

Using *Pyett* to Counter the Fall of Contract-based Unionism in a Global Economy

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Structural changes in the economy that contributed to high unemployment have combined with global wage competition to destroy the contract-making and contract-enforcement powers of unions. Supporters of labor uniformly insist on defining the role of unions as contractual, and condemn the Supreme Court's Pyett decision that permits unions to take control of their members' legal claims. Yet unions' contractual powers have dwindled under the National Labor Relations Act, thereby leaving workers vulnerable to the bargaining demands of their employers. This article shows how Pyett can renew the importance of unions.

The Article argues that read appropriately, Pyett is positively transformative in the same way as the Steelworkers Trilogy. Although the Pyett decision did not offer a compelling justification for its conclusion that unions are authorized to bargain about antidiscrimination rights, unions' effective advocacy for their members' antidiscrimination claims may be a practical necessity today. The Article focuses on Pyett's potential to transform the workplace by eliminating the line between contract and legal disputes. Using the Trilogy as a backdrop, and antidiscrimination rights as an example, the article addresses the theoretical and practical concerns cited as obstacles to Pyett's viability. It provides original answers to the questions Pyett left open and provides a roadmap on how the decision may be implemented contractually to advance employers' and workers' interests.

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INTRODUCTION

In 1960, the Supreme Court declared in the *Steelworkers Trilogy* that arbitrators are better qualified than judges to interpret and apply collective bargaining contracts.¹ The Court announced that labor contracts reflected a system of self-government that incorporated implied norms and industry practices that are foreign to the competence of judges.² Because arbitrators have a unique understanding of the parties' private regulatory regime, according to the Court, their authority and decision making should be given great deference.³ This principle of deference to the arbitrator and the arbitral award, even in situations where the arbitrator exceeded his authority, would purportedly promote the national policy of peaceful settlement of labor disputes.⁴

The *Trilogy*'s sweeping endorsement of the arbitral forum for the resolution of contract disputes was alarming to labor relations professionals.⁵ Employers were particularly bewildered by the notion that a

1. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 569 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). In *Warrior & Gulf*, the Court concluded that arbitrators have a special competence in interpreting collective bargaining agreements that judges lacked. 363 U.S. at 579-82. Arbitrators were expected to draw on their knowledge of shop and industry practices that supplemented express contractual provisions, and judges were not familiar with this "law of the shop" which arbitrators were expected to apply. *Id.* at 580-82. So, unless the contract explicitly excluded certain matters from arbitration, the arbitrator, not judges, must resolve the dispute. *Id.*

2. See *id.* at 578-82.

3. *Id.* at 581-82.

4. See *id.* at 578-82. The Court determined that arbitration served as a peaceful dispute resolution process that advanced the national goal of avoiding labor strife. *Id.* at 578. Since it is the arbitrator's construction of the contract that the parties bargained for, a court has no business overruling the arbitrator because its construction differs from his. See *Enterprise Wheel & Car Corp.*, 363 U.S. at 599.

5. See Benjamin Aaron, *Arbitration in the Federal Courts: Aftermath of the Trilogy*, 9 UCLA L. REV. 360, 361 (1962) (noting that the Court's exuberance for arbitration in the *Trilogy* "has been widely

labor contract was broader than its express terms, and that employees may have rights greater than those consciously ceded by management during contract negotiations.⁶ The Court's broad restriction on judicial involvement in reviewing the arbitrator's work seemed irrational,⁷ and companies scrambled to reconfigure contracts to rein in arbitral prerogative.⁸ But this initial consternation proved misplaced, and today few question the success of the *Trilogy*.

Almost fifty years after the *Trilogy*, the Court decided to launch a second revolution in collective bargaining. In *14 Penn Plaza LLC v. Pyett*, the Court ruled that unions and employers may contract away employees' statutory right to bring their antidiscrimination claims before a judicial forum, forcing employees to resolve their statutory claims before arbitrators exclusively.⁹ This decision is revolutionary because it endorses arbitration, a process designed to deal with contract disputes that implicate group interests,¹⁰ for the resolution of personal statutory claims that may conflict with the interests of the collective.¹¹ The *Pyett* decision also seems to be

deplored by practitioners and occasionally regretted by arbitrators"); Bernard D. Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464, 473 (1961) (noting the irony of the *Trilogy's* conclusion that judges were "dwarfs" and arbitrators were "giants" when dealing with labor agreements, in light of the Court's *Lincoln Mills* holding that judges were qualified to make new laws to govern labor agreements); Russell A. Smith & Dallas L. Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 VA. L. REV. 831, 888-89 (1966) (noting that there was general apprehension about the effects of the *Steelworkers Trilogy*).

6. See Smith & Jones, *supra* note 5, at 888-89.

7. See Jerome S. Rubenstein, *Some Thoughts on Labor Arbitration*, 41 MARQ. L. REV. 695, 696 (1966) (observing that the *Trilogy* permits arbitrators to play King Solomon on the premise "that in some way labor arbitration transcends the mere resolution of contractual disputes").

8. See Smith & Jones, *supra* note 5, at 889-91.

9. 556 U.S. 247 (2009).

10. See *id.* at 269-71 (holding that "[i]t was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands"); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (holding that individualized contracts are trumped by the interests of the collective once a union is chosen as the employees' bargaining representative); see also *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975) (holding that principles of majority rule take precedence over the individual claims of employees). This priority of group interests in the collective bargaining process has been one of the unwavering principles of the NLR. See *Adams v. Entercom Kansas City, LLC*, No. 08-2643-JWL, 2009 U.S. Dist. LEXIS 101400, at *48 (D. Kan. Oct. 30, 2009) (holding, *inter alia*, that individual rights are "inextricably intertwined" with—and trumped by—the collective contract); *Lagrotte v. AMR Corp.*, No. 3:97-CV-1278-P, 1998 U.S. Dist. LEXIS 3439, at *11-13 (N.D. Tex. Mar. 12, 1998) (recognizing that when individual contracts conflict with the collective bargaining agreement, the collective agreement will prevail); *O'Neil v. Epic Power Servs., Inc.*, 620 F. Supp. 32, 35-36 (S.D. Ga. 1985) (holding that the national policy of collective bargaining supersedes individual contracts when the two conflict).

11. Title VII, for example, protects each "individual" from discrimination by employers, employment agencies, and unions. See 42 U.S.C. § 2000e (2012). This individualized protection extends even to facially neutral practices that do not produce discriminatory results. See *Connecticut v. Teal*, 457 U.S. 440, 452-55 (1982) (holding that even if an exam used to decide promotions did not have an overall discriminatory racial impact, it was nonetheless illegal if it arbitrarily prevented individual black employees from being promoted).

irrational and unworkable because labor arbitrators historically did not interpret and apply statutory law,¹² unions have the legal right to sacrifice individual rights in pursuit of collective interests,¹³ and the jurisprudence supporting arbitral resolution does not trump an employee's express statutory right to the judicial forum.¹⁴

Although all the angles have not yet been worked out, the *Pyett* Court assured us that arbitrators are qualified to decide statutory claims;¹⁵ that employees will lose no substantive right in the arbitral forum;¹⁶ that Congress placed several checks in the National Labor Relations Act (NLRA) and antidiscrimination law on unions sacrificing individual rights to promote group interests;¹⁷ and that the duty of fair representation will ensure union accountability for processing statutory claims.¹⁸ Because these declarations are remarkable and unprecedented, this article will explore their *bona fides*. This article will assess whether the Court got it right, as it did in the *Trilogy*, and whether workers therefore need not feel threatened by the prospect of union control of their antidiscrimination rights.

