employment arbitration 33% of the time but only 22% of the time when a federal discrimination statute was involved (out of 216 cases overall). In federal district court, they found that employees won somewhere between 12% and 16% of the time over a 13-year period (involving about 80,000 cases). Interestingly, the authors also studied 580 labor arbitration cases and found an employee success rate of 52%. WHEELER, KLAAS & MAHONY, *supra* note 5, at 54. Union win rate in discharge cases (when no clear statutory claims were involved) has been found to be 57%. Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 548 (1987).

the same topic.[183] The authors found that the chances of an employee winning an employment arbitration case were 22%, a result much higher than that obtained by employees in litigation (12%).[184]

Other studies appear to yield lower rates of success for employees in arbitration, as compared to litigation.[185] Alexander Colvin reviewed a number of existing studies and then added his own data to the mix.[186] In the early 1990s, a number of authors reported very high win rates for employees in arbitration, ranging from 66% to 74%.[187] Colvin noted that these cases were decided prior to the adoption of the Due Process Protocol and that the majority of cases involved individually negotiated arbitration agreements rather than employer-promulgated arbitration

[183] WHEELER, KLAAS & MAHONY, *supra* note 5, at 55. All of the employment arbitration cases involved termination. The authors declared the case a success if the employee was reinstated to her job, with or without back pay. A back pay award without reinstatement was not considered a win. The authors examined 216 employment arbitration awards and 580 labor arbitration awards. *Id.* at 54. The authors concluded that, "the chances of an employee winning in employment arbitration would appear to be much greater than in court when the case goes to a final adjudication." *Id.* at 55. The authors also noted that success in labor arbitration was much higher—52%. No effort, however, was made to determine whether those cases involved statutory discrimination claims. In addition, the authors emphasized, in a traditional labor arbitration case, the employer has the burden of proving misconduct. *Id.*. Lisa Bingham confirmed this 52% success rate in labor arbitration. Bingham, *Employment Arbitration*, *supra* note 9, at 202.

[184] WHEELER, KLAAS & MAHONY, *supra* note 5, at 55. Wheeler, Klaas and Mahony report that their data ignored settlements. Instead, they examined federal district court cases disposed of by either a judge or a jury. Based on that data, between 1996 and 2000, employees in 26,841 employment discrimination cases were successful 12% of the time. The authors noted that only a small number of cases make it to trial and that the settlement rate for cases (79% to 84%) is much higher than for arbitrations (31% to 44%). *Id.* at 51.

[185] Michael H. LeRoy and Peter Feuille's study of employment arbitration awards between 1990 and 2001 found that employees won outright in arbitration only 20.6% of the time and 17.6% of the awards were split between employer and employee. Michael H. LeRoy & Peter Feuille, *Final and Binding, But Appealable to Courts: Empirical Evidence of Judicial Review of Labor and Employment Arbitration Awards*, *in* ARBITRATION 2001: ARBITRATING IN AN EVOLVING LEGAL ENVIRONMENT: PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL MEETING 49, 65 (Jay E. Grenig & Steven Briggs eds., 2002), *available at* http://www.naarb.org/proceedings/pdfs/2001-49.pdf. A study of employment arbitration cases in the securities industry showed that, between 1992 and 1998, employees won about 38.5% of the time. *Mandatory Arbitration in Securities Industry Employment Contracts: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. 93–94 n.24 (1998) (statement of Stuart J. Kaswell, Gen. Counsel, Securities Industry Association).

[186] Colvin, *supra* note 16, at 409, 412–18.

