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**14 PENN PLAZA V. PYETT:  
INTO THE ABYSS BETWEEN JUDICIAL PROCESS AND COLLECTIVELY BARGAINED  
AGREEMENTS TO ARBITRATE INDIVIDUAL STATUTORY CLAIMS**

Eric Sposito

ISSUES PARTIES NEED TO ADDRESS IN ORDER TO ASSURE THAT THEIR COLLECTIVELY BARGAINED  
ARBITRATION CLAUSES GRANTING PRECLUSIVE EFFECT OVER STATUTORY CLAIMS WILL BE  
ENFORCED BY FEDERAL COURTS

On April 1st, 2009 a bitterly divided United States Supreme Court, by a vote of 5-4, turned the world of labor arbitration on its head. The Court's opinion in *14 Penn Plaza v. Pyett* overturned 35 years of jurisprudence, grounded in *Alexander v. Gardner-Denver Co.* dictum, by establishing that collectively bargained clauses expressly authorizing the arbitration of statutory claims are enforceable, either compelling arbitration or precluding the grant of an award in a judicial action.<sup>1</sup> Grounding their decision, in part, on the prominent "Steelworkers Trilogy" case *United Steelworkers v. Enterprise Wheel*, the Court in *Pyett* narrowed the *Gardner-Denver* Court's view on whether a union can waive a member's right to seek judicial determination of a statutory right. The *Gardner-Denver* Court had stated:

we think it clear that there can be no prospective waiver of an employee's rights under Title VII.<sup>2</sup>

In *Gardner-Denver* the Court explained its trepidation with subjugating individual claims of discrimination to collectively bargained agreements to arbitrate on substantive as well as procedural grounds.<sup>3</sup> The Court pointed out that arbitrators are normally selected contingent on their

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<sup>1</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (distinguishing between collective rights properly asserted by a collective bargaining agent and private rights as established in Title VII).

<sup>2</sup> *Id.* at 51; see *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960) (stating, "the opinion of the arbitrator . . . may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission.").

<sup>3</sup> Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L. J. 803, 806, 810-11 (2009).

knowledge of “the law of the shop;” that limited fact finding processes are intrinsic in union-management arbitration agreements; that the union normally has “exclusive control over the manner and extent to which an individual grievance is presented;” as well as the inevitable subjugation of individual interest to the material interests of the group.<sup>4</sup> The *Gardner-Denver* Court astutely predicted that if Title VII claims were relegated to the arbitral forum, that tribunal would necessarily morph into a complex and expensive process, which is precisely what labor arbitration is not supposed to be.<sup>5</sup>

#### PROCEDURAL HISTORY

In *Pyett* the collective bargaining representative, Service Employees International Union Local 32BJ (32BJ), entered into a collective bargaining agreement with a multi-employer bargaining association, the Realty Advisory Board on Labor Relations (RAB).<sup>6</sup> In August of 2003 the union and Steven Pyett’s employer Temco, a member of the RAB multi-employer bargaining association, agreed that the building facility management company 14 Penn Plaza, which is served by Temco, would engage a Temco affiliate to provide security services.<sup>7</sup> As a result of the understanding between Temco and the union, Steven Pyett, Thomas O’Connell, and Michael Phillips, who were employed as night lobby watchman, were reassigned to less desirable lower paying duties.<sup>8</sup> Subsequently the three employees petitioned Local 32BJ to file a grievance on their behalf alleging, *inter alia*, age discrimination. After the initial arbitration hearing the union withdrew the grievant’s age discrimination complaint.<sup>9</sup> In disavowing the discrimination claim the union took the position that since it “had consented to the contract for new security personal at 14 Penn Plaza . . . it could not legitimately object” to the grievant’s reassignment.<sup>10</sup> Soon thereafter, Mr. Pyett filed a petition with the Equal Employment Opportunity Commission (“EEOC”) grounded in the Age Discrimination in Employment Act.

Approximately a month after he filed his complaint, the EEOC issued Pyett a notice to sue letter, leading Pyett to file a complaint in federal court for the Southern District of New York State.<sup>11</sup> The District Court dismissed defendant’s motion to compel arbitration of Pyett’s claim, citing to Second Circuit precedent positing that “even a clear and unmistakable union negotiated waiver of a right to litigate certain federal and state statutory claims . . . is unenforceable.”<sup>12</sup> The District Court’s ruling was affirmed by the Second Circuit Court of Appeals, with that Court holding that *Gardner-Denver* controlled; a collective bargaining agent could not bargain away a member’s ability to vindicate his individual statutory rights in a judicial forum.<sup>13</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> *Gardner-Denver Co.*, 415 U.S. at 57-58; *see* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS (Alan Miles Ruben at al. eds., BNA books 6th ed.2003) (stating the proposition that arbitration advantages lie in savings of time, expense, and trouble in addition to helping the parties avoid the “prolonged technical procedures of courts”).

<sup>6</sup> 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009); *see also* Pyett v. Penn. Build. Co., 498 F.3d 88, 90 (2d Cir. 2007). Pyett’s employer, Temco, is a member of a multi-employer bargaining association of the New York real estate industry. *Id.*

<sup>7</sup> *Id.* at 1462.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1462.

<sup>13</sup> *Id.* at 1463.

### THE SUPREME COURT'S ANALYSIS

In reversing the Second Circuit's holding, the majority in *Pyett* opined that, where an arbitration clause is "clear and unmistakable" in its subjugation of an individual's statutory claim to the employer-union arbitration process, it is enforceable as a matter of law.<sup>14</sup>

The language of the arbitration clause between 32BJ and the RAB is instructive. The collectively bargained clause states:

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 characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the American with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, Connecticut Fair Employer Practices Act, or any other similar laws, rules or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI [of the CBA]) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.<sup>15</sup>

In its opinion, the Court did not establish the essential language which would constitute an explicit waiver, leaving it to the lower courts to determine on a case by case basis whether an arbitration clause is sufficient in its breadth and scope to render it enforceable.

Next, the Court alluded to the *union's exclusive representation* authority as defined in the National Labor Relations Act, in claiming that a union's duty of fair representation assures union members that their representatives will vindicate their statutory rights.<sup>16</sup> As the quid pro quo for its right to exclusively represent its members in the workplace, a union is subject to a duty not to represent them in an arbitrary or capricious manner.<sup>17</sup> The Court conceptualized a union's liability under its duty of fair representation as sufficient to assure that a member's meritorious claim of discrimination will be heard in the arbitral forum.<sup>18</sup> Additionally, Justice Thomas, writing for the Court, observed that a union member's right to have his meritorious claim of employment discrimination heard is further protected since a labor union can be held liable for inducing, knowingly acquiescing, or entering into a labor contract that is discriminatory on its face.<sup>19</sup>

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<sup>14</sup> *Id.* at 1474. Holding that a clear and unmistakable agreement to arbitrate a member's ADA claim is enforceable.

<sup>15</sup> *Pyett v. Penn. Build. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).

<sup>16</sup> *14 Penn Plaza*, 129 S. Ct. at 1473-74.

<sup>17</sup> *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); see *THE DEVELOPING LABOR LAW*, 1993 (Patrick Hardin & John E. Higgins, Jr., eds in chief, BNA, 5th ed. 2001) "The critical focus of the inquiry is the union's good faith in the handling of the grievance . . . a breach . . . occurs when the union's conduct . . . is arbitrary, discriminatory or in bad faith." *Id.* (citing *Vaca* 386 U.S. 171 at 207).

<sup>18</sup> *14 Penn Plaza*, 129 S. Ct. at 1473.