This article argues that the *Pyett* decision can positively revolutionize workplace dispute resolution in the same way the *Steelworkers Trilogy* did.¹⁹ It argues that unions and employees should embrace the *Pyett*

12. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Court noted:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597.

13. See *Pyett*, 556 U.S. at 255-57 (holding that unions have broad discretion when contracting with employers, and can trade an employee's statutory forum rights for some group benefit the union desires).

14. Unlike the *Trilogy's* premise that arbitration promotes labor peace and is the substitute for industrial strife, *Warrior & Gulf*, 363 U.S. at 578-82, the *Pyett* decision cites no national antidiscrimination policy that will be advanced by arbitral resolution of such disputes. Instead, the Court inferred authority for forum waivers because Congress did not expressly prohibit them, and summarily concluded that the remedial and deterrent functions of antidiscrimination law will not be undermined by a switch to arbitration. See *Pyett*, 556 U.S. at 258; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-33 (1991).

15. See *Pyett*, 556 U.S. at 268-69 (stressing that the old mistrust and suspicions about the competency of arbitrators is misplaced and has long been rejected).

16. See *id.* at 265-66 (holding that a forum change can be effectuated without contravening any federal substantive guarantees).

17. See *id.* at 271-72.

18. See *id.* (concluding that the duty of fair representation imposed on unions is a sufficient deterrent to union mishandling of statutory grievances).

19. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (holding that the national policy in favor of arbitration would be undermined if courts were allowed to determine the merits of grievances when an arbitration clause arguably covered the dispute); *United Steelworkers v. Warrior &*

decision and push it to its interpretive extremes. If this is done, unions, their members, and employers can all benefit, and a new revolution in unionism and labor arbitration can occur. Theoretically, *Pyett* can be made a *raison d'être* for unions. Yet its practical success depends on the degree to which unions and their members recognize that a united front on workplace civil rights provides a basis for proving that unions have continuing relevance in the private-sector workplace.

To show the potential of *Pyett*, the article will first detail the rules of forum waiver as announced by the Court. Part I will start by exploring the Court's employment arbitration doctrine based on the *Gilmer* decision. Then, Part I will argue that the Court did not weave employment discrimination claims into the existing framework of traditional labor arbitration. Instead of adopting the existing contract-based system of labor arbitration, the Court *expanded* the contract-based rules to accommodate statutory discrimination claims.²⁰

The second Part of the article demonstrates that *Pyett's* expansion of labor arbitration rules to include statutory claims need not produce doomsday results for discrimination victims. In fact, the decision has the potential to do the opposite. This Part addresses the dilemma unions face now that forum waivers are subjects of mandatory bargaining, the historic tension between unions and discrimination victims,²¹ the tension between individual rights and collective interest, the suitability of the arbitral forum for the resolution of discrimination claims, and the perceived demand on union resources. Despite these difficulties, Part II argues that national

Gulf Nav. Co., 363 U.S. 574 (1960) (holding that unless the parties specifically exclude certain matters from arbitration, courts must defer to the special competence of arbitrators to interpret and apply the parties' unique system of self-governance established by the collective bargaining contract); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (holding that arbitrators can give remedies even after the contract has expired, and can consider extra-contractual sources as long as the award draws its essence from the contract).

20. See *Pyett*, 556 U.S. at 255-57. The Court specifically confirmed the union's status as the exclusive representative of its members, its broad bargaining authority during contract negotiations, and its obligation to represent its members fairly, impartially, and in good faith. *Id.*

21. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 749-50 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974) (commenting that in light of past racially discriminatory practices by unions, no harmony of interest between the union and employees can be presumed in racial discrimination disputes); *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650, 653-54 (7th Cir. 2006) (holding that the union was liable under Title VII for making a conscious decision to do nothing about the racially and sexually discriminatory behavior of its members with full knowledge of its power to punish the wrongdoers). In *Barrentine*, the Court noted:

Against a background of union discrimination, Congress was aware that, in the context of claims under the Civil Rights Act, unions sometimes had been the adversary of workers. Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts.

Barrentine, 450 U.S. at 750.

antidiscrimination policy may be advanced by arbitral resolution of discrimination disputes.

The third Part shows the incentives unions have to serve as gatekeepers of employees' statutory rights. It details how unions can evaluate and pursue legitimate claims in the same way private attorneys would. This means that unions can drop claims short of arbitration without exposing themselves to discrimination lawsuits or allegations that they breached the duty of fair representation. Further, unions can drop claims without waiving employees' substantive rights. The article concludes that the *Pyett* principles' success will require a reformulation of the union's role in the workplace but that the survival of unions depends on such changes. Structural changes in the economy and global wage competition have made traditional contract-based unionism bankrupt;²² unions must evolve and provide legal services in order to remain important to workers.

I.

INTERPRETING *PYETT*

In *14 Penn Plaza LLC v. Pyett*, the Supreme Court ruled that unions are empowered to bargain away their members' statutory right to bring age discrimination claims in court.²³ In exchange for employer concessions, unions can agree that all of their members' workplace claims will be resolved by arbitration exclusively.²⁴ The Court added, however, that unions cannot prospectively waive their members' substantive antidiscrimination rights.²⁵ This means that unions cannot make arbitration agreements that fail to provide for statutory damages, attorney fees, and discovery rights, among other things.²⁶

22. See Susan R. Hobbs, *Moderation Likely to Prevail in Active Year of 2012 Collective Bargaining*, 15 DAILY LAB. REP. (BNA) S-47 (Jan. 24, 2012) (discussing how foreign competition, high unemployment and a weak economy will adversely affect unions at the bargaining table); see also Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 469-70 (1988) (observing that free trade policies have strengthened the bargaining clout of employers by allowing businesses to easily shift operations to low cost localities when faced with union demands); Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 950 (1993) (noting that employers now pursue a low wage strategy in part because product market competition has increased with globalization).

23. *Pyett*, 556 U.S. at 257-58, 274 (holding that the bargain to arbitrate "must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep").

24. The Court concluded that "[a]s in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange." *Id.* at 257.

25. See *id.* at 265 (confirming the Court's prior holding in *Alexander v. Gardner-Denver*, 415 U.S. 36, 51-52 (1974), that federal antidiscrimination rights are not susceptible of prospective waiver). The *Pyett* Court noted that by agreeing to arbitrate, an employee only gives up his right to seek relief in court, and retains all substantive rights conferred by statute. See *id.* at 265-66.