[187] Bingham, *On Repeat Players*, *supra* note 9, at 233–34 (finding a 74% success rate for employees in a 1992 study of AAA employment arbitration outcomes and a 70% success rate in a subsequent study of AAA arbitration awards decided in 1993–1994). Lewis Maltby examined AAA's year 2000 arbitration awards and found a 66% employee win rate. Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* HOW ADR WORKS 915, 921 (Norman Brand ed., 2002).

agreements.[188] In the late 1990s, ironically after a number of arbitral organizations adopted the Due Process Protocol, Colvin reported that studies found employee win rates in arbitration were both lower and higher than win rates in court.[189] Colvin's study of AAA administered arbitrations between 2003 and 2006, which involved only cases where an employer-promulgated arbitration agreement was used, revealed that the employee win rate in arbitration was only 19.7%.[190] Colvin stated that the vast majority of these cases (83.3%) involved employees who made less than $100,000 per year. He noted that for this group of employees, arbitration may be the only available avenue for redress of discrimination claims.[191]

For higher-paid employees, then, arbitration may provide greater likelihood of success than would litigation. And, for the lower-paid employee, arbitration may provide the only option for obtaining relief. Thus, even if win rates are lower for the lower-paid employees, arbitration may be a useful and beneficial process. It is also worth noting that even if the win rates for employees in arbitration and litigation appear similar, the comparisons do not take into account the substantial motion practice that occurs in litigation. Because employer success on motions is so high (60% of the 3419 cases discussed in Maltby's study were resolved by motion, for example—of that 60%, employers prevailed 98% of the time), arbitration win rates, even for the lower-paid employee, may actually be higher than litigation win rates.[192]

Another difficult question is whether employees receive higher damages awards in arbitration as compared to litigation.[193] A 2003 study comparing employment litigation and arbitration found that the median awards were quite similar—approximately $95,000 in litigation compared to $100,000 in arbitration.[194] Other studies show that litigation awards tend to be somewhat higher than arbitration awards.[195] Commentators

[188] Colvin, *supra* note 16, at 413.

[189] *Id.* at 418–19. During this time frame, Eisenberg and Hill reported that employees succeeded 36.4% of the time with employment discrimination claims in federal courts while winning only 26.2% of the time in arbitration cases involving employment discrimination. The dataset used to find the latter number, though, was quite small—the authors reviewed only 42 cases. Eisenberg & Hill, *supra* note 3, at 48. By contrast, Delikat and Kleiner found that between 1997 and 2001, employees had a 46% rate of arbitration success in employment discrimination cases involving the securities industry compared to a 33.6% chance of success in litigation. Delikat & Kleiner, *supra* note 179, at 10.

[190] Colvin, *supra* note 16, at 418.

[191] *Id.* at 419.

[192] Maltby, *supra* note 187, at 917.

[193] WHEELER, KLAAS & MAHONY, *supra* note 5, at 56 ("Unfortunately, like win/loss statistics, the numbers on this issue are not straightforward.").

[194] Delikat & Kleiner, *supra* note 179, at 10.

[195] *See, e.g.*, Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ON ARB. & MEDIATION 1, 21 (2009).

offer several explanations for this difference.[196] Existing empirical studies end up comparing apples to oranges—arbitration awards are lower than litigation awards, but plaintiffs in arbitration receive a higher percentage of their demands than do plaintiffs in litigation. In addition, if arbitration is more accessible than litigation, potentially fewer meritorious cases will be heard in arbitration than in litigation. One would expect that the less meritorious case (or a case involving a lower-paid employee) would result in a lower damages award.

Professor Peter Rutledge found that higher mean recovery rates in litigation could be explained by the presence of "several relatively high damage verdicts skew[ing] the average upward."[197] Professor Rutledge concluded, after reviewing this and many other studies, that the recurring theme in the empirical scholarship is that "arbitration may indeed result in lower recoveries for a small number of plaintiffs; but, that change must be balanced against the more favorable outcomes, lower dispute resolution costs, and improved access to justice that arbitration provides."[198]