<sup>19</sup> *Id.*

In addition, the *Pyett* majority pointed out that an arbitration clause is a *mandatory subject of negotiation* as defined by the National Labor Relations Board (“NLRB”) under section 9(a) and 8(d) of the N.L.R.A.<sup>20</sup> In support of the freedom to contract, the Court identified the judicial reluctance to get involved in the contractual relationship between two parties, the bargained for exchange between the union and employer, and how a union may “freely” agree to subject its members to an agreement to arbitrate their individual claims in exchange for some other benefit.<sup>21</sup> On this point the court harmonized past precedent by finding no difference between circumstances where an individual knowingly signs an individual employment contract agreeing to arbitrate statutory claims, announced in *Gilmer v. Interstate Johnson*,<sup>22</sup> and an instance where a union and employer agree to require a third party union member to bring his personal claim of employment discrimination to arbitration.<sup>23</sup>

Finally, the Court spoke to the *procedural adequacy* of the arbitral forum in adjudicating claims of discriminatory conduct in the employment context. The court cited to *Mitsubishi Motors v. Soler* in declaring that the Court is over its suspicion of arbitral competence in vindicating statutory rights.<sup>24</sup> In addition, the majority went on to say that the Court recognizes an arbitrator’s ability to “resolve complex questions of fact and law.” While speaking to the procedural adequacy of arbitration the High Court failed to square the limited nature of judicial review of arbitral decisions with appellate review of lower court rulings.<sup>25</sup>

The Court avoided substantively addressing the arguments in Justice Souter’s dissenting opinion where that justice stated that collective bargaining is a majoritarian process, unlike the individual nature of the right to be free from proscribed employment discrimination.<sup>26</sup> Further, Justice Souter squarely faced the majority’s reliance on the mandatory issue of bargaining, stating that the NLRA envisioned union bargaining over group rights, not over the individual rights granted by congress.<sup>27</sup> The dissent correctly raised the inadequacy of fair representation jurisprudence, showing quite well the difficulty an individual has in proving that a union’s actions were both arbitrary and capricious when refusing to pursue a member’s claim to arbitration.<sup>28</sup> Curiously, the dissent failed to raise the procedural failures of labor arbitration in light of the absence of pre-hearing discovery and inadequacy of available remedies. On that point, the majority reached the

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<sup>20</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 1263 (defining the governing sections and issues that comprise mandatory bargaining subjects).

<sup>21</sup> *14 Penn Plaza*, 129 S. Ct. at 1464.

<sup>22</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

<sup>23</sup> *Id.* at 1465.

<sup>24</sup> *Id.* at 1470; *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626-27 (1985). “We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” *Id.*

<sup>25</sup> *14 Penn Plaza*, 129 S. Ct. at 1471, *see Georgios I. Zekos, Labour and Employment Arbitration and Courts Under U.S., English, Scottish and Quebec Laws*, 10 VJ 91, 102. “As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority that a court is convinced he committed serious error does to suffice to overturn his decision.” *Id.*

<sup>26</sup> *Id.* at 1477 (Souter, J. Dissenting); *see also Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) (announcing that Title VII protects individuals, not groups, from discriminatory practices that deprive them of employment opportunities).

<sup>27</sup> *14 Penn Plaza*, 129 S. Ct. at 1480.

<sup>28</sup> *Id.* at 1481; *see Barbara A. Atkin, Elaine Kaplan, and Gregory O’Duden, Wedging Open the Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional and Statutory Claims*, 12 EMPL. RTS. & EMPLOY. POL’Y J. 233, 292 (2008).

conclusion, and the dissent failed to address, that the virtual lack of discovery in labor arbitration does not prejudice a plaintiff's ability to pursue his statutory claim.<sup>29</sup>

This paper will examine the four issues most prominently raised by *Pyett* in turn; the explicitness of the arbitration clause, the union's duty of fair representation, the effect of mandatory subjects of bargaining, and the procedural adequacy of labor arbitration. In addition, it will raise two issues the court failed to address; the availability of congressionally mandated remedies available to grievants that prevail in labor arbitrations and the standard of judicial review of arbitral awards as compared to appellate review of district court decisions.

If parties to a collective bargaining agreement want to assure themselves that arbitral decisions will be enforced, the arbitration clauses they craft will ultimately have to address these issues. Advocates on both sides will agree that there is nothing worse than having to litigate a claim twice in two distinctly separate forums. Therefore, parties would be wise to craft agreements to arbitrate individual statutory claims so as to afford resulting arbitral awards the best chance of withstanding judicial scrutiny.

#### EXPLICIT CONTRACT TERMS

The Supreme Court in *14 Penn Plaza* spent no time reviewing the language of the arbitration clause that subjugated Steven Pyett's statutory claim to arbitration.<sup>30</sup> Justice Thomas relied on the respondent's own position that the collective bargaining agreement's arbitration clause was sufficiently explicit.<sup>31</sup> We will examine the language of the arbitration clause as it is instructive for the purposes of understanding what contractual language will be sufficient to bind the parties to arbitrate discrimination claims.

The Second Circuit court read the collective bargaining agreement in *Pyett*, which stated:

There shall be no discrimination against any present or future employee by reason of . . . age . . . , or any other characteristic protected by law, including, but not limited to, claims made pursuant to . . . the Age Discrimination in Employment Act . . . . All such claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.<sup>32</sup>

The arbitration provision embodied in the agreement between The Reality Advisory Board on Labor Relations and Local 32BJ contains:

- Unambiguous terms proscribing discriminatory conduct by the employer.

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<sup>29</sup> ELKOURI & ELKOURI, *supra* note 3, at 355 n.74 ("it has been generally accepted that unless authorized by applicable statute or by the collective bargaining agreement, the arbitrator has no subpoena power.")

<sup>30</sup> *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88, 90 (2d Cir. 2007).

<sup>31</sup> *Id.* at 1473.

<sup>32</sup> *Id.* at 1461 (internal references omitted).

- Specific reference to the legislative act which grants the cause of action being assigned to arbitration.
- A provision granting arbitration as the “sole and exclusive remedy.”
- An instruction to the arbitrator to look towards judicially created law in order to ground his findings.

These four factors, taken together, are sufficiently explicit to render the parties agreement to arbitrate claims arising under the Age Discrimination in Employment Act ultimately enforceable as a matter of law.<sup>33</sup>

In *St. Aubin v. Unilever HPC* the Court for the Northern District of Illinois held that an arbitration clause did not contain a clear and unmistakable waiver requiring the arbitration of employment discrimination claims.<sup>34</sup> The collectively bargained arbitration clause stated:

Grievances within the meaning of the grievance procedure and of this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of the Agreement. The arbitrator shall have no power to add to, or subtract from, or modify any of the terms of this Agreement.<sup>35</sup>

The federal court reasoned that the language stating “the parties agree to comply with all employment laws” was not sufficiently explicit to operate as a waiver of the St. Aubin’s right to seek relief in a judicial forum.<sup>36</sup>

In 2007 Donald St. Aubin was issued a warning for an attendance violation by his supervisor.<sup>37</sup> He responded by asserting that his absence from work was covered under the *Family Medical Leave Act* (“FMLA”).<sup>38</sup> Subsequent investigation by his employer uncovered an unrelated violation of the employer’s rule governing unauthorized internet usage during work time.<sup>39</sup> Soon thereafter his employer discharged him.<sup>40</sup>

St. Aubin filed a grievance with his local union asserting a violation of the just cause in dismissal provision in his collective bargaining agreement, which the arbitrator rejected.<sup>41</sup> Next, St. Aubin argued in his subsequent FMLA suit that the employer’s proffered reason for his dismissal, unauthorized computer usage, was pretextual and that the real reason for his dismissal was retaliation for his asserting his rights under the FMLA.<sup>42</sup> In its answer, Unilever maintained that, since St. Aubin submitted issues related to his FMLA retaliation claim at arbitration, the doctrine of

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<sup>33</sup> *Id.* at 1474

<sup>34</sup> *St. Aubin v. Unilever HPC NA*, No. 09 C 1874, 2009 WL 1871679, at \*5 (N.D. Ill. June 26, 2009).

<sup>35</sup> *Id.* at \*3-4.

<sup>36</sup> *Id.* at \*4

<sup>37</sup> *Id.* at \*1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*2.

claim preclusion applied and, therefore, the court should dispense with the action.<sup>43</sup> The Court dismissed Unilever's assertion.<sup>44</sup> Relying on the *Pyett* Court's reluctance to overturn *Gardner-Denver*, the Court held that claim preclusion arising from St. Aubin's assertions at arbitration did not apply to his FMLA claim.<sup>45</sup>

In contrast, in *Tewolde v. Owens & Minor Distribution*<sup>46</sup> the United States Federal Court for the District of Minnesota reached an entirely different conclusion in light of *Pyett's* narrowing of *Gardner-Denver*.