26. See *id.* at 273 ("[A] substantive waiver of federally protected civil rights will not be upheld.").

Pyett's far-reaching principles create doubt about the decision's legitimacy and viability. This is complicated by *Pyett's* political backdrop of a conservative Court majority that adopted the views of employers and the United States Chamber of Commerce, while rejecting those of unions and the neutral National Academy of Arbitrators.²⁷ Further, *Pyett* toppled employment discrimination laws from their pedestal by holding that such laws are no different than other workplace terms that unions and employers have traditionally traded.²⁸ And, by holding that the broad benefits of unionism outweigh specific losses of individual liberty, the decision appears to brush aside the fact that labor law grants unions the power to sacrifice employees' antidiscrimination rights in pursuit of self-interest or the interest of the collective.²⁹

For many Court-watchers, the decision's failure to account for the differences between contract labor arbitration and statutory employment arbitration threatens workplace protections afforded to employees and sows confusion.³⁰ The general discontent with *Pyett* has triggered legislative

27. See Brief for Chamber of Commerce of the United States of America as Amici Curiae Supporting Petitioners, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (No. 07-581), 2008 U.S. S. Ct. Briefs LEXIS 440, at *6-8 (arguing that employees give up no substantive right when their union agrees to arbitrate their claims, no conflict of interest can be presumed between the worker's individual interests and the union's collective goals, and the duty of fair representation is available to protect employees from union misconduct); see also Brief Amicus Curiae of the National Academy of Arbitrators in Support of Respondents, *Pyett*, 556 U.S. 247 (No. 07-581), 2008 U.S. S. Ct. Briefs LEXIS 587, at *21-31 (arguing that it is too dangerous to give unions control of their members' judicial forum rights subject only to the duty of fair representation, harmony of interest between employees and unions cannot be presumed, and that wide union discretion to process claims under current law allows unions to sacrifice their members' substantive rights). Even union *amici* argued that unions should not be given the power to control their members' judicial forum rights because of the inherent conflict between the two groups and the ineffective oversight provided by the duty of fair representation. See, e.g., Brief of the American Federation of Labor and Congress of Industrial Organizations and Change to Win as Amici Curiae in Support of Respondents, *Pyett*, 556 U.S. 247 (No. 07-581), 2008 U.S. S. Ct. Briefs LEXIS 621, at *5-6, 18-23; Amicus Curiae Brief of National Employment Lawyers Association et al. as in Support of Respondents, *Pyett* 556 U.S. 247 (No. 07-581), 2008 U.S. S. Ct. Briefs LEXIS 620, at *46-53 (arguing that unions have a conflict of interest problem in waiver situations that cannot be cured by the duty of fair representation).

28. See *Pyett*, 556 U.S. at 256 ("The decision to fashion a [CBA] to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery."). Justice Souter had great difficulty accepting this assessment of the status of statutory civil rights, particularly in light of Court precedents holding that antidiscrimination rights are special. See *id.* at 281-82 (Souter, J., dissenting).

29. See *id.* at 271 (stating that Congress decided "that the benefits of organized labor outweigh the sacrifice of individual liberty" and any conflict of interest argument is a meritless collateral attack on the NLRA).

30. See Kenneth M. Casebeer, *Supreme Court Without a Clue: 14 Penn Plaza LLC v. Pyett and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U. MIAMI L. REV. 1063, 1064 (2011) (contending that the Court confused individual rights and collective rights when deciding the *Pyett* case); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 843, 849, 851 (2010) (arguing that there is no statutory or common law support for the holding in *Pyett*, and the decision will create tremendous problems that can only be resolved by litigation); J. Nicholas Haynes,

proposals to undo it.³¹ In the judicial branch, judges have limited the impact of the decision by limiting the union's ability to drop a grievance short of arbitration, construing it as a prohibited waiver of employees' substantive rights.³² Further complicating matters is another judicial theory where unions may drop claims, but then union members are presumptively entitled to independently pursue them.³³

Despite the decision's unpopularity, its transformative potential cannot be denied because it portends a precedent-setting unification of labor and employment law. Read broadly, *Pyett* holds that when unions contract for forum waivers, their members are bound to arbitrate their discrimination claims even if their union does not want to participate in the case.³⁴ In effect, as long as the arbitration clause delivers a forum with substantive rights intact, with or without the union, employees will be deemed capable of effectively vindicating their statutory rights.³⁵ This is a remarkable turnaround from the Court's position in 1974 that unions were not empowered to bargain away their members' statutory individual rights.³⁶

On Precarious Ground: Binding Arbitration Clauses, Collective Bargaining Agreements, and Waiver of Statutory Workplace Discrimination Claims Post-Pyett, 2011 J. DISP. RESOL. 225, 225, 238 (2011) (arguing that the *Pyett* decision has created a great deal of confusion because it left many questions unanswered and transformed a forum designed to address contractual disputes into an arena where employee rights may be sacrificed by unions and employers). *But see* David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 429, 450, 457 (2010) (contending that although the Court was activist, political, and ideological in deciding *Pyett*, the decision does not spell doom for employees' antidiscrimination rights because it will have limited application).

31. *See* Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011). The companion Senate Bill is S. 987.

32. *See* *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH-FM, 2009 U.S. Dist. LEXIS 42944, at *9 (S.D.N.Y. May 19, 2009); *Morris v. Temco Serv. Indus., Inc.*, No. 09 Civ. 6194 (WHP), 2010 U.S. Dist. LEXIS 84885, at *11-12 (S.D.N.Y. Aug. 12, 2010); *De Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198, 205-207 (D. Mass. 2011).

33. *See* *Gildea v. Bldg. Mgmt.*, No. 10 Civ. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662 (S.D.N.Y. Aug. 16, 2011).

34. *See* *Pyett*, 556 U.S. at 258-59 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-33 (1991)). While the Court declined to address the power of unions to drop grievances, saying that contention was pure speculation in this case, it noted that the real issue is whether the collective bargaining contract allows the union to prevent its members from vindicating their statutory rights. *Id.* at 273-74.

35. *See id.* at 258-59, 273-74.

36. *See* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.").

A. Arbitration Law for Statutory Claims

In *Pyett*, the Court merged the law governing union waivers with the *Gilmer* rules governing individual employment waivers.³⁷ Instead of carving out a unique set of principles for unions, the Court simply layered the rules for at-will employees' waivers onto the collective bargaining process.³⁸ The effect is that all of the principles of employment arbitration are applicable to union waivers.³⁹

1. Employment Arbitration: The *Gilmer* Rules

Gilmer held that absent a congressional mandate to the contrary, individual workers can agree to trade their rights to a judicial forum in return for arbitral resolution of disputes with their employers.⁴⁰ The theoretical foundation for *Gilmer* is that loss of the judicial forum does not equate with loss of statutory or substantive rights.⁴¹ As long as the arbitration agreement permits employees to vindicate their statutory antidiscrimination rights in the arbitral forum, those laws will serve their remedial and deterrent functions.⁴² The *Gilmer* Court concluded that the switch to arbitration was a change in process, not a redaction of substantive protection; therefore, absent some legislative restriction, employees can agree to a forum change.⁴³

In *Gilmer* the Court signaled that judicial hostility to arbitral resolution of statutory discrimination claims had ended.⁴⁴ The Court ruled that arbitrators are competent at interpreting statutory law, arbitral forums are conducive to handling statutory claims, and employees' statutory rights are

37. See *Pyett*, 556 U.S. at 258 (“The *Gilmer* Court’s interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”).

38. See *id.* at 258-59. The Court ruled that that as long as the union waiver did not cede substantive rights, it will be as valid and enforceable as waivers made in the *Gilmer* non-union context. See *id.*

39. See *id.*

40. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that an objecting employee needs to prove that Congress intended to preclude waiver of the judicial forum for a statutory claim by reference to the statutory text, its legislative history, or by showing an “inherent conflict” between the purposes of arbitration and the purposes of the statute). The Court then concluded that Congress never intended to preclude arbitral resolution of ADEA claims. *Id.* at 29.

