

**Arbitrating Hate:
Why Binding Arbitration of Discrimination Claims
is Appropriate for Union Members**

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“By subjecting employment rights to a regime of private justice and cowboy arbitrations, we are eliminating most employment rights for most American workers.”²

-Katherine Van Wezel Stone

“It is a myth that access to justice must mean access to the courts.”³

-Alvin B. Rubin

When the Supreme Court issued its opinion in *Alexander v. Gardner-Denver Co.*,⁴ the Court appeared to announce a clear rule that all employees have a right to bring a statutory discrimination suit in federal court. This holding included union members who were employed under a collective bargaining agreement mandating binding arbitration.⁵ Sixteen years later, however, the Court issued a different opinion in *Gilmer v. Interstate/Johnson Lane Corp.*,⁶ requiring a non-union employee to arbitrate an Age Discrimination in Employment Act (“ADEA”) claim as a result of his having signed an arbitration

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22. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1050 (1996) [hereinafter Stone, *Yellow Dog*].

33. Alvin B. Rubin, *Arbitration: Towards a Rebirth*, in TRUTH, LIE DETECTORS, AND OTHER PROBLEMS IN LABOR ARBITRATION 35, PROCEEDINGS OF THE 31ST ANNUAL MEETING, NAT’L ACAD. OF ARBITRATORS (James L. Stern & Barbara D. Dennis eds. 1982).

44. 415 U.S. 36 (1974).

55. *Alexander*, 415 U.S. at 49-50.

66. 500 U.S. 20 (1991).

agreement when registering as a securities representative.⁷ While the Court in *Gilmer* was careful to avoid explicitly overruling *Gardner-Denver*,⁸ much of the reasoning found in *Gilmer* is at odds with the *Gardner-Denver* decision. This lack of uniformity has forced the lower courts to speculate whether *Gilmer* reversed *Gardner-Denver* by implication, or merely limited its application to union employees.

This article will argue that the Supreme Court should explicitly overrule *Gardner-Denver* and recognize the ability of binding arbitration to provide all employees an effective forum to vindicate their statutory rights. Part I will provide an overview of relevant Supreme Court precedent. Part II will address the confusion inherent in lower court opinions contending with the uncertainty of the holdings in *Gardner-Denver* and *Gilmer*. Part III will examine whether Congress intended to allow mandatory arbitration of Title VII claims when it amended the Civil Rights Act in 1991. Part IV will describe both why arbitration is an effective forum for employees to vindicate their statutory rights, and why the arguments against arbitration are based on a false and idealized view of the judicial system. Finally, Part V will describe both the structural and procedural considerations used in designing an arbitral forum that can be considered “appropriate” in accordance with Congress’ use of that term in amending the Civil Rights Act of 1964.

I. Overview

A. Alexander v. Gardner-Denver Co.

After being discharged by his employer, Alexander, an African-American union member, filed a grievance under the collective-bargaining agreement (“CBA”) against his

77. *Gilmer*, 500 U.S. at 27.

88. *Gilmer*, 500 U.S. at 35.

employer claiming that he was not fired for just cause. His grievance then proceeded to an arbitration hearing, where Alexander alleged that he was terminated because of his race. Without addressing Alexander's racial discrimination claim, the arbitrator determined that he had been discharged for just cause.⁹

Alexander had also filed a Title VII claim of racial discrimination with the Equal Employment Opportunity Commission ("EEOC"). After finding no reasonable evidence that a Title VII violation had occurred, the EEOC issued Alexander a "right to sue" letter and he continued to pursue his Title VII claim in district court. However, the district court held that Alexander was bound by the arbitral decision and, therefore, could not pursue a Title VII claim in district court. The Tenth Circuit affirmed the decision of the district court, whereby Alexander appealed to the Supreme Court.¹⁰

The Supreme Court unanimously reversed, emphasizing the independent nature of contractual rights and statutory rights. The Court explained that in the arbitral proceeding, Alexander sought to vindicate his contractual right to nondiscrimination under the CBA, but in filing a Title VII suit, Alexander asserted "independent statutory rights accorded by Congress."¹¹ The Court also emphasized that the pursuit of grievance procedures and arbitration cannot extinguish an employee's statutory claim: "In no event can the submission to arbitration of a claim under the nondiscrimination clause of a

99. *Alexander*, 415 U.S. at 42-43.

1010. *Id.* at 43.

1111. *Id.* at 49-50.

collective-bargaining agreement constitute a binding waiver with respect to an employee's right under Title VII."¹²

Throughout its opinion, the Court expressed reservations regarding the thoroughness of arbitral proceedings and the competence of arbitrators in deciding legal matters. The Court noted that an arbitrator's authority is limited to deciding contractual issues, and that this limited authority remains even when a contract incorporates a statute or parallels statutory language.¹³ The Court also recognized the possibility that arbitration might be inferior to the courts because "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."¹⁴ Finally, the Court expressed reservations as to the thoroughness of arbitral procedures in stating that: "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."¹⁵

Despite rejecting mandatory arbitration as an exclusive mechanism for resolving discrimination claims, the Court also recognized that an employee might want to pursue both arbitration and the judicial process. The Court noted that where an employee initially prevails in arbitration and later brings a Title VII claim to court, courts would

1212. *Id.* at 52, n. 15.

1313. *Alexander*, 415 U.S. at 53-55.

1414. *Id.* at 57 (citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-83 (1960)).

1515. *Alexander*, 415 U.S. at 57-58. *See also* *Bernhardt Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 427, 435-37 (1953).

then structure relief to avoid awarding a windfall.¹⁶ However, the Court also stated, without any further explanation, that a district court may accord a previous arbitral decision “great weight” where the arbitrator fully considers the employee’s Title VII claims.¹⁷

B. Gilmer v. Interstate/Johnson Lane Corp.

In contrast to the Court’s decision in *Gardner-Denver* which was opposed to binding arbitration of statutory discrimination claims, the Court in *Gilmer* required that a non-union employee arbitrate an ADEA claim in circumstances where the employee had signed a securities registration application containing a mandatory arbitration clause.¹⁸ The Court in *Gilmer* showed little reluctance in requiring mandatory arbitration of statutory discrimination claims. In contrast to the broad language found in *Gardner-Denver*, the Court held that it was “now clear” that a contractual agreement could in fact mandate arbitration of statutory discrimination claims.