The relevant arbitration clause governing employment discrimination claims entered into between Owens & Minor and Minnesota's Health Care Union Local 113 SEIU was general in nature, stating:

[there] shall be no discrimination by the Union or [Owens & Minor] against any employee because of membership or non-membership in the Union or because of the assertion of rights afforded by this Agreement.<sup>47</sup>

The plaintiff/grievant, Mesfin Tewolde, was passed up for a promotion and alleged that he was the victim of proscribed employment discrimination based on his national origin when he filed a claim with the Minnesota Department of Human Rights (MDHR).<sup>48</sup> Concurrently with his MDHR filing, his union processed his promotion grievance to final binding arbitration. The labor arbitrator, interpreting the collective bargaining agreement, determined that Tewolde was not qualified for the promotion and denied his grievance.<sup>49</sup>

In a subsequent arbitration hearing, the arbitrator summarily disallowed Tewolde's discrimination claim.<sup>50</sup> After filing a similar discrimination claim with the EEOC, the agency issued Tewolde a right to sue letter grounded in national origin discrimination and proscribed retaliation under Title VII.<sup>51</sup>

In the resulting court action, Owen & Minor argued that the labor arbitrator's decision precluded Tewolde from advancing his Title VII claims.<sup>52</sup> The court acknowledged that the governing collective bargaining agreement's arbitration clause was general in nature and not specific as to the mandatory arbitrability of statutory claims of employment discrimination.<sup>53</sup> However, the Court, in its tortured analysis of the narrowing of *Gardner-Denver* by *Pyett*, reasoned that:

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*4.

<sup>45</sup> *Id.* at \*5

<sup>46</sup> *Tewolde v. Owens & Minor Dist. Inc.*, No. 07-4075, 2009 WL 1653533, (D. Minn. June 10, 2009).

<sup>47</sup> *Id.* at \*2

<sup>48</sup> *Tewolde v. Owens & Minor Dist. Inc.*, No. 07-4075, 2009 WL 1653533, at \*4 (D. Minn. June 10, 2009).

<sup>49</sup> *Id.* at \*5.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at \*6.

<sup>52</sup> *Id.* at \*7.

<sup>53</sup> *Id.*

If an arbitrator's actions can directly limit judicial review of federal antidiscrimination laws, deference to an arbitrator's interpretation and application of a collective bargaining agreement in a later filed federal court action is warranted even if that deference precludes an employee's statutory claims. . . . 'so long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.'<sup>54</sup>

Using this logic, the Court dismissed Tewolde's claim of national origin discrimination, because the arbitrator had dismissed that specific claim, but allowed the retaliation action to proceed since the arbitrator failed to address it.<sup>55</sup>

In *Warfield v. Beth Israel Deaconess Medical Center*, Carol Warfield alleged her employer was guilty of gender-based discrimination and retaliation under Massachusetts state law.<sup>56</sup> The Arbitration Provision read, in pertinent part:

Arbitration. Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration.<sup>57</sup>

The Court acknowledged that neither the arbitration clause "nor any other provision of the agreement made reference to employment discrimination statutes or claims."<sup>58</sup> The court applied the *Massachusetts Arbitration Act* in uniformity with the *Federal Arbitration Act* in deciding that the plaintiff's "statutory claims are not covered by the arbitration clause of the agreement,"<sup>59</sup> thereby holding that the arbitration clause was general in nature and that Warfield was not compelled to arbitrate her statutory claim.<sup>60</sup>

In *Markell v. Kaiser Foundation Health Plan* the collective bargaining agreement governing Jean Markell's employment was negotiated by the Oregon Federation of Nurses and Health Professionals, Local 5017, FNHP/AFT, AFL-CIO and Kaiser Foundation Hospitals and Kaiser Foundation Health Plan of the Northwest. The pertinent contractual contained language stated:

The Employer and the Union agree that each will fully comply with applicable laws and regulations regarding discrimination and will not discriminate against any Employee because of such person's race, religion, color, national origin, ancestry, gender, age, marital status, physical or mental handicap, veteran status, sexual orientation, or the membership in and/or activity on behalf of the Union.<sup>61</sup>

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<sup>54</sup> *Id.* at \*9 (quoting *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008)).

<sup>55</sup> *Id.* at \*10-11.

<sup>56</sup> *Warfield v. Beth Israel, Deaconess Medical Center Inc.*, 454 Mass. 390, 391 (2009).

<sup>57</sup> *Id.* at 392.

<sup>58</sup> *Id.* at 393.

<sup>59</sup> *Id.* at 403.

<sup>60</sup> *Id.*

<sup>61</sup> *Markell v. Kaiser Foundation Health Plan of the N.W.*, CV 08-752-PK 2009 U.S. Dist. Lexis 95891, \*3-4 (D. Or., Sept. 14, 2009).



and

In the event such a dispute could not be resolved pursuant to the formal grievance procedure, the CBA provided that the parties were ‘free to arbitrate’ any such dispute. . . . regarding ‘problems arising in connection with the application or interpretation of’ the CBA itself.’<sup>62</sup>

The U.S. Court for the District of Oregon held that the arbitration provision was not an explicit waiver because it granted the parties an “option” to arbitrate their disputes. Further, the court pointed out that in his award the arbitrator did not address the statutory claims later advanced by Markell,<sup>63</sup> and, more importantly, Markell expressly refused to raise her “disparate treatment claim” at the arbitration hearing.<sup>64</sup>

In *Mathews v. Denver Newspaper Agency LLP*, the United States Court for the District of Colorado found a contractual anti-discrimination clause less explicit than the one found in *Pyett* sufficient where the discriminatee submitted his discrimination claim to the arbitrator. On that basis the court granted preclusive effect to the arbitrator’s dismissal of the grievant’s claim of unlawful employment discrimination.<sup>65</sup>

The collective bargaining agreement between the Denver Mailers Union Number 8 and the Denver Newspaper Agency contained an anti-discrimination clause, which stated:

The Employer and the Union acknowledge continuation of their polices of no discrimination against employees and applicants on the basis of age, sex, race , religious beliefs, color , national origin, or disability in accordance with and as required by applicable state and federal law.<sup>66</sup>

with the dispute resolution mechanism ending in final binding arbitration.<sup>67</sup>

In *Mathews*, the plaintiff supervisor was accused of inappropriate behavior and, as a result of an internal investigation, was demoted.<sup>68</sup> The Denver Newspaper Agency provided, as an undisputed fact, that the union employees were not required to arbitrate their statutory discrimination claims; the contract granted them the option of pursuing a judicial remedy if they so desired.<sup>69</sup> In light of his options, Mathews choose to retain counsel to conduct his representation.<sup>70</sup> The arbitration hearing was conducted under “prevailing Tenth Circuit and other applicable law regarding statutory discrimination claims.”<sup>71</sup> After the hearing, the arbitrator ruled that the parties understood the anti-

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<sup>62</sup> *Id.* at \*2, \*7.

<sup>63</sup> *Id.* at \*21.

<sup>64</sup> *Id.* at \*8.

<sup>65</sup> *Mathews v. Denver Newspaper Agency LLP*, No 07-cv-02097-WDM-KLM, 2009 WL 1231776, at \*7 (D. Colo. May 4, 2009).

<sup>66</sup> *Id.* at \*5.

<sup>67</sup> *Id.* at \*3.

<sup>68</sup> *Id.* at \*1.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

discrimination clause in the CBA to make statutory claims contractual claims under their agreement in ruling that Mathews's demotion did not violate the collective bargaining agreement nor Title VII.<sup>72</sup>

The Court held that since the parties "recognized that the CBA's arbitration agreement covered Plaintiffs statutory claims" and that Mathews pursued his discrimination claim at arbitration, his identical claims subsequently brought in court were barred by the "doctrine of *res judicata*."<sup>73</sup> Importantly, the Court stated that Mathews would have avoided preclusion if he were denied a full, fair opportunity to litigate his claim in a court of law.<sup>74</sup>

#### EXCEPTION TO ENFORCEABILITY OF AN EXPLICIT WAIVER

Recently the Federal Court for the Southern District of New York recognized an exception to the enforceability of an explicit waiver of a judicial forum for a Title VII claim where the union signatory to a collective bargaining agreement prevented an individual from bringing his claim to arbitration.<sup>75</sup>

In *Johnson v. Tishman Speyer Props.*, Judge Pauley reasoned that since the Supreme Court failed to consider if a CBA's explicit waiver is enforceable when a union prevents the member from vindicating his rights in arbitration, such union behavior should lead a court to hear the grievant's claim.<sup>76</sup>

However, the court ultimately failed to apply this exception, since the grievant admitted that he declined to pursue his grievance. It is important, nonetheless, to note the court's willingness to grant a forum to an individual where his collective bargaining representative has failed to do so is an important event.<sup>77</sup>

#### PRACTICAL IMPLICATIONS

In analyzing district court applications of *Pyett*, it is legitimate to conclude that, for the most part, courts will require explicit language in an arbitration clause before they will compel arbitration of employment discrimination claims. Those same courts seem willing to assure that claimants get a full and fair opportunity to be heard at arbitration before they will dismiss such claims. In addition, in order for a court to apply the doctrines of *res judicata* and *collateral estoppel*, a court can be expected to examine whether or not a grievant was given an opportunity to raise his discrimination claim before the arbitrator, and that the arbitrator considered it in formulating his opinion.