41. See *id.* at 26.

42. *Id.* at 28.

43. *Id.* at 26-28.

44. See *id.* at 24-25 (citing the FAA and Court precedents as evincing a liberal policy in support of arbitration).

protected in arbitration.⁴⁵ Citing to the Court's approval of arbitration agreements in the commercial contract and securities contexts, the Court announced that it would now favor arbitration agreements in the employment context.⁴⁶

Evidence suggests that the contractual powers conferred on employers by *Gilmer* permit employers to erect obstacles to employees' vindication of their statutory rights. For example, based on the *Gilmer* principles, employers do not need employees' express consent to subject them to arbitration,⁴⁷ nor do they need to provide consideration or something of legal value to bind employees to their arbitration policies.⁴⁸ *Gilmer* also allows employers to unilaterally implement dispute resolution systems that provide employees with fewer rights than what is expressed in statutory law.⁴⁹ By definition, employees lose their right to a jury, appellate review, and public development of the law when they become involuntarily bound to an employer's decision to implement an arbitration policy. And some employers have gone further and drafted mandatory arbitration policies that severely restrict or eliminate employees' statute of limitations rights, discovery rights, damages entitlements, and attorney fee entitlements, among other things.⁵⁰ Such restrictive policies directly rob employees of

45. See *id.* at 30-32 (rejecting concerns about arbitral bias, limits on discovery, and the absence of opinions and publicity as "far out of step" with the Court's sentiments that the arbitral forum is suitable for resolving statutory disputes).

46. See *id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 634 (1985) (commercial contract arbitration); Order Approving NYSE, NASD, and American Stock Exchange Proposed Rule Changes Relating to Arbitration Processes, 54 Fed. Reg. 21144, 21149-21151 (1989)).

47. See *Richardson v. V.I. Port Auth.*, No. 2009-136, 2010 U.S. Dist. LEXIS 40787, at *32-33 (D.V.I. Apr. 21, 2010) ("In the wake of *Gilmer*, numerous courts have extended its holding to find that a broadly worded arbitration clause governs disputes beyond those involving the terms of the contract, including discrimination claims.").

48. See *Sprinkle v. Gen. Dynamics Land Sys.*, No. C09-16722, 2010 U.S. Dist. LEXIS 43157, at *8-10, 26 (W.D. Wash. Mar. 30, 2010) (holding that illusory promise of at-will employment is sufficient consideration for an employee's promise to waive his judicial forum); *Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 819 (10th Cir. 2008) (holding that an employer's reciprocal agreement to arbitrate can constitute consideration so long as the employer does not have the unilateral power to "terminate or modify the arbitration agreement once the employee's claim has accrued").

49. For example, employers are not required to include in their arbitration policies the precise statute of limitations, discovery rights, damages provisions or attorney fees and forum costs provisions of the respective antidiscrimination statutes. See *Farber v. Menard, Inc.*, 367 F.3d 1048, 1053-55 (8th Cir. 2004) (upholding an arbitration agreement that required the employee to pay all of his attorney's fees and half of the arbitrator's fee). As long as an illegal arbitration policy can be modified or reformed by the court or arbitrator to permit vindication of statutory rights, it may be upheld. See *Ragone v. Atlantic Video*, 595 F.3d 115, 123-24 (2d Cir. 2010); *Jackson v. Cintas Corp.*, 425 F.3d 1313-17 (11th Cir. 2005); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 287-88 (3d Cir. 2004).

50. See *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 197 (3d Cir. 2010) (involving an arbitration policy that gave the employee only five days to complain); *McDaniels v. Hospice of Napa Valley*, No. C06-2558 CW, 2006 U.S. Dist. LEXIS 52752, at *5 (N.D. Cal. July 19, 2006) (involving an arbitration policy that prohibited discovery prior to the hearing); *Plaskett v. Bechtel Int'l Inc.*, 243 F.

substantive rights⁵¹ or may materially limit employees' ability to vindicate their discrimination rights in arbitration.⁵²

Gilmer, in effect, provided a platform from which to view how employers may manage their Court-created prerogative to require at-will employees to relinquish their judicial forum as a condition of employment. But although *Gilmer* expanded employers' common law prerogative to impose arbitration policies, it did not endorse overreaching.⁵³ To the extent that employer policies unduly limit employees' ability to prosecute their claims or recover what is guaranteed by statute, courts have generally found them to be unconscionable.⁵⁴ *Gilmer* therefore stands for the proposition that employees forced to arbitrate must get both the opportunity to advance their case and the recovery options that would otherwise be available to them in court. Anything less would be a prospective or substantive waiver.

Gilmer's broadening of the employer's common law prerogative to contract away workers' antidiscrimination forum has demonstrated workers' vulnerability because of the potential for abuse.⁵⁵ The prospect of employers overreaching in their arbitration policies has highlighted the need for employee-protective protocols in a labor market that continues to struggle with discriminatory practices.⁵⁶ It is therefore instinctive to view with suspicion the Court's decision to adopt the *Gilmer* principles for union waivers. While Court critics were still fretting about the abuses that *Gilmer*

Supp. 2d 334, 340-41 (D.V.I. 2003) (involving an arbitration agreement that required each party to pay its attorney fees regardless of the outcome of the case); *Derrickson v. Circuit City Stores, Inc.*, No. DKC 95-3296, 1999 U.S. Dist. LEXIS 21100, at *14 (D. Md. Mar. 19, 1999) (involving an arbitration provision that capped punitive damages and limited back pay to one year); *Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669, 675, 682-83 (Cal. 2000) (involving an arbitration policy that excluded punitive damages and limited any compensatory damages award); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 91-92 (Cal. Ct. App. 2004) (involving an arbitration policy that limited discovery to two depositions).

51. See *Hall v. Treasure Bay V.I. Corp.*, 371 F. App'x 311, 312-13 (3d Cir. 2010) (holding that an arbitration agreement that required a low-wage employee to pay the entire cost of arbitration should she lose was unconscionable).

52. See *Hooters v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (holding that an arbitration agreement that authorized the company to pick the entire panel of arbitrators from which three will be selected was "crafted to ensure a biased decision-maker").

53. *Gilmer* implicitly rejected arbitration policies that impeded the congressional goals of antidiscrimination law by requiring that such policies not deter or limit employees' ability to vindicate their statutory claims. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

54. See *supra* notes 51-52.

55. See *supra* notes 51-52.

56. An example of such a protocol was provided by the Dunlop Commission. See U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 56-57 (1994). The Dunlop Commission suggested that, in order to be fair, private arbitration systems to resolve statutory disputes need to include (1) a qualified neutral arbitrator, (2) a fair and simple discovery method, (3) a fair cost sharing system, (4) a right to independent representation, (5) remedies equal to those available in litigation, (6) a reasoned written opinion, and (7) limited judicial review to ensure compliance with the law. *Id.*

countenances, the Court expanded its waiver theory in *Pyett* to also give unions the prerogative to control their members' dispute resolution forum.

2. Labor Arbitration: The *Pyett* Rules

Observers have voiced concern that the *Pyett* decision is simply forcing statutory claims into a system that was designed for contract disputes.⁵⁷ But *Pyett* could be read differently. The decision can be interpreted as confirming the traditional principles of labor arbitration and supplementing them with the *Gilmer* principles for statutory cases.