The Court dismissed the procedural concerns that it had laid out in *Gardner-Denver*, by noting that the limited discovery allowed in most arbitration proceedings had not been found to be inadequate for the arbitration of other complex statutory claims, such as RICO and antitrust claims, and therefore was presumably adequate for discrimination claims. After acknowledging that arbitral procedures were often not as extensive as those available in judicial proceedings, the Court noted that the party had

1616. *Alexander*, 415 U.S. at 51 n.14.

1717. *Id.* at 60 n.21.

1818. *Gilmer*, 500 U.S. at 23-24.

19. *Id.* at 26.

20. *Id.* at 31.

exchanged those procedures for the “simplicity, informality, and expedition of arbitration.” The Court also dismissed Gilmer’s concerns about the frequent lack of a written opinion in arbitration, by stating that in his case, the arbitrator was required to issue a written opinion. In requiring that Gilmer arbitrate his claims, the Court explicitly dismissed many of the concerns that it had expressed in *Gardner-Denver*, and now appeared to be in favor of the efficiency of the arbitral process by stating: “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

Despite undercutting much of the rationale in the *Gardner-Denver* decision, the Court in *Gilmer* did not explicitly overrule *Gardner-Denver*. The Court did, however, take great efforts to distinguish *Gilmer* from *Gardner-Denver*. First, the Court noted that *Gilmer* involved the explicit arbitration of an ADEA claim, while *Gardner-Denver* involved the arbitration of a contract claim which did not specifically reflect a statutory claim. Second, the Court noted that Gilmer himself had agreed to arbitrate his statutory claims, while Alexander’s agreement was entered into by his union. Finally, unlike *Gilmer*, *Gardner-Denver* was not decided under the Federal Arbitration Act which favors arbitration.

21. *Id.*

22. *Id.* at 28.

23. *Gilmer*, 500 U.S. at 35.

24. *Id.*

25. *Id.*

While the Court carefully described the differences between *Gardner-Denver* and *Gilmer*, it did not explain the ramifications of how these differences might be applied to future cases. More importantly, the Court did not explain whether the presence of any of these factors is necessary to require mandatory arbitration of statutory discrimination claims. This has left lower courts with the difficult task of determining whether *Gardner-Denver* remains good law, and whether subsequent cases should be decided according to the *Gardner-Denver* decision or the *Gilmer* decision.

C. Wright v. Universal Maritime Service Corp.

In *Wright v. Universal Maritime Service Corp.*, the Supreme Court was given the opportunity to determine if a CBA could mandate arbitration as the exclusive forum for the resolution of an employee's statutory discrimination claims. Instead of addressing that question, however, the Court instead focused on the ambiguity of the waiver.

Wright, a longshoreman, alleged discrimination based on the Americans with Disabilities Act ("ADA"). As a union member, Wright was covered by a CBA that contained a general arbitration clause. At the suggestion of his union, Wright filed a suit which was eventually dismissed by the district court. The Fourth Circuit later affirmed this decision on the grounds that Wright had to pursue his claims through the grievance procedures contained in his CBA.

In deciding *Wright*, the Supreme Court acknowledged the obvious tension that can be found in the prior caselaw. The Court pointed out that: "Whereas *Gardner-Denver* stated that 'an employee's rights under Title VII are not susceptible of prospective

26. 525 U.S. 70 (1998).

27. *Wright*, 525 U.S. at 73.

waiver,' *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived." However, the Court found it unnecessary to resolve the question of the validity of a union-negotiated waiver because the arbitration provision in *Wright* was not "clear and unmistakable" as to waive his statutory rights. The Court itself recognized that its opinion dodged the larger issue concerning the scope of *Gilmer*: "[W]hether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."

The *Wright* opinion highlighted the Court's unease with this area of the law. While the Court could have reaffirmed the *Gardner-Denver* decision by explicitly rejecting any prospective waiver of *Wright's* statutory rights, the Court instead rejected arbitration on unrelated grounds. In reaching this conclusion, the Court avoided having to address the controversy found in the caselaw leading to its decision in *Wright*.

II. State of Confusion

The Supreme Court's decision in *Wright* has left the lower courts in a state of confusion as to the possible impact of *Gilmer* on waiver clauses found in CBAs. Some courts have taken the view that an arbitration clause can bar litigation of statutory discrimination rights, while others have rejected a union's ability to waive an employee's

28. *Id.* at 76-77.

29. *Id.* at 77, 80.

30. *Id.* at 80.

right to a judicial forum. The Supreme Court's failure to resolve this issue has also caused a split amongst the circuit courts.

A number of circuit courts and district courts have held that a union member cannot be required to forego litigation of statutory discrimination claims. Some courts have held where an employee first arbitrates his claim and is unsuccessful, that employee can then pursue his claim for a second time in federal court. Other courts have gone one step further, in holding that an employee who succeeds on his discrimination claim in arbitration may still go to federal court.

In *Pryner v. Tractor Supply Co.*, in an opinion by Judge Richard Posner, the Seventh Circuit rejected a CBA waiver of access to federal courts for statutory discrimination claims. Judge Posner noted that statutory discrimination rights are given to individuals, and that arbitration of such claims can only be mandatory where the

31. The Second, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia Circuits have explicitly held that a union employee can litigate a statutory discrimination claim even if the employee's CBA mandates arbitration as the exclusive forum. *See* *Pyett v. Pennsylvania Bldg Co.*, 498 F.3d 88 (2d Cir. 2007); *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209 (8th Cir. 1996); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443-53 (10th Cir. 1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999). The Fourth Circuit has explicitly held that a union employee is limited to an arbitral forum where the CBA exclusively provides for arbitration of statutory discrimination claims. *See* *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (1996).

32. *See* *Lynch v. Pathmark Supermarkets*, 987 F. Supp. 236 (S.D.N.Y. 1997), *aff'd*, 152 F.3d 919 (2d Cir. 1998); *Humphrey v. Council of Jewish Fed'ns*, 901 F. Supp. 703 (S.D.N.Y. 1995).

33. *See* *Udo v. Tomes*, 54 F.3d 9 (1st Cir. 1995); *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991).

34. 109 F.3d 354 (7th Cir. 1997).

35. *Pryner*, 109 F.3d at 362.

individual employee consents to arbitration after the dispute arises. The Seventh Circuit rejected the union's authority to consent for employees through a CBA.