#### THE UNION'S DUTY OF FAIR REPRESENTATION

Over a strong dissent, the *Pyett* majority reasoned that, when an individual's statutory claim is placed in the hands of his collective bargaining representative, the union's duty of fair representation

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<sup>72</sup> *Id.* at \*5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Johnson v. Tishman Speyer Props.*, No. 09 Civ. 1959 (WHP), 2009 U.S. Dist. Lexis 96464, \*9 (S.D.N.Y. 2009); *see* *Borrero v. Ruppert Housing Co. Inc.*, No. 08 CV 5869(HB), 2009 WL 1748060, \*2, 3 (S.D.N.Y. 2009).

<sup>76</sup> *Johnson*, 2009 U.S. Dist. Lexis 96464, at \*8, 9.

<sup>77</sup> *Id.* at \*10.

assures that his meritorious claim will be prosecuted through the contractual grievance procedure to arbitration.<sup>78</sup>

The post-*Pyett* district court decisions have yet to establish the duty of representation that will be applied to unions that have explicitly agreed to arbitrate their members' statutory claims. In order to recognize the fallacy of Justice Thomas's argument, it is important to examine the duty and how it is applied by the NLRB and the courts. This section will examine a union's duty to its members in various contexts and attempt to predict what duty courts will impute to unions when they fail to bring their members' claims of employment discrimination to final binding arbitration.

The duty of fair representation during collective bargaining finds its genesis in three early Railway Labor Act cases.<sup>79</sup> Taken together they establish that an exclusive bargaining agent, while not barred from agreeing to contracts that have negative effects on some members, must not reach discriminatory agreements "based on irrelevant and invidious considerations."<sup>80</sup> Further, the courts have held that the right to be represented fairly and without discrimination is grounded in federal law and, as such, is subject to equitable as well as monetary damages.<sup>81</sup>

Much later, in *Air Line Pilots Association v. O'Neill*, the Court refined its definition of the duty; a union can act "within a wide range of reasonableness" and "any substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities."<sup>82</sup>

The seminal case where the Supreme Court defined a union's duty to its members in the arbitration context under the National Labor Relations Act is *Vaca v. Sipes*.<sup>83</sup> Therein, the Court announced that a union breaches its duty when it acts in ways that are "arbitrary, discriminatory, or in bad faith."<sup>84</sup> The Court then elaborated, stating:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.<sup>85</sup>

Further, in *Steelworkers v. Rawson*, the Court held that "The courts have in general assumed that mere negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim for breach of the duty of fair representation, and we endorse that view today."<sup>86</sup>

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<sup>78</sup> *14 Penn Plaza*, 129 S. Ct. at 1473.

<sup>79</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 1889-90.

<sup>80</sup> *Id.* (citing *Steele v. Louisville & N.R. Co.* et al., 323 U.S. 192 (1944); *Tunstall v. Locomotive Firemen and Enginemen, Ocean Lodge No. 76*, et al., 323 U.S. 210 (1944); and *Wallace Corp. v. National Labor Relations Board*, 323 U.S. 248 (1944)).

<sup>81</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 1889.

<sup>82</sup> *Air Line Pilots Association v. O'Neill*, 499 U.S. 65, 76-78 (1991).

<sup>83</sup> *Vaca v. Sipes*, 386 U.S. 171 (1967).

<sup>84</sup> *Id.* at 207.

<sup>85</sup> *Id.* at 191.

<sup>86</sup> *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990).

A union's duty of fair representation in the hiring hall context is elevated from that found in collective bargaining or contract administration. The union is required to show that "referral[s] are made pursuant to a valid hiring hall provision or that the union action is necessary for the effective performance of the union's representational function."<sup>87</sup>

It is important to note that a union is under no obligation to secure counsel in its prosecution of a member's grievance in final binding arbitration.<sup>88</sup> If in fact the union does not secure counsel, the union's grievance representative is not expected to prosecute a grievance with the expertise of a trial lawyer.<sup>89</sup> Even if a union does decide to supply an attorney to pursue a grievant's case, the affected individual has no right to direct the attorney, "dictate what arguments are to be made, or what testimony is to be sought."<sup>90</sup>

A plaintiff's most important decisions, when bringing a claim of employment discrimination, relate to his selection of counsel and his input in the pursuit of his claim.<sup>91</sup> It should also be noted that there is an absence of Title VII type punitive damages in duty of fair representation suits.<sup>92</sup>

#### THE DUTY IN COLLECTIVE BARGAINING

During bargaining for a contract a union is granted its widest discretion. As previously stated, the Supreme Court announced in *Air Line Pilots v. O'Neill* that the union must act within a wide range of reasonableness in its negotiation of a collective bargaining agreement.<sup>93</sup> In addition, the *O'Neill* Court established "that any substantive examination of a union's performance, therefore, must be highly deferential" and that the union's conduct during bargaining must be analyzed "in light of both the facts and the legal climate . . . at the time of the negotiations."<sup>94</sup> Finally, and maybe most importantly, in the contract negotiation context a union that "improperly balance[s] the rights and obligations of the various groups it represents" is not a per se breach of its duty of fair representation.<sup>95</sup>

Earlier, in *Ford Motor Co. v. Huffman*, the Court reported that a union has an obligation to represent all its members and make an honest effort to serve all their interests without hostility towards any.<sup>96</sup> The Court went on to state:

<sup>87</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 2158

<sup>88</sup> *Del Casal v. Eastern Airlines*, 465 F.Supp. 1254, 1257 (S.D. Fla. 1979), *aff'd*, 634 F.2d 295.

<sup>89</sup> *Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union 327*, 233 N.L.R.B. 1213, 1217 (1977).

<sup>90</sup> *Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 542*, 223 N.L.R.B. 533, 533 (1976).

<sup>91</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (stating a lawyer shall: "reasonably consult with the client about the means by which the client's objectives are to be accomplished.").

<sup>92</sup> *IBEW v. Forest*, 442 U.S. 42 (1979) (stating "Punitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *see also* *Turner*, *supra* note 19 at 189 (stating "labor arbitrators . . . powerless to grant employees damages, attorney's fees, and costs available under the statute" when considering arbitration under the Fair Labor Standards Act).

<sup>93</sup> *Air Line Pilots Association*, 499 U.S. at 76.

<sup>94</sup> *Air Line Pilots Association*, 499 U.S. at 78.

<sup>95</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 2060 (citing to *Freeman v. Locomotive Eng'rs*, 375 F. Supp. 81, 93 (S.D. Ga.) *aff'd*, 493 F.2d 628 (5th Cir. 1974); *see also* *Newport News Shipbuilding & Dry Dock*, 236 N.L.R.B. 1470 (1978) (little or no investigation into reasons for discharge); *Service Employees Local 3036*, 280 N.L.R.B. 995 (1986) (assuring employee that the union would take care of grievance, but then abandoning it without explanation and without informing grievant).