Another explanation for the somewhat lower arbitration awards is that, in many of the cases, the employee in arbitration is not represented and a repeat employer-arbitrator pairing exists.[199] Professor Lisa Bingham documented the impact of the repeat player in employment arbitration in a study of 270 cases consisting of arbitration awards issued in 1993 and 1994.[200] This study revealed that arbitrators award damages to employees less frequently and in lower amounts when the employer is a repeat player.[201] According to Professor Bingham, in repeat player cases, employees recover only 11% of what they demand; while in cases against non-repeat player employers they recover approximately 48% of what they demand.[202] Moreover, employees lose significantly more often in cases involving repeat player employers.[203] According to the study, employees arbitrating with one-shot player employers win over 70% of the time. When arbitrating against repeat player employers, however,

[196] *See, e.g.*, *id.*; Bingham, *Employment Arbitration*, *supra* note 9, at 209; Bingham, *On Repeat Players*, *supra* note 9, at 234; Colvin, *supra* note 16, at 424.

[197] Rutledge, *supra* note 195, at 21 (quoting Delikat & Kleiner, *supra* note 179, at 8–9).

[198] *Id.*

[199] Colvin notes that the lower win rates and damages awards can be attributed in part to the lower salary levels of the employees bringing claims. One would expect lower awards overall (although not lower win rates) if the employee bringing the claim was lower paid. Colvin, *supra* note 16, at 424.

[200] Some of these cases were decided under AAA's Commercial Arbitration Rules. Others were decided under AAA's Employment Dispute Rules. Bingham, *On Repeat Players*, *supra* note 9, at 234.

[201] *Id.*

[202] *Id.*

[203] Bingham, *Employment Arbitration*, *supra* note 9, at 209–10.

they win only 16% of the time.[204] Assuming these studies are accurate, these findings are especially relevant to predicting success for individual employees in labor arbitration. One would expect that, in labor arbitration, unionized employees would enjoy success closer to that of the one-shot employee against the one-shot employer than that of the one-shot employee versus the repeat employer. Unlike employment arbitration, labor arbitration involves repeat players—both union and management repeatedly negotiate for arbitration clauses and participate in the arbitration process.[205] Thus, the risk of lower win rates or awards as a result of the repeat player effect should be reduced.

Representation costs would also be lower in labor arbitration than in employment arbitration. Either the union would represent the employee[206] (and pay for the arbitration, thereby lowering the employee's overall cost), or the employee would be able to retain a lawyer to represent him in arbitral proceedings (and this would only be necessary if the employee disagreed with the course of the union's representation or where the union refused to take the employee's case to arbitration).

Research also demonstrates that unionized employees tend to obtain better results than their nonunionized counterparts. Wheeler, Klaas, and Mahony's survey of arbitrators revealed that, compared to labor arbitrators, individual employment arbitrators were more likely to place the burden of proof on the employee, more reluctant to overturn discharges where the employee violated a clearly unreasonable rule and more reluctant to overturn discharges where the employer acted in good faith.[207]

Empirical research comparing employment arbitration with litigation and labor arbitration suggests that employees in the labor arbitration process will achieve faster results at a lower cost (both in terms of the process costs and the cost of representation) than if they were to take their claims to court. In addition, the benefit of representation and the status as repeat player increases the unionized employee's likelihood of success in arbitration. While the data is not abundant, reasoning by analogy and using the data that is available, one can conclude that unionized employees will enjoy a higher success rate in labor arbitration than they would in court. A greater number of unionized employees will receive awards because arbitration is both less costly and more efficient. Slightly less clear is the question whether the

[204] Bingham, *On Repeat Players*, *supra* note 9, at 234.

[205] Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89, 125 n.189 (2008) (Unlike individual employment arbitration, arbitration in the collective bargaining context works well because both parties are repeat players.).

[206] This is a not insignificant cost. One scholar estimated that hourly arbitration fees range from $250 to $600 or more and that the total arbitrator fees in an average case range from $3,750 to $14,000. Turner, *supra* note 74, at 167.