The Seventh Circuit acknowledged, but quickly dismissed, the argument that the 1991 amendments to Title VII allowed for mandatory arbitration of Title VII claims. The employer argued that Congress had agreed to allow mandatory arbitration through CBAs when it amended Title VII to say: "Where appropriate and to the extent authorized by law . . . arbitration . . . is encouraged to resolve disputes arising under" Title VII. The court rejected this argument, finding that mandatory arbitration was "not appropriate" where the union had consented under a CBA.

In contrast, the Fourth Circuit and several district courts have held that a union member can be barred from litigating a statutory discrimination claim where the CBA mandates arbitration. In *Austin v. Owens-Brockway Glass Container, Inc.*, the Fourth Circuit determined that a union member's Title VII and ADA claims could only be brought through the grievance procedures contained in her CBA. The court relied heavily on *Gilmer*, which it viewed as mandating the enforcement of agreements explicitly subjecting statutory claims to arbitration. In holding that the waiver was

36. *Id.* at 363.

37. *Id.*

38. *Id.*

39. *Id.* (citing 42 U.S.C. § 12212).

40. *Pryner*, 109 F.3d at 363.

41. *See, e.g.*, *Bright v. Norshipco and Norfolk Shipbuilding & Drydock Corp.*, 951 F.Supp. 95 (E.D. Va. 1997); *Moore v. Duke Power Co.*, 971 F. Supp. 978 (W.D.N.C. 1997).

42. 78 F.3d 875 (4th Cir. 1996).

43. *Owens-Brockway Glass*, 78 F.3d at 875.

enforceable as long as it was voluntary, the Fourth Circuit gave no weight to the fact that Austin's union negotiated her waiver. Thus, the court's holding suggests that it believed the distinction found between *Gardner-Denver* and *Gilmer* was of no consequence here.

The Fourth Circuit also concluded that the 1991 amendment to Title VII that encouraged arbitration "where appropriate," was meant to be a clear Congressional endorsement of the arbitral process in statutory discrimination cases. In reaching this conclusion, the Fourth Circuit adopted a point of view that was sharply different than the Seventh Circuit's holding in *Pryner v. Tractor Supply Co.*

In *Cole v. Burns International Security Service*, Chief Judge Harry Edwards of the D.C. Circuit similarly held that *Gilmer* required arbitration of a Title VII claim where a non-union employee signed an employment agreement mandating arbitration. In *Cole*, the D.C. Circuit held that *Gilmer* mandated enforcement of arbitration provisions where:

the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable

44. *Id.* at 885. The Fourth Circuit has subsequently narrowed the circumstances where it will find a waiver of an employee's right to a federal forum for statutory discrimination claims. In *Brown v. Trans World Airlines*, 127 F.3d 337, 342 (4th Cir. 1997), the Fourth Circuit held that a CBA clause prohibiting discrimination did not submit statutory claims to binding arbitration because the CBA "neither incorporated the statutory duties into its substantive provisions by reference nor made the statutory claim into one involving application of the contract." After the Supreme Court's *Wright* decision, the Fourth Circuit rejected mandatory arbitration under a CBA because it did not find the arbitration clause to be a "clear and unmistakable" waiver of an employee's right to a federal forum for statutory discrimination claims. *Brown v. ABF Freight Systems, Inc.*, 183 F.3d 319, 321 (4th Cir. 1999). The Fourth Circuit explained: "While the language of this contractual agreement not to discriminate on certain specified bases in certain specified ways may parallel, or even parrot, the language of federal antidiscrimination statutes and prohibit some of the same conduct, none of those statutes is thereby explicitly incorporated into the agreement, by reference or otherwise." *Id.* at 322 (internal citations omitted).

45. *Owens-Brockway Glass*, 78 F.3d at 881.

46. 109 F.3d 354, 363 (7th Cir. 1997).

47. 105 F.3d 1465 (D.C. Cir. 1997).

costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum.

Although the *Cole* opinion did not address a CBA waiver, the D.C. Circuit's focus on the effectiveness of arbitral procedures reinforced the argument of allowing for mandatory arbitration of union employees' statutory discrimination claims.

III. Congressional Intent

When the issue concerning union waivers of federal forums for statutory discrimination rights comes before the Supreme Court again, the Court should address whether Congress intended to amend Title VII to allow for mandatory arbitration. The circuit courts have reached inconsistent conclusions regarding the purpose of the amended provisions. The Supreme Court should therefore explain whether the "where appropriate" language in the 1991 amendment to Title VII allows for unions to waive a judicial forum in statutory discrimination claims.

While the evidence of Congressional purpose is inconsistent, there are several reasons to believe that Congress intended to allow for waivers of a federal forum in CBAs when it amended the Civil Rights Act. The amended language itself clearly indicates that Congress believed that arbitration should be allowed "where appropriate and to the extent authorized by law." Because Congress added this provision shortly after the Supreme Court's decision in *Gilmer*, one could reasonably conclude that Congress may have viewed *Gilmer's* more expansive view of arbitration as "appropriate" and

48. *Cole*, 105 F.3d at 1482.

49. *Compare Pryner*, 109 F.3d at 363, *and Owens-Brockway Glass*, 78 F.3d at 881.

50. 42 U.S.C. § 12212.

51. *Id.*

“authorized by law.” In addition, during the Senate debate on this issue, Senator Robert Dole (R-KA) indicated that the provision was intended to encourage the use of binding arbitration. Dole argued: “In light of the litigation crisis facing this country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of [binding arbitration of Title VII claims].”

However, other evidence shows that some members of Congress did not believe that the amended language allowed for binding arbitration of statutory discrimination claims. For instance, a House Committee reported that it believed this provision allowed arbitration to “supplement, not supplant” a Title VII suit. Some members of Congress may even have thought that this amended language, “to the extent authorized by law,” may have actually endorsed the *Gardner-Denver* framework instead.

An alternative view is that Congress may have intentionally included the ambiguous “where appropriate” language to ensure majority support for the bill. If neither the supporters nor opponents of binding arbitration could receive a majority vote on language explicitly favoring their positions, each side may have agreed to insert this ambiguous language into the statute in the hope that the courts would use their discretion to side with their respective positions.

While this legislative history is inconclusive, the Court is not constrained by this history when deciding the meaning of this amended language. As Justice Antonin Scalia,

52. 137 Cong. Rec. S15472-01, S15478 (Oct. 30, 1991) (statement of Sen. Dole).