<sup>96</sup> *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honest of purpose.<sup>97</sup>

#### THE DUTY DURING CONTRACT ADMINISTRATION

In contract administration the union is held to a higher duty than during contract negotiation. In “rights arbitration,” a union is charged with assuring that the employer of its members is adhering to the collectively bargained contractual provisions. Courts have interpreted the Supreme Court’s opinion in *Vaca* to mean that a union may not handle a meritorious grievance in a “perfunctory fashion.”<sup>98</sup>

In the leading case of *Hines v. Anchor Motor Freight* a truck driver was discharged for dishonesty when his employer accused him of seeking reimbursement for motel expenses exceeding those he actually incurred.<sup>99</sup> At a grievance hearing the company produced evidence that tended to support their position.<sup>100</sup> In response, the union asserted their members innocence and proceeded to move the issue along to final binding arbitration before a “joint area committee.”<sup>101</sup>

During the time leading up to the arbitration the union made no effort to investigate the charges. Additionally, it appeared that union officials were hostile to the grievant. *Sua sponte*, the grievant hired an attorney; his investigation uncovered evidence establishing that the motel records were probably falsified by a motel clerk.<sup>102</sup> Subsequently, after a hearing, the arbitration committee sustained the dismissal of the grievant.<sup>103</sup> Afterwards, the District Court dismissed the employee’s charge that the union violated in its duty of representation by failing to investigate the veracity of the company’s evidence against him, as well as failing to provide any exculpatory evidence at the arbitration hearing.<sup>104</sup> Upon review, the Sixth Circuit Court of Appeals reversed and held that “there were sufficient facts from which bad faith or arbitrary conduct on the part of the local union could be inferred by the trier of fact” but dismissed the charges on other grounds.<sup>105</sup> While the Supreme Court granted certiorari on the issue of whether or not an innocent employer could be held liable for a union’s misconduct, the High Court recognized that, in this particular instance, the union was guilty of a breach of its duty.<sup>106</sup>

In *Black v. Ryder P.I.E. Nationwide* the Sixth Circuit Court of Appeals analyzed the burden that a union member would have to bear in order to establish that “a union has acted discriminatorily or in bad faith.”<sup>107</sup> The court held that a union must undertake a reasonable investigation of the issues

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<sup>97</sup> *Id.* at 338.

<sup>98</sup> *Id.* at 2043.

<sup>99</sup> *Hines v. Local Union 377*, 506 F.2d 1153, 1154 (6th Cir. Ohio 1974).

<sup>100</sup> *Id.* at 1156.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1155.

<sup>104</sup> *Id.* at 1158-59.

<sup>105</sup> *Id.* at 1157.

<sup>106</sup> *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 556 (1976).

<sup>107</sup> *Black v. Ryder P.I.E. Nationwide Inc.*, 15 F.3d 573, 584 (6th Cir. Tenn. 1994).

surrounding the employer's disciplinary action that led to the grievance.<sup>108</sup> In defining what constitutes a reasonable investigation, the court enunciated a heavy burden that a plaintiff would have to satisfy in order to prove that a union failed in its duty:

the plaintiff must meet the onerous burden of proving that the grievance process was 'seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.'<sup>109</sup>

The court reached the conclusion that, in this particular case, the union breached its duty to its member by failing to communicate with an essential witness.<sup>110</sup> The court reasoned that "while in many circumstances the failure to call a particular witness cannot amount to a breach of the union's statutory duty, this is not true of every case."<sup>111</sup> The court concluded that the union's lack of thoroughness in its investigation, in addition to the evidence that Black was an intra-union rival, was enough for a fact finder to conclude that the union breached its duty.<sup>112</sup>

In conclusion, a union's failure to raise arguments at arbitration that might be beneficial to a grievant, while amounting to negligence or poor judgment, do not give rise to a breach of the duty.<sup>113</sup> Courts will not second guess a union's conduct at an arbitration as long as the union does not process the grievant's action in an arbitrary or perfunctory fashion, conducts some minimal level of investigation, and exhibits no hostility to the grievant or displays bad faith behavior.

#### THE DUTY IN THE HIRING HALL CONTEXT

A union can legally operate a work referral mechanism called an exclusive hiring hall; the union supplies individuals to employers in order to "accommodate an employer's need for a skilled workforce and the employee's needs for job security."<sup>114</sup> Unions that operate hiring halls are proscribed from discriminating against prospective hires for "invidious, capricious, [or] arbitrary reasons."<sup>115</sup> Further, it has been established that a union must incorporate objective standards in handling an individual's application for job referrals.<sup>116</sup> More telling is the fact that, unlike the union's duty in arbitration, mere negligence can expose a union to liability resulting from a failure of its duty to fairly administer the hiring hall.<sup>117</sup>

In *Jacoby v. Nat'l Labor Relations Bd.* the Court of Appeals for the District of Columbia held that "a single error in the hiring hall setting did not breach the Duty of Fair Representation," but recognized that when a union operates an exclusive hiring hall it operates "under a heightened duty standard."<sup>118</sup> Furthermore, the court set forth that "a union might violate the DFR in instances of

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<sup>108</sup> *Id.* at 585.

<sup>109</sup> *Id.* (quoting *Hines*, 424 U.S. at 570).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 2049.

<sup>114</sup> *Id.* at 1306.

<sup>115</sup> *Id.* at 2163.

<sup>116</sup> *Id.* at 2164.

<sup>117</sup> *Id.* at 2166.

<sup>118</sup> *Jacoby v. NLRB*, 325 F.3d 301, 309 (D.C. Cir. 2003).

gross negligence or in circumstances in which its hiring hall business practices are so reckless as to cause foreseeable adverse affects” on an individual seeking work referrals.<sup>119</sup> Finally, the Court required the union to rise to a “heightened duty of fair dealing requir[ing] a union to operate a hiring hall using “objective criteria” and “consistent standards.”<sup>120</sup> The Court then refused to go further, stating that it does not “set the standard of conduct so high as to make anything less than a flawlessly run system an actionable offense.”<sup>121</sup>

The Supreme Court in *Breining v. Sheet Metal Workers* determined that a union’s duty of fair representation was heightened in administering a hiring hall because “a union does wield additional power in a hiring hall by assuming the employer’s role” and “its responsibility to exercise that power fairly *increases* rather than *decreases*” (emphasis in original).<sup>122</sup> The Court reasoned that since, in an exclusive hiring hall situation, “there is no balance of power” and “the individual employee stands alone against a single entity: the joint union/employer”, the “union does not shed its duty of fair representation merely because it is allocating job openings.”<sup>123</sup>

### PRACTICAL IMPLICATIONS

In light of Justice Souter’s strong dissent in *Pyett*, and the varying standards that a union is held to in dealing with its members, district courts will probably hold the union to a “heightened duty of representation standard” such as that applied in the exclusive hiring hall context. The union’s obligation, once agreeing with an employer to subjugate its member’s statutory claims to final binding arbitration, must lead to more than a mere guarantee to refrain from arbitrary or capricious handling of a member’s claim. A standard placing an affirmative duty upon the union to act without negligence, giving the employee access to counsel, and allowing the employee to have a greater say in directing the proceedings more closely follows the rights a plaintiff has when bringing his statutory claim in a court of law.

### ARBITRATION AS A MANDATORY SUBJECT OF NEGOTIATIONS

Justice Thomas opined in *Pyett* that, since arbitration clauses in collective bargaining agreements are mandatory subjects of negotiations, they are “freely negotiated” and, as such, members of the union gain “other concessions” in return for forfeiting their right to bring discrimination claims in courts of law.<sup>124</sup> The flaw in his logic becomes apparent when one analyzes what constitutes good faith in collective bargaining and what occurs when parties fail to agree to mandatory subjects of negotiations.

From the inception the National Labor Relations Act, the NLRB has held that employers and unions must negotiate over terms and conditions of employment such as “discharges, pensions, profit sharing, workloads and work standards, insurance benefits, union shop clauses, subcontracting, shop rules, work schedules, rest periods, and merit increases.”<sup>125</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Breining v. Sheet Metal Workers Int’l. Ass’n Local #6*, 493 U.S. 67, 87 (1989).

<sup>123</sup> *Id.* at 437.

<sup>124</sup> *14 Penn Plaza*, 129 S. Ct. at 1464.

<sup>125</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 2049.