In *Pyett*, the Court concluded that grievance arbitration is a mandatory subject of bargaining.⁵⁸ The Court, however, did not address whether a union and its members are bound to honor a unilaterally implemented arbitration policy that is the product of a bargaining impasse.⁵⁹ This is a particularly interesting question because arbitration policies generally require the parties' consent in order to be binding.⁶⁰ Yet, when a topic is a subject of mandatory bargaining, the employer can unilaterally implement its last good faith proposal upon reaching impasse.⁶¹ After *Pyett*, this would mean that employers can always implement forum waiver policies, if not through consensual agreements with unions, then involuntarily after bargaining to impasse.⁶² Once implemented, the mandatory arbitration policy becomes a "contract term" even though the union did not expressly consent to it. While this may seem problematic, on the other hand, because

57. See Haynes, *supra* note 30.

58. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 256 (2009).

59. Under prevailing labor laws, employers are free to unilaterally implement their pre-impasse proposals and break the impasse after deadlocking on mandatory subjects. See LEE MODJESKA, ABIGAIL COOLEY MODJESKA & ZACHARY L. KARMEN, FED. LAB. LAW: NLRB PRAC. § 9:9 (2012); see also W. Newspaper Publ'g Co., 269 N.L.R.B. 355, 355 (1984) ("It is well settled that, after bargaining to an impasse, an employer does not violate Section 8(a)(5) of the [NLR] by making unilateral changes, as long as the changes are reasonably encompassed by the employer's pre-impasse proposals."), supplemented by 276 N.L.R.B. 1566.

60. See Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). But the principle of actual consent is not absolute. In *John Wiley & Sons Inc. v. Livingston*, 376 U.S. 543, 548 (1964), the Court ruled that national labor policy may require a successor employer to arbitrate grievances under a collective bargaining contract it had not consented to. See also *Nolde Bros., Inc. v. Local 358, Bakery and Confectionary Workers Union*, 430 U.S. 243, 255 (1977) (holding that the duty to arbitrate may survive contract expiration); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 209 (1991) (narrowing the scope of arbitrable rights that survive contract expiration to "vested" rights).

61. See *Atrium of Princeton, LLC v. NLRB*, 684 F.3d 1310, 1317 (D.C. Cir. 2012) (citing *Mail Contractors v. NLRB*, 514 F.3d 27, 31-32 (D.C. Cir. 2008) (noting that when a union and employer are at a bargaining impasse, "[t]he employer then may make unilateral changes that are reasonably comprehended within [its] preimpasse proposals").

62. See *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1164-66 (D.C. Cir. 1992) (holding that an employer may be able to hold out to an impasse over mandatory subjects of bargaining, even over proposals which would give it discretion over mandatory subjects).

of the mandatory subject classification, an employer could not circumvent the union and make side agreements directly with union members about arbitrating statutory claims.⁶³

The *Pyett* decision confirmed that the union is the employees' exclusive representative that will make decisions about mandatory subjects of bargaining, including its members' wages, hours and other working conditions.⁶⁴ It then broadened the union's bargaining authority by holding that the union's contractual powers extend to its members' statutory forum rights.⁶⁵ Further, the Court reaffirmed the obligation of unions to represent their members fairly, impartially and in good faith.⁶⁶ By affirming the traditional principles of labor arbitration, the *Pyett* rules permit a relatively painless transition to arbitrating statutory claims.⁶⁷

In addition to leaving the law of labor arbitration intact, the Court decided that the principles of *Gilmer* also govern the behavior of unions.⁶⁸ Some may see this as unworkable because under traditional labor laws, unions have wide discretion in deciding whether to bring claims, or whether to drop claims they have brought prior to arbitration.⁶⁹ By contrast, in personal waiver cases, the employee is guaranteed the arbitral forum, and has total control over the decision whether to advance his case.⁷⁰ Further, in personal waiver cases, the employee can presume that his representative or

63. See *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 346 F. App'x 602, 603 (2d Cir. 2009) (holding that employer side-deals for arbitration are unenforceable because this is a mandatory bargaining subject over which unions have exclusive authority). The Supreme Court confirmed this conclusion in *Pyett*, 556 U.S. at 255-56.

64. See *Pyett*, 556 U.S. at 255-56.

65. See *id.* at 256-57.

66. *Id.* at 256.

67. See *id.* at 255-57. The Court specifically confirmed the union's status as the exclusive representative of its members, its broad bargaining authority during contract negotiations, and its obligation to represent its members fairly, impartially, and in good faith. *Id.*

68. See *id.* at 258 (holding that the *Gilmer* principles are equally applicable to collective bargaining situations).

69. See *Air Line Pilots v. O'Neill*, 499 U.S. 65, 78 (1990). The Court held:

Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between courts and labor unions as similar to that between the court and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude the negotiators need for the effective performance of their bargaining responsibilities.

Id.

70. See *infra* text accompanying notes 84-94; see also Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 80-81, 83, 86-89 (2009) (noting that for organized workers, their unions control whether and how an issue is arbitrated while individual workers control the decision to proceed in arbitration if they are not represented by a union).

lawyer will make decisions based on the merits of his case.⁷¹ A union member, however, cannot always be sure that his union is relying on legitimate claim-related considerations when making advocacy decisions.⁷² Unionized workers may face the prospect of hostility from their representative emanating from discriminatory animus⁷³ or antagonistic group interests.⁷⁴ This could result in no case being filed or a decision to perfunctorily prosecute or drop the discrimination claim.

The *Pyett* Court's failure to effectively address the historical and inherent tension between individual rights and union interests has left doubts about the viability of union waivers. However, the prospect of union abuse could be controlled if *Pyett* is understood to hold that, in order to be valid, union waivers *must* deliver the employee into the arbitral forum with substantive rights intact. This means that the union waiver provision must permit the employee his day before the arbitrator, even if the union drops the case because it harbors discriminatory animus or determines that the employee's case is weak or frivolous.⁷⁵ This is the *quid pro quo*: if the union and employer want to trade employees' judicial forum, then the arbitration agreement must also permit the employee to proceed in front of an arbitrator if the union declines to represent him.⁷⁶ All of this can be

71. See *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 585-86 (1990) (explaining that while a union may consider collective interests when representing an individual, a private lawyer's ethical duties preclude representation when self-interest or other conflicts exist); see also MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1)(2).

72. See *Berger*, *supra* note 70, at 83-84.

73. See *Blue v. Int'l Bhd. of Electrical Workers, Local 159*, 726 F. Supp. 2d 1009, 1011-15 (W.D. Wis. 2010) (involving a union business manager who refused to refer-out black electrician for work on racial grounds and then retaliated against the union secretary when she questioned his motivation); *Slaughter v. Fred Weber, Inc.*, 570 F. Supp. 2d 1054, 1056 (S.D. Ill. 2008) (involving a union that denied black females the opportunity to sign work referral sheets and referred them for temporary and short-term jobs while referring white males to full-time and permanent positions).

74. See *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650 (7th Cir. 2006) (involving a union that refused to help a black female employee when senior white employees refused to give her on-the-job training because of her race and gender).