53. M. Lane Lowrey, *Arbitration or Adjudication?: The Trials and Tribulations of the Federal Circuit Split Over Mandatory Arbitration of Employment Discrimination Claims*, 40 S. TEX. L. REV. 993, 1014 (1999).

the Court’s leading opponent of legislative history, noted in *Thompson v. Thompson*, “Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.” Given the ambiguous legislative history, the Supreme Court should resolve the issue by focusing on the text of the law that allows for the use of arbitration “where appropriate.”

In considering whether arbitration is appropriate, the Court should recognize the “liberal federal policy favoring arbitration agreements.” Furthermore, under the Federal Arbitration Act (FAA), “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Finally, the Court has recognized “a presumption of arbitrability” in CBAs. Given the long-established policy favoring arbitration and these presumptions, the Supreme Court should recognize that binding arbitration of statutory discrimination claims is “appropriate” where the arbitration procedure is both fair and allows for an employee to effectively vindicate his statutory rights.

IV. Effectiveness of Arbitration in Vindicating Statutory Rights

54. 484 U.S. 174 (1988).

55. *Thompson*, 484 U.S. at 191-92 (Scalia, J., concurring).

56. *Hosp Moses H. Cone Mem’l. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

57. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25.

58. *AT&T Tech., Inc. v. Commc’ns Workers*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

59. *See Gilmer*, 500 U.S. at 28 (“[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

Any attempt in deciding whether binding arbitration found in a CBA is “appropriate” should include an examination of whether a union employee can effectively vindicate his statutory rights through arbitration. Whether arbitration allows for this effective vindication should be determined by comparing the likelihood of successfully resolving a meritorious claim in arbitration with the likelihood of success in federal court. There are two opposing camps on this issue. One side contains arbitration opponents like Professor Katherine Van Wezel Stone, who believe that arbitration often is the equivalent to an outright waiver of statutory rights and that mandatory arbitration of individual statutory rights is nothing more than a new “yellow-dog” contract. The other side contains arbitration proponents like Professor Samuel Estreicher, who believe that arbitration is generally a better forum than a court for an aggrieved worker to effectively vindicate his statutory rights.

While this debate is far from being resolved, recent history suggests that the arbitration proponents are correct. Opponents of binding arbitration often wrongly presume an idealized judicial system that allows victims of discrimination to vindicate their statutory rights. In reality, the current judicial system fails most victims of discrimination because of its excessive waiting periods, massive procedural hurdles and the lack of lawyers willing to pursue discrimination claims. In contrast, arbitration offers employees a simple, informal and expedient forum that guarantees a decision on the

60. Professor Stone defines “yellow dog contracts” as contracts in which employees had to promise not to join a union in order to get a job. Stone, *supra* note 2, at 1037.

61. *Gilmer*, 500 U.S. at 31.

merits. Arbitration is “appropriate” because it is generally more effective than the courts in allowing aggrieved employees a forum to vindicate their Title VII rights.

Employees pursuing Title VII claims through the judicial system must first exhaust their claims through an administrative process before being allowed to pursue their claim in court. After exhausting their administrative remedies, employees must typically wait years before their claim is considered on the merits in federal court. As Judge Harry Edwards noted in *Cole*: “[e]mployees bringing public law claims must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint.” One study concluded that an average employment discrimination claim takes nearly two years to resolve in the court system, but less than nine months in arbitration. Low wage workers, the individuals most likely to suffer from employment discrimination, are generally unable to afford the time and money needed to pursue their claims through the judicial

62. Much of the difficulty employees face in securing relief in the courts can be attributed to the difficulty in obtaining counsel. In contrast to the National Labor Relations Act, which provides representation to union employees for unfair labor practice claims, Title VII does not provide any representation. Thus, employees are left to attempt to seek counsel to enforce their rights or to pursue their claims pro se.

63. *Brown v. General Service Administration*, 425 U.S. 820, 827 (1976).

64. *Cole*, 105 F.3d at 1488.

65. Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). The American Bar Association estimated that the average time needed for an arbitrator to process a grievance and reach an award is 250 days. American Bar Association, *A New Look at Methods, Procedures and Systems Designed to Expedite the Labor Arbitration Process*, in SECTION OF LABOR AND EMPLOYMENT LAW, 1981 COMMITTEE REPORTS, Vol. II 198 (1981).

process, are more likely to make procedural errors that get their claim dismissed, and are less likely to receive substantial relief in a jury trial.

The lengthy delay in litigation also makes it less likely that an aggrieved ex-employee would be able to return to his position if his discrimination claim is resolved favorably. As noted by Professor Estreicher: “[a]rbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement.”

In addition, few lawyers are willing to represent employees with statutory discrimination claims. Paul Tobias, founder of the National Employment Lawyers’ Association, a professional organization of lawyers representing employees, estimates that 95% of employees who seek a private lawyer to pursue an employment discrimination claim are unable to obtain counsel. As Lewis Maltby, former Director of the National Task Force on Civil Liberties for the ACLU noted: “[m]ost people with claims against their employer are unable to obtain counsel, and thus never receive justice.” In one ADA suit, the judge noted: “[w]e have simply priced the court system

66. *Cole* 105 F.3d at 1488. See Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, in PROCEEDINGS OF THE 35TH ANNUAL MEETING OF THE NAT’L ACAD. OF ARBITRATORS 16, 24 (James L. Stern & Barbara D. Dennis eds., 1983)[hereinafter *Edwards, Reflections*]. Judge Harry Edwards suggests that many cases are: “[w]on or lost on ‘procedural’ points that have nothing whatsoever to do with the merits of the case.”

67. *Cole*, 105 F.3d at 1488 (concluding that “the litigation model of dispute resolution seems to be dominated by ‘ex-employee’ complainants, indicating that the litigation system is less useful to employees who need redress for legitimate complaints, but also wish to remain in their current jobs”).

68. Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001).

69. Alternative Dispute Resolution, 1994: Testimony Before the Commission on the Future of Worker-Management Relation (Statement of Paul Tobias, founder of NELA) (1994).

70. Maltby, *supra* note 65, at 58.

beyond the reach of most citizens, because the cost of litigation far exceeds the value of the decision itself.”

In contrast to the daunting scenario facing employees who try to navigate Title VII claims through the administrative process and court system, arbitration guarantees that an employee will receive a hearing on the merits. Arbitration offers a distinct advantage over litigation “where relatively few employees survive the procedural hurdles necessary to take a case to trial.”