In *Nat'l Labor Relations Bd. v. Wooster Div. of Borg Warner*, the Supreme Court recognized the Labor Board's definition of Mandatory Subjects of Bargaining:

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment \* \* \*.' The duty is limited to those subjects, and within that area neither party is legally obligated to yield.<sup>126</sup>

Thus, it is apparent that, when it comes to mandatory subjects of bargaining, neither party is required to yield as to their position in order to meet their duty to bargain in good faith.<sup>127</sup>

When parties are unable to reach accord on a mandatory term and condition of employment, the law recognizes the existence of an "impasse."<sup>128</sup> In *Hi-Way Billboard*, the NLRB held:

Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike; the employer can engage in a lockout, make unilateral changes in working conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees.<sup>129</sup>

As a result of the parties reaching impasse, the employer is free to unilaterally implement the changes in the terms and working conditions embodied in its proposal.<sup>130</sup> After an employer implements its "last, best, and final offer" the union can either unconditionally accept the employer's proposals or go on strike, thereby putting their member's jobs at risk.<sup>131</sup> Even after a union strikes, they retain the right to unconditionally accept the employer's last offer.<sup>132</sup>

In light of the Court's and Labor Board's proclamations on mandatory bargaining subjects, it is not difficult to imagine a predicament where an employer lawfully insists on the inclusion of a broad arbitration clause compelling arbitration of all statutory claims of employment discrimination to impasse, resulting in an imposition of that clause upon the union and, by extension, to its individual members. The question presented is then how will courts deal with the arbitration clause that was not "freely negotiated" and not agreed to in exchange for other terms and conditions of employment?

<sup>126</sup> NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342, 349 (1958).

<sup>127</sup> NLRB v. American Nat. Ins. Co., 343 U.S. 395, 404 (1952) (reasoning "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the National Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.").

<sup>128</sup> THE DEVELOPING LABOR LAW, *supra* note 17, at 988 ("Where there are irreconcilable differences in the parties' positions after full good faith negotiations, the law recognizes the existence of an impasse.").

<sup>129</sup> *Hi-Way Billboards Inc.*, 206 N.L.R.B. 22, (1973) *enft. denied* NLRB v. *Hi-Way Billboards Inc.*, 500 F.2d 181 (5th Cir. 1974).

<sup>130</sup> *Id.* at 996.

<sup>131</sup> See *Walnut Creek Honda Ass'n 2 Inc. v. NLRB*, 89 F.3d 645, 648 (9th Cir. 1996).

<sup>132</sup> See *Walnut Creek Honda Ass'n 2 Inc.*, 89 F.3d at 647.



Since the *Pyett* Court determined that the arbitration clause in question was freely granted in return for other concessions during collective bargaining, it is unclear how they would view an arbitration clause that was imposed as a result of a bargaining impasse.<sup>133</sup>

One must acknowledge the possibility, indeed the likelihood, that a union will resist an arbitration clause which will impose an obligation to adequately represent its member's statutory claims, and the requisite pecuniary burdens.<sup>134</sup> Additionally, some commentators state, and this one in particular agrees, that "no employer, acting alone or in conjunction with a union, should be able to force an employee to waive the statutorily provided forum, procedures, and remedies as the price of getting or keeping a job."<sup>135</sup> Furthermore, it is essential to recognize that most unionized employees do not have a right to vote on the collective bargaining agreements that are negotiated on their behalf.<sup>136</sup> If waiver of a statutory right to a judicial forum is supposed to be knowing and voluntary, how can a union member waive such a right without having the opportunity to read the agreement and, at the very least, comment on its contents?<sup>137</sup> Finally, unions, who notoriously lack financial resources, can be expected to vigorously resist arbitration clauses which subject them to the expensive burden of prosecuting their member's statutory claims of employment discrimination.

#### PRACTICAL IMPLICATIONS

It is probably important for an employer to avoid reaching impasse on an arbitration clause requiring union employees to arbitrate their statutory claims. It might be advantageous for the parties to negotiate an arbitration clause that will allow individual employees to bring their statutory claims of employment discrimination to final binding arbitration whether or not the union wishes to pursue the claim. An arbitration clause that allows an individual employee to bring his discrimination claim to arbitration would remove the possibility that a union would resist agreeing to such a clause.

A dual tract arbitration clause can effectively preserve the traditional labor arbitration forum for contract administration claims, while giving individual employees the opportunity to control the prosecution of their individual statutory claims. If the parties decide not to seek two distinct arbitration clauses, they should recognize the difficulties associated with including arbitration clauses mandating arbitration of employment discrimination claims and act accordingly.

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<sup>133</sup> See *14 Penn Plaza*, 129 S. Ct. at 1464.

<sup>134</sup> PETER A. VEGLAHN, *ARBITRATION COSTS/TIME: LABOR AND MANAGEMENT VIEWS* 50 (On file with the National Labor College and the author) (stating in a survey that 33% of labor unions view arbitration costs as a potential problem); see e.g. BOB REPAS, *GRIEVANCE PROCEDURES WITHOUT ARBITRATION* 382 (on file with the National Labor College and the author) (where the regional director of the United Auto Workers in 1937 stated that arbitration can be used by employers to break a union financially and the following director of the same organization was particularly concerned that the costs of arbitration to small local unions.).

<sup>135</sup> Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than it Looks*, 41 U. MICH. J.L. Reform 783, 787 (2008).

<sup>136</sup> Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Workers Statutory Right to a Judicial Forum*, 49 EMORY L. J. 135, 164 (2000).

<sup>137</sup> *Id.*

### THE PROCEDURAL ADEQUACY OF LABOR ARBITRATION

Justice Thomas' opinion in *Pyett* assumes that "arbitral tribunals are readily capable of handling the factual and legal complexities of" statutory causes of action.<sup>138</sup> He cites to *Gilmer v. Interstate/Johnson Lane Corp.* in announcing that "it is unlikely . . . that age discriminations claims require more extensive discovery than other claims that we have found to be arbitrable."<sup>139</sup> In support of his position he cites to cases that directly refer to the adequacy of N.Y.S.E. rules governing arbitration procedures without ever discussing how those rules differ from the rules that govern discovery, subpoena power, and remedies in labor arbitration.<sup>140</sup>

The Court, in its zeal to narrow the *Gardner-Denver* line of jurisprudence, gives short shrift to plaintiff's procedural needs when they are attempting to prove subtle, invidious, employment discrimination.<sup>141</sup> This note, on the other hand, will not fail to do so.<sup>142</sup>

### SUBPOENA POWER AND DISCOVERY IN LABOR ARBITRATIONS

Courts of law generally recognize that discovery rules are construed broadly and in a liberal manner in cases of employment discrimination grounded in *Title VII* as well as the *Age Discrimination in Employment Act*.<sup>143</sup> However, even in those cases where the courts are inclined to grant broad discovery, the plaintiff must articulate the reasons why such information should be provided by the defendant.<sup>144</sup>

In *Gomez v. Martin Marietta Corp.* the court articulated that discovery "should not be narrowly circumscribed" in a case where an employee sued his employer based on age, race and national origin discrimination.<sup>145</sup> In cases where an employee is required to prove that the employer's proffered reason for an adverse employment action are mere pretexts for proscribed discrimination the courts have avoided placing unnecessary limits in granting wide discovery of personnel files.<sup>146</sup>

Although the *Federal Arbitration Act* authorizes arbitrators to issue subpoenas it is unclear if this power applies to collective bargaining agreements.<sup>147</sup> While it is becoming clear that the Supreme Court has begun to apply the FAA to employment contracts,<sup>148</sup> they have not enunciated their

<sup>138</sup> *14 Penn Plaza*, 129 S. Ct. 1456 at 1471.

<sup>139</sup> *Id.* (quoting *Gilmer*, 500 U.S. at 31).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Suzette M. Malveaux, *Is it the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 80, (2009) (stating "the federal judiciary's current antagonism toward employee claims of discrimination (as demonstrated by recent empirical studies . . .)").

<sup>143</sup> BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW*, 2231 (C. Geoffrey Weirich, ed. in chief, BNA, 4th ed. 2007).

<sup>144</sup> *Id.* at 2232.

<sup>145</sup> *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995).

<sup>146</sup> *Cardenas v. Prudential Ins. Co.*, 91 Fair Empl. Prac. Cases (BNA) 82, 84 (D. Minn. 2003) ("in Title VII cases, in which plaintiffs are required to demonstrate pretext, courts have customarily allowed a wide discovery of personnel files."); *see also* *Jackson v. Montgomery Ward Co.*, 74 Fair Empl. Prac. Cases (BNA) 529, 530 (D. Nev. 1997) ("In Title VII cases, courts should avoid placing unnecessary limitations on discovery.>").