75. This relaxation of the union's power is necessary to address the concerns the Court raised in 1974 in *Alexander v. Gardner-Denver*, 415 U.S. 36, 58 n.19 (1974). There, the Court confronted the issue of the manner and extent to which the grievance is presented in view of the unions' power to subordinate individual rights in pursuit of collective interests, and in light of unions' past discriminatory practices against racial minorities. *Id.* An arbitration policy that guarantees the employee his day before the arbitrator takes away the union's power to drop the case for improper reasons.

76. See *id.* (expressing concern that the collective interest of the union will discriminatorily overpower that of the individual employee). As the exclusive representative, the union can decide for legitimate administrative reasons that it does not want to advocate. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69-70 (1975) (holding that union members do not have separate negotiation rights); *NLRB v. Allis-Chalmers*, 388 U.S. 175, 180 (1967) (noting that, by prioritizing collective bargaining, Congress chose to subordinate the rights of union members to the discretion of their chosen representative). While under extant labor laws unions and employers generally do not permit employees to go it alone or to advocate with private counsel, this is the price the parties must pay if they wish to trade employees' statutory forum rights. See Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National*

accomplished by contract, and *Pyett* should be read to require these conditions as a prerequisite to a union waiver's legitimacy.⁷⁷

This approach departs from current labor laws, which generally do not dictate the content of labor contract provisions, and lodge the discretion to file grievances and advocate in arbitration solely in the hands of union officials, subject to the duty of fair representation.⁷⁸ This modification to bargaining discretion is also binding on employers⁷⁹ and is narrowly limited to instances when the parties desire to arbitrate statutory claims. The *Pyett* modification of a union's authority to drop claims is a limited one that is restricted to instances when the union is contractually required to represent employees in discrimination cases.⁸⁰ In all other instances, the union's power to control the filing or blocking of grievances remains intact, and there are no amendments to extant labor laws.⁸¹

B. Lower Courts' Post-Pyett Responses

Interpreting *Pyett* as requiring arbitration agreements that guarantee union members the arbitral forum will bring clarity to judicial disagreement over the power of unions to control their members' substantive rights. The Court did not specifically address whether a union's decision to drop a case

Labor Relations Act, 40 UCLA L. REV. 571, 628 (1992) (noting that many unions view employee direct-dealing with employers as undermining the union's role).

77. Although the Court avoided the contention that the union's blocking power constituted a substantive waiver, it referenced respondents' argument that if the employees were permitted by contract to go it alone, they would not be prevented from vindicating their statutory rights. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009).

78. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (holding that union employees do not have an absolute right to arbitrate their grievances). Unions also have the discretion to deny their members private counsel for claims they are pursuing or claims they dropped. See *Morris v. United Parcel Serv.*, No. 98CIV7353KMWRLE, 2001 WL 705852, at *2 (S.D.N.Y. June 13, 2001) (“[T]here is no right for an individual grievant to be represented by his own counsel at any stage of the grievance procedure, including arbitration”); see also *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985); *Bynog v. SL Green Realty Corp.*, No. 05 Civ. 0305 (WHP), 2007 U.S. Dist. LEXIS 19110, at *36-37 (S.D.N.Y. Mar. 20, 2007).

79. In *Emporium Capwell Co.*, 420 U.S. at 989, the Court ruled that employers are not required to deal directly with unionized employees about their grievances. This freedom to deal exclusively with the union extends to instances when the union releases the employee to use a private lawyer. See, e.g., *General Drivers Local 984 v. Malone & Hyde, Inc.*, 23 F.3d 1039, 1043 (6th Cir. 1994); see also *Payne v. Local Lodge 698*, 856 F.Supp.2d 915, 923 (E.D. Mich. Mar. 6, 2012) (reaffirming that principles of collective bargaining and the NLRA are violated when an employer disregards a union chosen by its workers, and negotiates with them directly). *Pyett* seems to modify this general rule in the context of statutory claims.

80. While unions are not required to take all contractual claims to arbitration, see *Vaca*, 386 U.S. at 191, they must deliver employees with statutory claims to the arbitral forum. Cf. *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (“[A]n arbitration agreement [involving a non-union employee] that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.”).

81. See *Vaca*, 386 U.S. at 191.

or its power to block arbitration also constitutes a substantive waiver⁸² since such actions may deny the employee a forum to vindicate his rights.⁸³ Some courts have theorized that the blocking power of unions does not extend to antidiscrimination rights. In *Gildea v. Building Management*, the collective bargaining contract contained an arbitration provision that effectively waived the employee's court forum rights.⁸⁴ The grievance procedure also provided that only the union could choose to bring claims or compromise or settle them.⁸⁵ When the union did not file a discrimination case for the employee, the plaintiff-employee argued that this constituted a substantive waiver that released him to pursue his case in court.⁸⁶

However, the district court disagreed, holding that the employee failed to prove that the contract prevented him from effectively vindicating his statutory rights.⁸⁷ To prove that the forum waiver contract prevents vindication, the employee must show alternatively that the contract imposed high arbitration costs, improperly shortened the statute of limitations for filing a claim, provided for a wrongful award of attorneys' fees, or otherwise robbed the employee of a statutory right.⁸⁸ The employee here was unable to show that any of these statutory rights were vitiated, in part because the contract provided that the arbitrator must apply the appropriate law.⁸⁹ On the question of the union's refusal or failure to arbitrate, the court found that the contract did not *require* union participation at arbitration.⁹⁰

82. For a definition of this term, see notes 25-26 and accompanying text.

83. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273-74 (2009). The Court concluded that it could not resolve this issue because it involved disputed factual questions that were not briefed or properly presented to the Court. *Id.* This hesitation is interesting in view of the Court's willingness to take on issues not presented in other cases. For example, in *Patterson v. McLean Credit Union*, a Section 1981 employment discrimination case, the Court ordered the parties to brief and argue the legitimacy of *Runyon v. McCrary*, which held that Section 1981 prohibits racial discrimination in the making and enforcement of private contracts, even though that issue was not before the Court. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171-72 (1989) (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976)) *superseded by statute on other grounds*, Pub. L. No. 102-166, 105 Stat. 1071. See also *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 982, 994-98 (1988), a decision in which the Court articulated more stringent proof responsibilities for plaintiffs in disparate impact cases, although the issue before the Court was whether disparate impact analysis as articulated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was applicable to subjective employer decision making.

84. See *Gildea v. Bldg. Mgmt.*, No. 10 Civ. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662, at *12-13 (S.D.N.Y. Aug. 16, 2011). The contract provided that grievance arbitration is the sole and exclusive remedy for discrimination claims. *Id.*

85. See *id.* at *13-14. The contract provided that the right to bring claims was vested in the union exclusively, and individual employees could not bring claims, or compromise or settle them without the union's written permission. *Id.*

86. See *id.* at *5. The employee argued that this scenario is an exception to the *Pyett* principle that union waivers are binding. *Id.*

87. See *id.* at *12-13, 16 ("No party has put forth evidence showing that the CBA prevents Plaintiff from effectively vindicating his statutory rights through arbitration as an individual.").

88. See *id.* at *11.

89. *Id.* at *16.

90. See *id.* at *16.

Although the contract provided that only the union can bring or settle claims, the court found that the contract was silent on whether a claim could proceed if the union dropped it, therefore the possibility existed that the employee could proceed without the union.⁹¹

In addition to finding that a contractual provision that gave the union exclusive control of discrimination claims did not “foreclose the possibility” of the employee going it alone, the *Gildea* court found that the union’s blocking power only extended to contract rights, not to statutory individual claims.⁹² The court reasoned that statutory rights are independent of contract rights, which the union controls. Therefore, as long as the company was willing to proceed to arbitration with the employee and without the union, the waiver provision was effective.⁹³ Since the employer had invoked the arbitration process, the employee failed to show that the contract prevented him from effectively vindicating his statutory rights in arbitration.⁹⁴ In effect, the court held that the union’s exclusive control of contract grievance arbitration did not extend to statutory claims.