Harry Edwards, a former arbitrator and current judge with experience in employment cases in both forums, has given perhaps the best endorsement of arbitration as a more “appropriate” forum for resolution of individual employment claims. Edwards noted: “If I were employed in a job from which I could be fired, and if I did get fired and had a right to challenge my discharge in a forum of my choice, I would rather be in arbitration than in court.” Edwards then explained that he would make this choice because arbitration is quicker, less costly and lacks the procedural barriers of the courts, which often prevent a claimant from ever raising his issue on the merits in court.

Opponents of binding arbitration often make the shallow argument that they do not oppose arbitration per se, but rather prefer that an employee have the option of both

71. Bright v. Norshipco and Norfolk Shipbuilding & Drydock Corp., 951 F.Supp. 95, 98 (E.D. Va. 1997).

72. Cole, 105 F.3d at 1488.

73. Harry T. Edwards, *Where are we Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U.L. REV. 293, 308 (1999) [hereinafter Edwards, *Where are we Heading*].

74. Edwards, *Reflections*, *supra* note 66, at 18.

75. Edwards, *Reflections*, *supra* note 66, at 23.

76. *Id.* at 24.

arbitrating *and* litigating his statutory discrimination claims. This proposal ignores the reality that employers have an incentive to reject arbitration clauses that encompass statutory rights, if the aggrieved employee can pursue both arbitration and litigation. As noted by Judge Posner in *Pryner*: “[u]nless the arbitral remedy is exclusive, the company's incentive to agree to negotiate an arbitration clause broad enough to encompass statutory violations will be reduced, as the only effect of such a clause will be to multiply the employee's remedies.”

Opponents of binding arbitration suggest that employees should have the option of choosing to enter into binding arbitration after their claim arises. However, this ignores the incentives that come into play after a dispute arises. Once an employee raises a discrimination claim, an employer can examine the claim to see if the employee both will be able to overcome Title VII’s procedural hurdles, and to determine if the employee will likely have enough damages to obtain legal counsel. In the vast majority of situations, where the employee cannot meet a procedural hurdle or cannot obtain counsel, the employer is likely to reject arbitration. In the relatively rare case where an employee can obtain counsel and overcome procedural hurdles, the employee is unlikely to agree to arbitration. Thus, the situation where elective post-dispute binding arbitration is agreed to by both employees and employers is likely to be rare.

Opponents of binding arbitration of statutory rights generally make unsubstantiated attacks against arbitration or provide anecdotal evidence without

77. *Pryner*, 109 F.3d at 361. *See also* *Rios v. Reynolds Metals Co.*, 467 F.2d 54, 57 (5th Cir. 1972) (“An employer would have little incentive to agree to arbitrate under a system where only the employee, in the event of an adverse arbitral determination, would have an opportunity to relitigate the matter in court.”).

recognizing that arbitration offers most employees the most effective forum to vindicate their statutory rights. For example, Professor Stone equates binding arbitration with an employer getting a claim summarily dismissed and suggests that arbitration amounts to “eliminating most employment rights for most American workers.” Other opponents have referred to arbitration as an “oppressive scheme.” Such unsubstantiated attacks fail to recognize that for most employees, procedural hurdles and lack of legal representation make victory through the courts a mere illusion.

Other opponents of binding arbitration oppose it on the ground that it can be both secretive and that employers can create lopsided arbitration agreements. While these concerns are understandable, the arbitral process endorsed in *Gilmer* required published awards and fair procedures. Where an arbitrator gives an unwritten award or enforces procedures that are disadvantageous to employees, the court should rightly reject such procedures because they do not allow an employee to effectively vindicate his statutory rights. The mere possibility of some conceivably unfair arbitral procedures should not be considered an adequate reason to reject all binding arbitration procedures.

Finally, some studies have suggested that an employee is better off in litigation because awards are generally higher in litigation than in arbitration. This reasoning fails to recognize that most employees never have the merits of their claims decided in

78. Stone, *supra* note 2, at 1018.

79. *Id.* at 1042.

80. Lowrey, *supra* note 53, at 2021.

81. Stone, *supra* note 2, at 1042.

82. Edwards, *Where are we Heading*, *supra* note 73, at 297-98.

83. *Gilmer*, 500 U.S. at 31-32.

litigation. In contrast, arbitration does not create procedural barriers to deny decisions on the merits. As a result, employees are more likely to bring financially smaller claims which would not receive adequate legal representation or which would be procedurally barred. Arbitration is also more likely to result in lower awards, because the timely resolution of claims through arbitration results in less back pay than the court system.

V. “Appropriate” Binding Arbitration of Title VII Claims

Arbitrators already consider statutory discrimination issues. As Judge Harry Edwards noted: “Title VII [is] so interwoven in the fabric of collective bargaining agreements that it is simply impracticable in many cases for arbitrators to deal with contractual provisions without taking into account statutory provisions.” Arbitrators often address statutory discrimination claims even where the CBA makes no mention of statutory rights. For example, one advocate acknowledged that she regularly adopts the strategy of framing discrimination cases as “just cause” cases in order to get the arbitrator to decide cases that would otherwise fall under Title VII. Creative advocates are already incorporating discrimination issues into many disputes and arbitrators are already addressing these issues, though in many instances they are not explicitly framing the dispute as arising under statutes. Because these statutory issues are already being

84. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer’s Quinceanera*, 81 TUL. L. REV. 331, 350-51 (2006).

85. Edwards, *supra* note 66, at 22 (quoting Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, in ARBITRATION—1977 35-36, PROCEEDINGS OF THE 30TH ANNUAL MEETING, NAT’L ACAD. OF ARBITRATORS (Barbara D. Dennis & Gerald G. Somers eds. 1978)).

86. Marilyn Teitelbaum, *The State of External Law’s Effect on the Arbitration Process*, Panel Discussion, National Academy of Arbitrators 216 (2004).

addressed, the legal system should allow binding arbitration that can effectively allow an employee to pursue his statutory rights.

Arbitration of statutory discrimination claims should only be binding where the union agrees to such resolution, either by specifically referencing the statute in the CBA, including language in the CBA that tracks statutory language or by a special submission to the arbitrator. As discussed earlier, the Supreme Court held in *Wright* that a union's waiver of a federal forum for statutory rights must be "clear and unmistakable." Because binding arbitration generally requires a less extensive discovery process and forfeiture of the right to a jury trial, courts should not presume that a general arbitration provision is intended as a waiver of federal forums for statutory discrimination claims.