<sup>147</sup> ELKOURI & ELKOURI, *supra* note 3, at 355 n.74 ("it has been generally accepted that unless authorized by applicable statute or by the collective bargaining agreement, the arbitrator has no subpoena power.>").

<sup>148</sup> *14 Penn Plaza*, 129 S. Ct. at 1471 n.10 ("Moreover, an arbitrator's decision as to whether a unionized employee has been discriminated against . . . remains subject to judicial review under the FAA.>").

position on the subpoena and discovery powers of arbitrators in the collective bargaining context. It is clear that labor arbitrators need subpoena power if they are going to be able to provide an adequate forum for the vindication of an individual's substantive statutory rights.<sup>149</sup>

The American Arbitration Association (AAA) is a popular nonprofit organization that provides arbitrators, services, and procedures for labor arbitrations as well as other private agreements to arbitrate.<sup>150</sup> Their rules for the adjudication of *employment disputes* that arise between individuals and their employers authorize arbitrators to order discovery in the form of depositions, interrogatories, and document production that the arbitrator considers necessary for a full and fair resolution to the claims being adjudicated.<sup>151</sup> The AAA's *Labor Dispute* rules, which govern arbitrations between unions and employers, on the other hand, contain no such rules dealing directly with discovery. Although AAA rule 28 does authorize arbitrators to issue subpoenas at the direction of either party,<sup>152</sup> it is generally accepted that arbitrators in the organized workplace have no subpoena power.<sup>153</sup>

In contrast to accepted arbitration practice in the organized workplace, the New York Stock Exchange Arbitration rules, cited repeatedly by the *Pyett* majority, call for "the fullest practicable" "voluntary exchange of documents and information" by the parties.<sup>154</sup>

Rule 619 (b)(1) of the NYSE Constitution and Arbitration Rules states:

Any party may serve a written request for information or documents upon another party 20 business days or more after service of the statement of claim.<sup>155</sup>

In rule 619(b)(2) it states:

Information request shall be satisfied or objected to within thirty days from the date of service.<sup>156</sup>

In section 619(c) the rules further state:

All parties shall serve on each other copies of documents in their possession that they intend to present at the hearing.<sup>157</sup>

Subsection (f) to rule 619 continues:

The arbitrator and any counsel of record shall have the power of the subpoena process as provided by law.<sup>158</sup>

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<sup>149</sup> Gary Furlong, *Fear and Loathing in Labor Arbitration: How can there possibly be a full and fair hearing unless the arbitrator can subpoena evidence*, 20 WILLAMETTE L. REV. 535 (A source of arbitral subpoena power backed by force of law is needed); see also ELKOURI & ELKOURI, *supra* note 3, at 355 n.74.

<sup>150</sup> ELKOURI & ELKOURI, *supra* note 3, at 43.

<sup>151</sup> *Id.* at 360.

<sup>152</sup> *Id.*

<sup>153</sup> ELKOURI & ELKOURI, *supra* note 3, at 355.

<sup>154</sup> DEPARTMENT OF ARBITRATION, ARTICLE XI, NYSE CONSTITUTION AND ARBITRATION RULES 18, <http://www.nyse.com/pdfs/Rules.pdf>.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 19

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 21

Finally, subsection (g) to rule 619 states:

The arbitrator shall be empowered without resort to the subpoena process to direct the appearance of an person employed or associated with any member or member organization of the New York Stock Exchange.<sup>159</sup>

Clearly, the New York Stock Exchange rules that the *Pyett* court relies on in justifying the sufficiency of arbitration procedures have no rational relation, and are far superior, to common practice in labor arbitration.

Similarly, the National Association of Securities Dealers notice of SEC arbitration rules and procedures call for “necessary pre-hearing depositions consistent with the expedited nature of arbitration.”<sup>160</sup> Arbitrators are “empowered to award any relief that would be available in a court under law”, and “arbitrator[s] shall have the authority to provide for reasonable attorney’s fee[s].”<sup>161</sup> In the same vein, the Revised Uniform Arbitration Act of 2000 provides that arbitrators may issue subpoenas calling for attendance of witnesses, the production of records at hearings, depositions of any witness, and general discovery of documents that the arbitrator believes pertinent.<sup>162</sup>

#### PRACTICAL IMPLICATIONS

If two parties express interest in including arbitration clauses in collective bargaining agreements that require union members to arbitrate their statutory claims, both sides should insist that such clauses expressly give arbitrators broad powers to order discovery as well as, deposition testimony. As a matter of equity, it is best practice for arbitration to mimic the courts subpoena power in discrimination actions. In the interests of finality, there can be no greater assurance that an arbitration award will be upheld by a court than where the arbitrator is granted discovery that mirrors judicial standards.

#### REMEDIES CREATED BY CONGRESS IN INSTANCES OF EMPLOYMENT DISCRIMINATION V. THOSE AVAILABLE IN LABOR ARBITRATIONS

The remedies arbitrators are empowered to grant are generally defined by the parties, and expressed in their collective bargaining agreements.<sup>163</sup> Over the decades, labor arbitration has evolved to provide for monetary damages based solely on compensation for lost wages and benefits. It is standard that unless the collective bargaining agreement contains some express terms granting the arbitrator the power to award punitive damages, arbitrators will normally limit awards to “make whole” remedies.<sup>164</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> NASD NOTICE TO MEMBERS 99-96, EMPLOYMENT ARBITRATION RULES, *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p004042.pdf> (last visited Feb. 14, 2010).

<sup>161</sup> *Id.*

<sup>162</sup> ELKOURI & ELKOURI, *supra* note 3, at 357.

<sup>163</sup> ELKOURI & ELKOURI, *supra* note 3, at 1195.

<sup>164</sup> *Id.* at 1201-02.

Up until now, compensatory damages, such as labor arbitrators normally award, have been the sole relief granted in grievances grounded in sex and age discrimination cases.<sup>165</sup>

Congress recognized the need for and sought to apply the remedial effect that punitive damages have when they amended Title VII in the Civil Rights Act of 1991; they expanded the monetary relief available to victims of employment discrimination to make punitive damages available to plaintiffs.<sup>166</sup> The availability of punitive damages to victims of discrimination and their preclusive effect on future wrongdoers validates the strong public policy choice made by Congress when it authorized them.<sup>167</sup> Only one federal court has had the opportunity to decide if they will grant preclusive effect to labor arbitration awards that fail to award punitive damages where a court would have. In a moment we will turn to that case.

The Supreme Court in *Gilmer* stated that “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”<sup>168</sup> Further, the Court recognized arbitration agreements will not be enforced, despite their favorability, if they affect substantive rights.<sup>169</sup> Punitive remedies granted by Congress are substantive rights; therefore courts are likely to grant review where arbitral awards fail to adequately address both punitive damages and reasonable attorney fees to grievants that prevail in arbitration of claims of employment discrimination.

In *Dunnigan v. City of Peoria*, the plaintiff filed a discrimination charge against the city after he was passed over for a promotion. Nine months later he was investigated for possible disciplinary action, and thereafter terminated.<sup>170</sup> An arbitrator reduced his termination to a ten day suspension and reinstated the plaintiff/grievant with full back pay and back benefits.<sup>171</sup> The city introduced the arbitration award in a motion to dismiss when Dunnigan continued to pursue his Title VII discrimination claim in court.<sup>172</sup> The court held that “plaintiff’s arbitration award does not erase that adverse employment action, though it does affect the remedies available in this lawsuit,” therefore, “plaintiff can seek other damages allowed by Title VII that were not covered by the arbitrator’s award.”<sup>173</sup>

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<sup>165</sup> *Id.* at 1203.

<sup>166</sup> *Id.* at 2166.

<sup>167</sup> *Hadnot v. Bay, Ltd.*, 344 F.3d 474 (5th Cir. 2003) (finding an arbitration clause prohibiting punitive damages unenforceable); *see also Booker v. Robert Half Intern., Inc.*, 315 F.Supp.2d 94 (D.D.C. 2004) (holding provision in arbitration clause of employment agreement excluding punitive damages as arbitration remedy was unenforceable); *but see Tupper v. Bally Total Fitness Holding Corp.*, 186 F.Supp.2d 981 (E.D. Wis. 2002) (holding arbitration clause of employment agreement which limited arbitrator’s award in disputes to back pay, less interim earnings, front pay up to a maximum of two years and very limited punitive damages granted arbitrator sufficient authority to fully compensate employee for damages, and, thus, was enforceable under Wisconsin law).