The *Gildea* court’s theory that a union’s control of its members’ statutory rights is limited to contracting away their court forum and does not extend to the prosecution of their claims has no precedent. Labor laws vest unions with exclusive control of their members’ “prosecutorial” rights, even in the context of discrimination claims, subject only to a duty of fair representation.⁹⁵ And labor laws do not require employers to deal directly with employees whose claims are poorly processed, dropped or blocked by

91. *See id.* at *13.

92. *See id.* at *15-16.

93. *See id.* at *15. The court ruled that “allowing an individual employee to pursue or to settle his statutory discrimination claim through arbitration without Union participation is wholly consistent with forbidding an individual employee from settling a union claim for breach of the CBA.” *Id.* at *16.

94. *Id.* at *16.

95. This proposition is a longstanding precedent of the Supreme Court. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975). In this case, black employees complained to their union that the company was engaging in race discrimination contrary to Title VII and a contractual promise of nondiscrimination. *Id.* at 53-55. Believing that the contract’s grievance procedure was ill-suited for resolving systemic discrimination, some employees attempted to meet directly with the company’s president who refused to deal with them. *Id.* at 54-55. The employees then resorted to picketing the store and were fired. *See id.* at 55-56. The Court ruled that the employees had no right to circumvent the union, and the company had no obligation to deal with the employees directly. *Id.* at 69-70. The Court decided that the national policy against discrimination did not trump the exclusivity principle of the NLRA, which requires that employees deal only with the majority representative. *Id.* at 66-70. Minority group union members can therefore advance their grievances only through their union representatives who must represent them in good faith. *See id.* at 64, 69-70; *see also Davis-Molina v. Port Auth. of N.Y. & N.J.*, No. 08 CV 7584 (GBD), 2011 U.S. Dist. LEXIS 93868, at *51-52 (S.D.N.Y. Aug. 19, 2011) (noting that the duty of fair representation does not even require the union to file a grievance, and a union could make a tactical decision to settle a complaint without invoking the grievance process); *Meeks v. HMS Host*, No. 11-1021 CW, 2011 U.S. Dist. LEXIS 129305, at *13-14 (N.D. Cal. Nov. 8, 2011) (noting that multiple mistakes by the union during an arbitration proceeding would not constitute breach of the duty of fair representation).

their union.⁹⁶ Unions can relinquish their exclusive control of the grievance arbitration machinery by negotiating contract provisions that permit employees to pursue their claims directly with the employer.⁹⁷ Without such a provision, employees are in the words of Justice Douglas, “prisoners of the [u]nion.”⁹⁸ The *Pyett* Court confirmed this while expanding the power of unions to contract about statutory rights.⁹⁹

Having a forum is indispensable for vindicating employee rights and for avoiding a prospective waiver; yet, *Pyett* did not hold that unions must arbitrate every discrimination claim their members make. Statutory law guarantees each employee a forum in which to pursue his claim, which is then subjected to judicial review for merit.¹⁰⁰ At the same time, neither *Pyett* nor extant labor laws require the union to represent employees in the arbitral forum in every case. However, should the union fail to conduct a good-faith review of a claim, decide to drop a meritorious case, or refuse to file a claim for some prohibited reason, the union may face liability for breach of the duty of fair representation or for violating the NLRA or employment discrimination laws.¹⁰¹ Failures on the part of the union, however, cannot deprive the employee of the arbitral forum in a statutory case. Broadly read, *Pyett* requires the union to guarantee the employee the contractual right to go it alone when the union undertakes forum waiver bargaining. Anything less would make the forum waiver agreement void for preventing effective employee vindication of statutory rights.

96. See *Emporium Capwell Co.*, 420 U.S. at 64-65, 69-70 (observing that employees must resort to the NLRA, the duty of fair representation, and Title VII to address malfeasance by their union, and holding that employers need only deal directly with the union regarding grievances).

97. As masters of the grievance arbitration machinery, unions may relinquish their power to control the processing of claims. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (noting that the union had permitted the employees to arbitrate individually after it had dropped their claims). However, releasing control of grievance processing is not something that unions did in the past, nor is it something unions have any incentive to do. See *Emporium Capwell Co.*, 420 U.S. at 70.

98. See *Emporium Capwell Co.*, 420 U.S. at 73 (Douglas, J., dissenting).

99. See *Pyett*, 556 U.S. at 255-56, 273 (noting that unions are exclusive representatives of their members with broad contracting authority).

100. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (noting that public law confers both substantive rights and a reasonable right of access to a neutral forum to vindicate such rights).

101. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (holding that the union violated Title VII by deliberately ignoring racial grievances, and by refusing to complain about race-based terminations), *superseded by statute on other grounds*, Pub. L. No. 101-650, 104 Stat. 5089; *Vaca v. Sipes*, 386 U.S. 171, 177-78 (1967); *Davis-Molina v. Port Auth. of N.Y. & N.J.*, No. 08 CV 7584 (GBD), 2011 U.S. Dist. LEXIS 93868, at *50-51 (S.D.N.Y. Aug. 19, 2011); see also *Pyett*, 556 U.S. at 271-72 (indicating a union is subject to liability if it breaches its duty of fair representation and thus violates the NLRA); *Mitchell v. Plumbers & Steamfitters Local Union No. 157*, No. 2:08-cv-00230-JMS-WGH, 2010 U.S. Dist. LEXIS 93906, at *9 (S.D. Ind. Sept. 7, 2010) (involving an employee who sued his union under 42 U.S.C. § 1981 for refusing to grieve racial discrimination occurring on the job, among other things).

While the *Gildea* court held that unions have no power over their members' statutory rights, other courts have held that unions have complete control. In *Kravar v. Triangle Services Inc.*, the union dropped the employee's disability, national origin, and retaliation grievances prior to arbitration.¹⁰² The contract did not permit Ms. Kravar to bring her claims as an individual, so the court confronted the issue of whether the contract operated as a substantive waiver.¹⁰³ The court answered in the affirmative on the premise that the contract denied the employee the two available forums for vindicating her statutory rights.¹⁰⁴ With no forum to advance her claims, the court decided there was a prospective waiver.¹⁰⁵

In *Kravar* the employer argued that the union's actions were irrelevant because it was willing to arbitrate directly with the employee.¹⁰⁶ However, the court was unwilling to permit *post hoc* modifications of the contract's grievance arbitration rules that made the arbitral forum available after the union dropped the claims.¹⁰⁷ This approach contrasts sharply with that of the *Gildea* judge who ruled that unless prohibited by contract, the union and employer can make gap-filling or supplemental agreements which guarantee the employee the arbitral forum after the case is dropped by the union.¹⁰⁸

The *Kravar* court also did not articulate any limits on the union's power to control the statutory claims once it was incorporated into the collective bargaining contract. As such the union controlled not only the content of the forum provisions, i.e., which claims will be funneled to arbitration, but also whether and how to prosecute statutory claims. This holding is consistent with current labor laws, which give unions exclusive control of the grievance arbitration process.¹⁰⁹