In *Gilmer*, the Court recognized that the arbitration agreement at issue was part of a "take-it-or-leave-it" contract and the employee had little, if any, ability to negotiate its terms. Nonetheless, the Court concluded that this "inequality in bargaining power" was not sufficient to hold such an agreement unenforceable. While individual employees

87. See ABA TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship (1995), <http://www.bna.com/bnabooks/ababna/special/protocol.pdf>; *Cole v. Burns International Security Service*, 105 F.3d 1465, 1475; *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996). James Oldham, *Arbitration and Relentless Legalization in the Workplace*, in ARBITRATION 1990: NEW PERSPECTIVES ON OLD ISSUES 23 (Gladys W. Gruenberg ed., 1991) (Professor Oldham refers to this process as "particular incorporation" and says it "can be done by expressly mentioning the statute or law or by repeating in the contract, verbatim or nearly so, the statute's operative language").

88. 525 U.S. 70, 77-80 (1998).

89. *Gilmer*, 500 U.S. at 31.

90. *Pryner*, 109 F.3d at 363.

91. *Wright*, 525 U.S. at 80.

92. *Gilmer*, 500 U.S. at 33.

93. *Id.*

have little power to oppose such an agreement, unions have bargaining power to negotiate the inclusion and content of an arbitration clause in a CBA. Thus, union employees are in a better position to have an arbitration clause that truly represents their interests because the union has the ability to negotiate inclusion and scope of arbitration clauses.

While it is possible for an arbitral system that explicitly authorizes arbitrators to apply external statutory discrimination law to expand upon the traditional arbitral role, such a shift is already well underway and most arbitrators have become comfortable applying external law. Furthermore, as the Supreme Court noted in *Gilmer*, arbitrators have decided cases incorporating complex statutory claims, such as the Sherman Act, the Securities' Acts, and RICO. Given the comparatively less elaborate framework of Title VII, it should similarly be considered "appropriate" for arbitration.

One unresolved issue is whether the Supreme Court intended to endorse the New York Stock Exchange's ("NYSE") arbitration requirements in *Gilmer* as a set of minimal standards that must be present in any arbitral system for it to be "appropriate." Several courts and scholars have interpreted *Gilmer* as mandating that any arbitration system used for statutory discrimination claims must serve as little more than an alternative forum and, therefore, must largely mimic the procedural protections and judicial review that

94. See generally Oldham, *supra* note 87; Harry T. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE NAT'L ACAD. OF ARBITRATORS 59, 79 (1975).

95. Theodore J. St. Antoine, *External law in Arbitration: Hard Boiled, Soft-Boiled, and Sunny-Side Up*, in ARBITRATION 2004: NEW ISSUES AND INNOVATIONS IN WORKPLACE DISPUTE RESOLUTION 185, 189 (Charles J. Coleman ed., 2004) (stating that a majority of respondents that he surveyed "are prepared to cite external law in their decisions").

96. *Gilmer*, 500 U.S. at 31.

would be present if an employee had brought his Title VII claim before a federal court. For example, the D.C. Circuit in *Cole* interpreted *Gilmer* as mandating that binding arbitration must, at a minimum, provide: 1) neutral arbitrators, 2) more than minimal discovery, 3) a written award, 4) all of the relief that would be available in court, and 5) must not require an employee to pay unreasonable costs as a prerequisite to access to arbitration. The Department of Labor Commission on the Future of Worker-Management Relations (“Dunlop Commission”) also examined the issue and suggested that in addition to the *Gilmer* “mandates” identified by the D.C. Circuit, binding arbitration of statutory discrimination rights must: “6) allow the employee the option of obtaining independent representation and 7) be accompanied by ‘sufficient judicial review.’” While the Supreme Court did not explicitly state that the procedures present in *Gilmer*’s arbitral system are a floor that any arbitration system must meet, the Court also did not state that these standards were optional. The following discussion will address each of the purported “mandates” and discuss potential conflicts that might arise with other precedents.

1. Neutral Arbitrators

97. See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 670 (6th Cir. 2003); *Cole*, 105 F.3d at 1484; *Bales*, *supra* note 84, at 386-87.

98. *Cole*, 105 F.3d at 1482; see also *Edwards, Where are we Heading*, *supra* note 73, at 301 (describing *Gilmer*’s holding as mandating minimal requirements for arbitration agreements of statutory claims).

99. Commission on the Future of Worker-Management Relations, Report and Recommendations 30-31 (1994).

The premise that *Gilmer* mandates neutral arbitrators is consistent with prior precedent and is therefore unlikely to meet much resistance. The FAA allows courts to overturn arbitral awards “where there was evident partiality.”

Under most arbitration agreements, the neutrality of arbitrators is unlikely to be disputed. In fact, arbitration offers a distinct advantage over litigation because parties participate in the selection of their arbitrator and rarely believe that the success of their claim hinges on the “luck of the draw” mentality that is present in the judicial forum. Parties can even appoint Title VII experts to ensure a rigorous hearing.

In the majority of cases, however, parties to Title VII arbitration proceedings need not seek out Title VII specialists. Rather, the appointment of arbitrators with a “working knowledge of the basic protections and proscriptions of [Title VII] as well as the case law underlying [Title VII]” will generally be appropriate because “[m]ost discrimination claims are entirely factual in nature and involve well-settled legal principles.” The ability of arbitrators to handle most statutory discrimination claims was made clear in a study of arbitral awards by Michele Hoyman and Lamont Stallworth. The study found that:

100. 9 U.S.C. § 10(b); *see also* *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999) (holding an arbitration agreement unenforceable where the agreement included language “crafted to ensure a biased decisionmaker.”)

101. Edwards, *Reflections*, *supra* note 66, at 25. Judge Edwards previously suggested that special training might be appropriate for ADR neutrals to ensure expertise. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 683 (1986).

102. 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, 153 (2000).

103. *See* Cole, 105 F.3d at 1488; *see also* Edwards, *Where are we Heading*, *supra* note 73, at 303; Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 104 (1996) (“most employment disputes are fact-based and not likely to raise the kind of legal issues that would call for significant judicial review.”).

104. Michele Hoyman & Lamont E. Stallworth, *Arbitrating Discrimination Grievances in the Wake of Gardner-Denver*, 39 ARB. J. 49 (1984).

“[e]ven in cases where de novo review was available under *Gardner-Denver*, only 1.2% of all discrimination cases were reversed by the courts.”