[207] WHEELER, KLAAS & MAHONY, *supra* note 5, at 67–68.

unionized employee will receive awards that are higher than they would receive in court. If the "jackpot" cases are removed, it appears that litigants do just as well, if not better, in arbitration as in litigation. Taking these factors together, the union's decision to send statutory claims to arbitration appears to be one that employees should embrace.

3. Delegation of Decision Making to an Expert

Cognitive psychology provides another potentially useful method for analyzing whether the Court was right to allow the transfer of decision-making power regarding adjudication of statutory claims from employees to their union representatives.[208] Unquestionably, the hazards of individual decision making, from the cognitive psychology perspective, are myriad and difficult to overcome. Cognitive psychologists believe that individuals use heuristics to assist themselves when evaluating available choices.[209] Heuristics are short cuts that individuals use to make the decision-making process less cognitively demanding.[210] An individual's use of various heuristics to make certain kinds of decisions will, most of the time, result in sufficiently accurate decisions. Yet, cognitive psychologists have discovered that individuals use these short cuts even when their use results in inaccurate decision making.

For example, the availability heuristic describes the situation where an individual correlates his ability to recall a type of event with the likelihood that the event will occur.[211] In other words, if one can recall an event easily, one is likely to believe that the event will occur more often than is statistically supportable. Thus, the availability heuristic leads a decision maker to over-predict the likelihood of events that are easy for him to recall.[212] In addition to the availability heuristic, numerous

[208] The analysis in this Section is not intended to suggest that there is only one way to interpret the use of heuristics in the union-employee context. Just as one cannot eliminate the use of heuristics in decision-making, neither can one state with any certainty the impact of the various heuristics or that countervailing heuristics and biases might not also be at play. This Section merely suggests that there may be value in delegating decision-making power to an entity with expertise and objectivity. For more on the use of heuristics in decision making, see Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982).

[209] *Id.*; Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 555 (2002).

[210] Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 494–95 (2002).

[211] *Id.* at 501.

[212] Mark Seidenfeld offers an example of the impact of the availability heuristic in the context of Environmental Protection Agency (EPA) rulemaking. According to Seidenfeld, legal scholars believe that "virtually every rule promulgated by the [EPA] is challenged in court." The statistics reveal that only 3% to 26% of EPA rules are challenged. This difference between "folklore and reality," states Seidenfeld, "may well reflect that rules subject to challenge are much more salient in the minds of members of the agency and hence easier for them to recall, leading agency members to believe that eighty percent or more of all rules were challenged." *Id.* at 501. *See also*

heuristics help individuals make quick and relatively accurate decisions every day about where to eat dinner and what route to take to work. Yet, the use of these heuristics to make more complex decisions may lead to poor results.

One way cognitive psychologists recommend overcoming an individual's predictable use of misleading heuristics is to delegate the making of decisions to experts.[213] Not only are these experts potentially more knowledgeable in general about the issue to be decided and, more specifically, about decision making,[214] but they may also offer a better decision-making perspective[215] While it is always possible that an expert hired to make decisions will rely on the same (or different) misleading heuristics as the individual, they have a better "opportunity to develop different ways of representing problems, and hence, a better opportunity to learn to avoid relying on an inferior heuristic. They also offer an outsider's perspective, making them more likely to see alternative frames and frequentist problem representations."[216] In addition, experts make decisions repeatedly—as a result, they may be in a better position both to expend resources to educate themselves about the risks and consequences of relying on cognitive illusions and to learn from their experiences,[217] thereby altering the course of their decision making in the future.[218]

Rachlinski & Farina, *supra* note 209, at 556 (availability heuristic harms decision making when "ease of recollection does not correspond to actual frequency").

[213] According to Jeffrey Rachlinski, "virtually every scholar who has written on the application of psychological research on judgment and choice to law has concluded that cognitive psychology supports institutional constraint on individual choice." Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1166 (2003).