<sup>168</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Mitsubishi*, 473 U.S. at 637) (modification in original).

<sup>169</sup> *Cooper v. MRM Inc. Co.*, 199 F.Supp.2d 771, 780 (M.D. Tenn. 2002) (summarizing a main point of *Gilmer* thusly: “although arbitration agreements are generally favored, they will not be enforced if they affect individual’s substantive rights.”).

<sup>170</sup> *Dunnigan v. Peoria, Ill.*, No. 09-01064, 2009 WL 2566958, \*1, (C.D.Ill., 2009).

<sup>171</sup> *Id.* at \*2.

<sup>172</sup> *Id.* at \*2-3.

<sup>173</sup> *Id.* at \*9.

In *Green Tree Financial Group v. Randolph* a plaintiff sought to disavow her agreement to arbitrate her claim grounded in the *Truth in Lending Act*.<sup>174</sup> The agreement in the purchase contract of her mobile home stated:

All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration.<sup>175</sup>

The Court articulated a two-part test, citing to *Gilmer*, whereby “we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>176</sup>

Since the contractual language was explicit as to the agreement to arbitrate, the Court turned to the second question in holding that pursuing her statutory rights would not be onerous since any financial burden she would incur from sharing the costs of the arbitration are too speculative to justify invalidating the contractual arbitration clause.<sup>177</sup>

On an interesting note, in *Investment Partners*, the court discussed an arbitration provision that prohibited punitive damages but allowed for statutory treble damages in its arbitration awards.<sup>178</sup> The court reached the conclusion that the absence of punitive damages, although frequently awarded in this context, was not fatal to the arbitration clause because the availability of statutorily created treble damages was deemed to be punitive enough.<sup>179</sup>

The question presented post-*Pyett* is squarely addressed in *Dunnigan* and distinguished from *Randolph* since, in labor arbitration, only compensatory back pay damages are awarded to successful grievants, and the likelihood that punitive damages will not be awarded is more than mere speculation.<sup>180</sup> In labor arbitration, punitive damage awards must be authorized by the agreement of the parties. If a labor arbitrator were to award such damages *sua sponte*, his award might be found to not have drawn its essence from the contract. Since reasonable attorney’s fees and punitive damages are awarded to successful litigants in judicially adjudicated employment discrimination claims, similar remedies need to be available to prevailing grievants in labor arbitration of discrimination claims.

#### PRACTICAL IMPLICATIONS

In federal discrimination cases, punitive damages and attorney’s fees are statutorily authorized. Such clauses should contain provisions empowering arbitrators with the right to grant punitive damages and attorneys fees, as well as mandating published written opinions. It is important to note that Congress has clearly vocalized its intent that punitive damages advance the public

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<sup>174</sup> *Green Tree Financial Group v. Randolph*, 531 U.S. 79, 82 (2000); 15 U.S.C. 1601 et seq. (2006).

<sup>175</sup> *Id.* at 83, n.1.

<sup>176</sup> *Id.* at 90.

<sup>177</sup> *Id.* at 91.

<sup>178</sup> *Investment Partners L.P.*, 298 F.3d at 317.

<sup>179</sup> *Id.* at 318.

<sup>180</sup> ELKOURI & ELKOURI, *supra* note 3, at 1201,02.

interest.<sup>181</sup> It is essential that arbitration clauses waiving individual's rights to bring discrimination claims in court vindicate the public policy concerns of Congress. It is probable that most courts will find the absence of a contractual clause granting the arbitrator power to award punitive damages and attorney's fees sufficient to hold that an arbitration clause, explicit as it may be, unenforceable as a matter of law.

#### JUDICIAL REVIEW OF STATUTORY CLAIMS IN LABOR ARBITRATIONS

Section 10 of the Federal Arbitration Act defines the grounds upon which a court can vacate an arbitration award. It states that where the award was procured through fraud, evident arbitral partiality, refusal to postpone a hearing where justified, refusal to hear pertinent evidence, or exceeding his powers as granted by a contractual agreement, a court is within its rights to vacate the award.<sup>182</sup> These standards are more concrete than those applied in labor arbitrations and enunciated in the *Steelworker's* trilogy and its progeny.<sup>183</sup> While the majority in *Pyett* attempts to maintain that they are not substituting FAA section 10 for the established "essence of the contract" standard announced in *Steelworkers* and followed in *Lincoln Mills*, *Vaca v. Sipes*, and *Misco*, the Court's opinion in *Circuit City Stores v. Adams* leads this commentator to believe that they are ready to do so.<sup>184</sup>

In a post-*Pyett* decision, the Federal Court for the District of Minnesota reached the conclusion that:

If an arbitrator's actions can directly limit judicial review of federal antidiscrimination laws, deference to an arbitrator's interpretation and application of a CBA in a later-filed federal court action is warranted even if that deference precludes an employee's statutory claims.<sup>185</sup>

In holding that since "the arbitrators acted within the scope of their authority and arguably construed and applied the CBA,"<sup>186</sup> the Court, "affords substantial deference to their conclusions" thereby granting preclusive effect to the arbitrators ruling on the grievant's discrimination claim.<sup>187</sup>

The Supreme Court last spoke on the arbitral deference doctrine in *Major League Baseball Players Ass'n v. Garvey*, where they upheld an arbitrator's ruling in settling a dispute surrounding an arbitration settlement distribution plan.<sup>188</sup> In reversing the appellate court's ruling, the Supreme Court re-announced that "[c]ourts are not authorized to review . . . arbitrator's decisions on the merits . . . ."<sup>189</sup> The Court cited back to *Misco* and *Enterprise Wheel* in restating the long-standing "applying the contract and acting within the scope of his authority" test as well as the requirement

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<sup>181</sup> Joseph Z. Fleming, *Arbitration Update Fall 2008: Addressing Complaints*, 637 A.L.I. 665,66 (2008), see *United Paperworkers Int. Union v. Misco*, 484 U.S. 29, 43 (1987).

<sup>182</sup> Elkouri & Elkouri, *supra* note 3, at 67.

<sup>183</sup> *Id.* at 60.

<sup>184</sup> *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957); see e.g. *Vaca v. Sipes*, 386 U.S. 171 (1967); *United Paperworkers Int. Union v. Misco, Inc.*, 484 U.S. 29 (1987); see *Circuit City Stores v. Adams*, 532 U.S. 105, 113 (2001).

<sup>185</sup> *Tenolde*, Slip Op. No. 07-4075, 2009 WL 1653533, at \*10.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001).

<sup>189</sup> *Id.* at 509.

that the arbitrator be proscribed from “dispens[ing] his own brand of industrial justice.”<sup>190</sup> The Court answered a pressing question when it held that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determination, no matter how erroneous the arbitrator’s decision.”<sup>191</sup>

#### PRACTICAL IMPLICATIONS

It seems that the Court is applying the highly deferential standard granted to arbitral decisions as announced in the *Steelworkers Trilogy* and later labor law cases to all arbitrations. Such a standard is far more deferential than a clearly erroneous standard usually applied when appellate court reviews determinations of fact that were reached below. When parties to a collective bargaining agreement explicitly agree to arbitrate an individual’s statutory claims, they should be comfortable with the high deference courts give to arbitrator’s decisions and the truncated nature of judicial review.

#### CONCLUSION

If parties to a collective bargaining agreement want to assure that arbitration awards governing statutory claims of employees will be enforced, they should seek to construct arbitration clauses that include provisions for judicial type discovery, assurances that an individual is free to hire his own counsel, that an employee can continue with the arbitration even if the union refuses to do so, and Title VII type awards of both punitive damages and attorney’s fees to the winning grievant. If an arbitration clause contains these provisions the parties can probably be comfortable in their assumption that arbitration of discrimination claims will be compelled and arbitral awards will be enforced.

Alternatively, if the parties wish to maintain procedures for contract administration arbitrations that have worked well in the past, they might consider a two-track system where one set of standards and procedures for arbitration of those claims would exist side by side with a second procedure for employment discrimination claims which would afford procedures closely mirroring those recommended by this article.

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 510.