2. *Adequate Discovery*

The Supreme Court should resist the establishment of uniform mandatory minimum discovery procedures because this would interfere with the informality of the arbitral process and, therefore, might require duplication of the informal “discovery” that the parties would have already performed in the grievance process. Under most CBAs, an aggrieved employee files his grievance with a first-line supervisor, who then investigates his claim and tries to reach a settlement with the employer. If no settlement can be reached, the grievance is pursued through the management hierarchy with the employee represented by union officials at each step. If the union cannot resolve the employee’s claim through the grievance process, the claim can then be taken through arbitration. If the Supreme Court mandated specific discovery procedures for arbitration, such procedures would likely duplicate much of the work that the union had already performed during the grievance process.

The Court’s *Gilmer* opinion suggests that it did not intend to mandate specific discovery procedures. In *Gilmer*, the NYSE discovery provisions allow for document production, information requests, depositions, and subpoenas. However, the Court accepted these procedures because *Gilmer* failed to show that they were “insufficient [to allow him] a fair opportunity to present [his] claims.” Thus, the test in *Gilmer*, as applied

105. *Id.* at 55.

106. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 213-214 (6th ed. 2003).

107. *Gilmer*, 500 U.S. at 31.

to the union context, would presume the sufficiency of arbitral discovery procedures unless the union or employee could demonstrate otherwise.

The Court should continue the *Gilmer* presumption of sufficiency because this allows the arbitral process to serve as an informal and efficient forum. If the Court were to create exact standards for discovery, this could create ancillary jurisdiction in circumstances where the arbitral process deviated even slightly from those standards. The *Gilmer* opinion also suggests that the presumption would not place an unfair burden on the grievant because it can be rebutted. Thus, in circumstances where the grievant truly cannot access the information needed to present his case, courts could either mandate formal discovery or hold the arbitration clause to be unenforceable.

In *National Labor Relations Board v. Truitt Manufacturing Co.*, the Supreme Court considered an unfair labor practice claim in which the employer told the union that it was financially unable to raise workers' wages, but the employer refused to provide any financial evidence to support its claim. The Court agreed with the National Labor Relations Board ("NLRB") that the Court could find a failure to bargain in good faith "when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim."

Similarly, an employer should not be able to avoid resolution of a Title VII claim by refusing to turn over information needed by a grievant to support his claim in

108. See, e.g., *Hooters*, 173 F.3d at 940 (holding an arbitration agreement unenforceable because the employer included "so many biased rules" that it created "a sham system unworthy even of the name of arbitration.").

109. 351 U.S. 149 (1956).

110. *NLRB*, 351 U.S. at 153.

arbitration. While arbitration should offer a more flexible and informal discovery process, courts should be reluctant to require arbitration when an employer acts in bad faith by refusing discovery during grievance and arbitration.

3. Written Award

To ensure the adequacy of the arbitral process, arbitrators should produce a written opinion. Written opinions would ensure that employees are able to effectively vindicate their statutory rights by providing a record of the arbitral proceedings for an appeals court to review. Written awards are already the standard in labor arbitration so, if the Court were to explicitly require them, this would have little or no effect.

4. Equivalent Relief to That Available in Court

Several circuits have held that employees arbitrating Title VII claims must have access to the same types of relief that are available in court. While arbitrators have previously been reluctant to award punitive damages, the Sixth Circuit believes that any such bar to punitive damages is unenforceable because it would constitute a waiver of the substantive relief available under Title VII. As the Sixth Circuit recognized in holding a damage limitation clause in an arbitration agreement to be unenforceable:

[T]he enforcement of the arbitration agreement would require [the employee] to forego her substantive rights to the full panoply of remedies under Title VII and would thereby contravene Congress's intent to utilize certain damages as a tool for compensating victims of discrimination and for deterring employment discrimination more broadly. The critical question is not whether a claimant may obtain *some* amount of the entire range of remedies under Title VII, but whether the limitation on remedies at issue undermines the rights protected by the statute.

111. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 670 (6th Cir. 2003).

Other circuits have taken a similar approach. For example, in a sex discrimination and retaliation case, the Eighth Circuit severed a limitation on a punitive damages clause in an arbitration agreement with a severability clause. In a Title VII case where the arbitration agreement did not contain a severability clause, the Eleventh Circuit held the arbitration agreement to be unenforceable because it only allowed damages for breach of contract. The Ninth Circuit similarly held in a Title VII case that an arbitration agreement limiting an employee's total damages was unconscionable because it "fails to provide for all the types of relief that would otherwise be available in court."

If the Supreme Court confirms the views of these circuit courts, this would likely create confusion in both the arbitral process and encourage further litigation. For instance, where an arbitral award fails to designate damages as "compensatory" or "punitive," an aggrieved employee could then argue that he was denied the entire range of remedies available under Title VII. Employers also might have a disincentive to agree to arbitration if they believed it would only lead to further litigation, or that unions would seek punitive damages in more traditional arbitration cases.

5. No Unreasonable Costs

The D.C. Circuit also interpreted *Gilmer* as mandating that employees cannot be required to pay unreasonable costs as a prerequisite to pursuing arbitration. Because an employee would not have to pay for a judge if he pursued his claims through the judicial

112. *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001).

113. *Paladino v. Avnet Computer Tech.*, 134 F.3d 1054, 1060 (11th Cir. 1998).

114. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178-79 (9th Cir. 2003).

system, any requirement that employees pay costs in arbitration beyond the minimal costs that similarly arise in a court filing would not be “appropriate.” However, a CBA provision mandating that the union pay half of the arbitrator’s fees should be enforceable because it places no disincentive on the employee to pursue his claim. As the D.C. Circuit noted: “[i]t would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.”

6. Independent Representation and Right of Action

The Dunlop Commission concluded that employees who are required to arbitrate statutory discrimination claims under their CBA should have the right to seek independent legal counsel and an independent right of action to bring their grievances. While it is the union, not the aggrieved employee, that is historically regarded as the party in arbitral disputes, binding arbitration of statutory discrimination claims would address statutorily protected individual rights as opposed to contractually mandated rights. Thus, binding arbitration of individual statutory discrimination claims should be treated differently because it is a substantial departure from the union’s traditional role in balancing the collective interests of its members.

115. See *New York Typographical Union v. Printers League Section of the Ass’n of Graphic Arts*, 878 F.2d 56, 58 (2d Cir. 1989).