[214] Experts can develop better decision-making abilities than laypersons making the same decision because they have opportunities to obtain training and because they will acquire experience in making decisions. Rachlinski & Farina, *supra* note 209, at 559. Experts who make decisions on the same issues routinely will obtain feedback about the costs and benefits of a particular decision. Experience in making these decisions, combined with examination of feedback, will assist experts in developing different ways of thinking about a problem—thus, they should be able to avoid the problems misleading heuristics cause. *Id.*

[215] Rachlinski, *supra* note 213, at 1216; Rachlinski & Farina, *supra* note 209, at 558 ("Experts clearly have advantages over laypersons in decisionmaking.").

[216] Rachlinski, *supra* note 213, at 1216.

[217] Experience, even without feedback, can help decisionmakers avoid mistakes in the future because experience allows individuals to step outside a problem to evaluate decisionmaking strategies. Rachlinski & Farina, *supra* note 209, at 559. Perhaps this is why advocates of problem-solving negotiations encourage litigants and attorneys to "go to the balcony" to think about offers and comments during negotiation—this allows the opportunity to reflect and conduct a more objective analysis before responding. WILLIAM URY, GETTING PAST NO 31–51 (1993).

[218] Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821–22 (2001) (describing similar phenomenon with judges and advising judges to consciously make an effort to avoid cognitive illusions).

Jeffrey Rachlinski offers attorneys as examples of expert decision makers to whom it may be wise to delegate decision-making power.[219] The attorney's objective point of view, together with her training in evaluation and risk assessment, as well as decision making, improve her ability to avoid some common decision-making mistakes. For example, as an objective analyst, an attorney can skeptically consider the client's claims rather than accepting them at face value. Empirical studies support the theory that attorneys' training and experience help them avoid some of the common layperson cognitive mistakes.[220] But, Rachlinski expounds further, some studies do support the belief that attorneys make many of the same mistakes that lay people do.[221]

The alternative dispute resolution movement helps lawyers avoid reliance on misleading heuristics. Decision-making tools such as decision analysis, summary jury trial, mini-trial, and mediation help lawyers (and clients) overcome some of their innate biases—in particular, overconfidence in the outcome of the case. Repeated experience with evaluation of cases should also provide the attorney with much needed methods for avoiding the common heuristic pitfalls. Unions should be capable of playing a role similar to that of attorneys in providing expert objective guidance to help individuals overcome various biases.[222] The union, like the attorney, acts as an analyst to evaluate the costs and benefits of selecting particular contract provisions. Rather than rely on inexperienced employees to make important decisions, the union's independent status provides it the ability to evaluate factors and dynamics from an unbiased perspective. Moreover, its expertise and experience with contract clauses ensures greater objectivity in contract clause analysis. As Rachlinski notes, "Bargaining and negotiation is separated from the evaluation process, thereby avoiding a host of possible biases. It also converts subjective probabilities into frequentist

[219] Rachlinski also mentions financial planners as another example. Since attorneys are closer in practice to union representatives than are financial planners, my focus will be on the benefits of utilizing attorneys to avoid reliance on misleading heuristics. Rachlinski, *supra* note 213, at 1216–17.

[220] *Id.* (citing Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 99–100 (1997)) (collecting data that demonstrates that lawyers are less vulnerable to "framing effects" when evaluating settlements than are laypeople). Rachlinski also contends that legal training itself might help an individual avoid relying on misleading heuristics. *See id.*

[221] *Id.* at 1217. Seidenfeld agrees. Although experts, such as administrative agencies, are less likely to make cognitive errors, they will "on occasion" make them. Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L. J. 1059, 1063 (2001).