116. *Cole*, 105 F.3d at 1484; see also *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (finding an arbitration agreement to be unenforceable where it required the employee to pay half of the arbitrator’s fees). The Supreme Court also indicated in a Truth in Lending Act case that arbitration agreements should not be structured to create a financial disincentive to seeking arbitration. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)(holding “a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs.”).

Allowing aggrieved employees to bring their own grievances and to have their own legal counsel involved in arbitration would address the Court's fear in *Gardner-Denver*, that: "[t]he interests of the individual employee m[ight] be subordinated to the collective interests of all employees in the bargaining unit." It would also be consistent with the premise that arbitration merely serves as an alternate forum, as the individual employee would have been allowed his own attorney if he had brought his case in court.

Despite these advantages, allowing an independent right of action and independent counsel would also likely conflict with the Supreme Court's precedent in *Emporium Capwell Co. v. Western Addition Community Organization*. In *Emporium*, minority union members picketed their employer because they did not believe that their union would adequately address their discrimination complaints through the grievance procedures. The Court held that the minority employees' picket was unprotected under the National Labor Relations Act because the union is the exclusive representative of the bargaining unit. Thus, if employees are to have an independent right of action to bring an arbitration claim under Title VII, the Court would have to eliminate the union's traditional role as the exclusive representative of union members in the limited context of discrimination claims.

7. *De Novo Review*

If arbitration represents a mere alternative forum and not a waiver of statutory rights, then an employee should be able to have an arbitral decision reviewed for legal

117. *Alexander*, 415 U.S. at 58.

118. 420 U.S. 50 (1975).

119. *Emporium Capwell Co.*, 420 U.S. at 70.

error. As Professor Richard Bales explained: “If an arbitrator erroneously denies an employee the rights and remedies to which she is statutorily entitled and the error cannot be corrected on review, then the employee has lost far more than a mere forum.” To ensure that an employee can effectively vindicate his rights in a manner comparable to a federal proceeding, arbitral decisions on Title VII claims should be subject to de novo review for legal error.

De novo review for legal error would discourage incompetent arbitrators from serving in Title VII cases and would provide an incentive for arbitrators to obtain “a working knowledge of the basic protections and proscriptions of [Title VII] as well as the case law underlying [Title VII].” If arbitrators had to be concerned that their opinions might be overturned for legal error, they would also have an incentive to keep abreast of the relevant law.

While de novo review would mark a departure from the traditional deference to arbitral decisions, it would not seriously undermine the arbitral process. As discussed above, most Title VII claims are “entirely factual” and do not involve complex statutory issues. Thus, arbitrators are unlikely to commit legal error with any regularity. In fact, if the Hoyman/ Stallworth study as discussed earlier is indicative of the current arbitral

120. Bales, *supra* note 84, at 386-87.

121. While the Supreme Court has assumed that “competent, conscientious, and impartial arbitrators” are available to decide complex statutory claims, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985), in a 1975 survey of arbitrators in the National Academy of Arbitrators conducted by Harry Edwards, 16% of the respondents indicated that they had never read any Title VII opinions. Edwards, *supra* note 94, at 71. Those arbitrators would presumably be dissuaded from deciding Title VII cases under a system with de novo review of legal determinations.

122. Stephen L. Hayford, *The Changing Character of Labor Arbitration*, PROCEEDINGS OF THE 45TH ANNUAL MEETING OF THE NAT’L ACAD. OF ARBITRATORS 69, 85 (1993).

123. See *Cole*, 105 F.3d at 1488; see also Edwards, *supra* note 73, at 303; Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 104 (1996).

reality, arbitration decisions in employment discrimination cases are reversed by the courts in approximately 1% of cases, even with de novo review. Allowing de novo review of arbitration is preferable to the alternative of litigation in federal courts or before an administrative judge because most Title VII claims are factual and can be resolved efficiently and promptly in arbitration without the expense, delay, and hurdles of litigation.

Under current law, the FAA limits the grounds for vacating an arbitrator's award to: "(1) corruption, fraud, or undue means; (2) evident partiality; (3) misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material; and (4) where the arbitrators exceeded their powers." In addition, the Supreme Court has said that an award may be vacated for "manifest disregard" of the law. Despite the seemingly high standards for vacating an arbitrator's award, courts have found "manifest disregard of the law" in a wide (and seemingly inconsistent) range of cases. Other courts have simply assumed authority to review legal decisions by arbitrators. Given that courts are already subjecting arbitral decisions of legal issues to judicial

124. Michele Hoyman & Lamont E. Stallworth, *Arbitrating Discrimination Grievances in the Wake of Gardner-Denver*, 39 ARB. J. 49, 55 (1984).

125. Federal Arbitration Act, 9 U.S.C. § 10(a) (2000).

126. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

127. See Edwards, *Where are we Heading*, *supra* note 73, at 304-05 (describing cases applying the "manifest disregard of the law" standard).

128. See, e.g., *Cole*, 105 F.3d at 1487.

review, establishing an explicit de novo standard would be unlikely to undermine the arbitral process in Title VII claims.

VI. Conclusion

In *Gardner-Denver*, the Supreme Court concluded that: “[t]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.” Professor Feller described the opinion as holding that Alexander: “[w]as not seeking to get two bites of the same apple. He had two apples that looked alike but were different. He was entitled to one bite of each.”

The Court rejected much of the reasoning of *Gardner-Denver* in its *Gilmer* opinion and should have explicitly overruled *Gardner-Denver*. The reasoning in *Gardner-Denver* failed to recognize that employers have no incentive to agree to the “second apple” of arbitration if employees are already guaranteed an “apple” through the federal courts. If employers will not agree to arbitrate these claims, then an aggrieved employee will only be left with the option of litigation in the courts. The costs, procedural hurdles, and lack of attorneys willing to pursue Title VII claims in court

129. Establishing a de novo standard of review for other complex statutory issues decided by arbitrators might do much to undermine the arbitral process and the author does not advocate broadly applying such review to all statutory determinations. In a Title VII claims, however, most determinations are “entirely factual” and, therefore, de novo review would not be significantly disruptive.

130. *Alexander*, 415 U.S. at 59-60.

131. David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 975 (1993).

virtually guarantee that an employee will fail and be left with nothing more than a rotten apple. In contrast, the binding arbitration process affirmed in *Gilmer* provides an effective forum for an aggrieved employee to vindicate his statutory rights and should be considered appropriate for union members.