[222] Rachlinski states, "Some entities, notably labor unions, provide a kind of hybrid of organizational decisionmaking and privately hired experts." Rachlinski, *supra* note 213, at 1218. *See also* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 823 (1994) (unions help keep workers' perceptions about ill treatment in proper perspective).

formats. In fact, one study indicates that only when employees are unionized do they sensibly bargain for optimal levels of workplace safety."[223] Importantly, too, unions are accountable—directly accountable—to their constituency, the employees. Research on the accountability heuristic suggests that the more likely an individual is to be held accountable for his decisions, the more likely he will make efforts to improve the quality of his decision making.[224] In other words, the greater a decision maker's responsibility for a judgment, the more careful and complete will be his use of the relevant evidence.[225] Accountability also reduces the extent to which decision-makers are subject to some of the various other types of psychological biases described above.[226] In addition, accountability prompts a decision-maker to be more careful with his decision if he may suffer negative consequences because he failed to justify the decision by providing a satisfactory explanation for it.[227] Although accountability may have other effects on a decision-maker, cognitive psychologists agree that one effect of accountability is to increase the likelihood that a decision-maker will consider all relevant evidence and "modify initial impressions in response to contradictory evidence."[228]

The union, as a repeat player, is already in a better position than an individual employee when negotiating the nondiscrimination and arbitration clauses to be contained in a CBA. If the heuristics and biases discussed above impact individual decision-making, an even better case exists supporting the individual employee's delegation of the decision about how to negotiate these provisions to the union. The union, as an objective expert on the bargaining process, should be able to avoid some of the major cognitive errors that an individual employee might make. In addition, the union's accountability to its membership, both through the initial vote to approve the CBA and the negotiation of a written agreement, further reduces the risk that the union will fall into typical cognitive traps. While imperfect, delegation of decision-making to the

[223] Rachlinski, *supra* note 189, at 1218.

[224] David. M. Sanbonmatsu, Sharon A. Akimoto & Earlene Biggs, *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERSONALITY & SOC. PSYCHOL. 892, 896–97 (1993). *See also* Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632 (1989).

[225] Sanbonmatsu, Akimoto & Biggs, *supra* note 224, at 896.

[226] These other biases often lead a decision-maker to inferior decisions. The bias heuristics include attribution (the tendency to attribute one's beliefs and opinions to others), overconfidence (experts tend to be overconfident about decisions they make based on relevant evidence) and availability (the ability to recall similar events to assist in the current decision). Decision makers can be affected by other biases as well. Seidenfeld, *supra* note 221, at 1063–64.

[227] *Id.* at 1064.

[228] Tetlock, Skitka & Boettger, *supra* note 224, at 632.

union should improve the opportunities for all individual employees to reduce cognitive errors in negotiating rules to govern the workplace.

V. CONCLUSION

Many employee advocates and academic commentators strongly dislike the arbitration process. Unfortunately, arbitration critics make little effort to distinguish between employment and labor arbitration processes. In addition, many critics treat labor arbitration as if it were mired in the 1970s—little credit is given to unions despite their pragmatic evolution to championing the causes of the traditionally underrepresented workforce. The Supreme Court rejected the status quo perceptions of unions and labor arbitration when it ruled that unions and employers may negotiate for arbitration agreements that require statutory discrimination claims to proceed in the labor arbitration process. While the Supreme Court did not decide the question, it is likely that it would find, as one lower court already has, that if the union declined to pursue an individual's claim in arbitration, that the individual could proceed with that claim with her own representative. Once it is clear that no individual's claims will be rejected without hearing, the question is whether there remains any legitimate basis for refusing to allow statutory discrimination claims to be heard in labor arbitration. Concerns about arbitrator expertise seem misplaced. So, too, do allegations that the union might "sell out" individual employees when negotiating these clauses. Even if the union was not looking out for individual interests, labor arbitration is likely to be a more accessible and better forum than court for adjudicating these claims. It will be faster, cheaper, and likely to result in more frequent grievant wins with comparable awards. It will be worth examination of these arbitration cases, as they become more common, to determine whether there is cause for concern about lower awards or arbitrators misunderstanding the law. Perhaps a reinvigorated duty of fair representation or more effective judicial review might be appropriate if the evidence suggests it. But, until such time as that evidence exists, the experiment the Supreme Court authorized in *Pyett* appears to be one that is well worth taking. All I am saying is, give *Pyett* a chance.