In sum, *Pyett* should not be read as authorizing unions to control access to the arbitral forum, thereby creating the prospect of substantive waivers. Instead, for unions and employers desiring arbitral resolution, *Pyett* now modifies their bargaining powers to require a guaranteed arbitral forum with

102. See No. 1:06-cv-07858-RJH-FM, 2009 U.S. Dist. LEXIS 42944, at *8-9 (S.D.N.Y. May 19, 2009).

103. See *id.* at *3-4. The contract provided that only the union or the company can demand arbitration. *Id.* at 4.

104. See *id.* at *9. The court found that "[t]he CBA here operated to preclude Ms. Kravar from raising her disability-discrimination claims in any forum." *Id.*

105. See *id.*

106. See *id.* at *9.

107. See *id.* at *9-11. The court ruled that "[t]he arbitration provision that the court must enforce is the one the union and the realty board entered into, not a hypothetical agreement in which the employer's rather than the union's consent is critical." *Id.*

108. See *Gildea v. Bldg. Mgmt.*, No. 10 Civ. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662, at *13-16 (S.D.N.Y. Aug. 16, 2011) (holding that the employee can arbitrate individually with the employer's consent if the union drops the claim).

109. See *Berger*, *supra* note 70.

all substantive rights. *Pyett* simply informs the parties that they have the right to bargain about arbitrating statutory claims and establishes the ground rules for such bargaining. If the union and employer want the benefits of forum trading, they must guarantee employees a forum to vindicate their rights and ensure that their substantive rights are preserved. This can be accomplished with a contract provision that provides the opportunity to prosecute the claim and get statutory relief, with or without the union.

II.

THE VIABILITY OF *PYETT*'S PRINCIPLES

A. *The Mandatory Subject Dilemma*

Unions have not viewed *Pyett* as a positive development and are not rushing to sign forum waiver agreements, limiting the revolutionary potential of *Pyett*. But the express consent of unions may not be required because the Court classified this issue as a mandatory subject of bargaining.¹¹⁰ The default rules for mandatory subjects, in the event bargaining fails, favor employers. Since the Court did not modify the rules for mandatory subjects, this means that forum waivers will be governed by the controlling law for mandatory subjects of bargaining. Generally, when the parties fail to agree in first contract or contractual renewal situations, the employer will have the power to unilaterally implement its final arbitration proposal.¹¹¹

But longstanding precedents also hold that arbitration is a creature of contract, and only consenting parties are bound to an arbitration policy.¹¹² Unions may argue that for this mandatory subject employers need the union's consent because the content of the arbitration policy compromises workers' NLRA rights. Specifically, a mandatory arbitration policy may preclude employees from resorting to the NLRB when disputes with their

110. 14 Penn Plaza LLC v. *Pyett*, 556 U.S. 247, 256 (2009). Mandatory subjects are issues the parties must talk about if raised because they qualify as wages, hours or terms or conditions of employment as contemplated by the NLRA. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). For a list of factors to consider when evaluating whether a bargaining demand is mandatory, see *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210-12 (1964).

111. See *United Paperworkers v. Champion Int'l*, 81 F.3d 798, 802 (8th Cir. 1996) (holding that upon reaching impasse, an employer may unilaterally change terms and conditions of employment provided the changes are consistent with offers the union rejected); see also *Borden, Inc. v. NLRB*, 19 F.3d 502, 512 (10th Cir. 1994) (holding that an employer is legally entitled to implement all or part of its final offer with respect to mandatory subjects, upon bargaining to impasse).

112. See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *First Options of Chi. v. Kaplan*, 514 U.S. 938, 944 (1995); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), overruled on other grounds by *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Switching forums not only requires consent, but must be clear and unmistakable in the case of agreements to arbitrate statutory claims. See *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998).

employers occur. But an exclusive arbitration policy cannot rob the NLRB of jurisdiction.¹¹³ Extant labor laws treat policies lawfully implemented at impasse as the prerogative of employers.¹¹⁴ For example, if a union and an employer bargain to impasse over a drug testing policy, the employer can unilaterally implement and enforce that policy against employees.¹¹⁵ Despite this unilateralism, the union remains obliged to represent its members if they are disciplined under such a unilaterally implemented policy subject to its duty of fair representation.¹¹⁶ The effect of unilateralism would be no different than in situations where the union consents to the exclusive arbitration policy without waiving its members' NLRA rights.

Pyett can be read as endorsing the same rules for unilaterally implemented forum waiver policies. And the *Gilmer* principles that *Pyett* incorporated also support this conclusion. Under *Gilmer*, an employee's express assent to a forum waiver policy is not necessary.¹¹⁷ Assent can be secured through any common law contractual rule that provides for indirect assent. So employees may accept by silence,¹¹⁸ or by failing to act, or by doing a particular act.¹¹⁹ For example, continuing to work after being

113. The NLRB has held that a mandatory arbitration policy is unlawful if it limits an employee's right to access the Board's processes and benefit from the protections of the NLRA. See *Supply Techs. LLC*, 359 N.L.R.B. 38, at *1 (Dec. 14, 2012). This holding is supported by the Supreme Court's *Waffle House* decision. See *EEOC v. Waffle House*, 534 U.S. 279 (2002). In *Waffle House*, the Court addressed the specific question of whether an exclusive arbitration policy can limit the remedial powers of the EEOC. *Id.* at 282. The Court held that a mandatory arbitration policy cannot bind a non-party agency charged with enforcing a statute, and that the pro-arbitration policies of the Federal Arbitration Act do not require the agency to give up its statutory authority. *Id.* at 294.

114. See *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 377 (2d Cir. 1990) (stating that upon bargaining to impasse, an employer can implement some or all of its pre-impasse proposals, provided its actions were "reasonably comprehended" within its earlier offers to the union); see also *NLRB v. Powell Electric Mfg. Co.*, 906 F.2d 1007, 1011 (5th Cir. 1990).

115. See *United Steelworkers v. ASARCO, Inc.*, 970 F.2d 1448, 1452-53 (5th Cir. 1992).

116. See Susan L. Gragel, *Drug Testing: The Union Perspective*, 2 J.L. & HEALTH 83, 84, 87 (1988) (discussing unilaterally implemented drug testing policies and the union's duty to fairly represent its members).

117. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); see *supra* note 40.

118. See, e.g., *Day v. Fortune Hi-Tech Mktg.*, No. 10-305-JBC, 2012 U.S. Dist. LEXIS 22495, at *17-20 (E.D. Ky. Feb. 22, 2012), *vacated by* No. 10-305-JBC, 2012 U.S. Dist. LEXIS 130581 (E.D. Ky. Sept. 13, 2012); *McBride v. Gamestop, Inc.*, No. 1:10-CV-2376-RWS, 2011 U.S. Dist. LEXIS 12615, at *7-8 (N.D. Ga. Feb. 8, 2011); *Legair v. Circuit City Stores, Inc.*, 213 F. App'x 436, 439 (6th Cir. 2007) (holding that employee demonstrated his acceptance by not opting out or otherwise informing management that he did not wish to be bound); see also *Nelson v. Insignia/ESG, Inc.*, 215 F. Supp. 2d 143, 151 (D.D.C. 2002) (holding that an employee is bound as long as he had an opportunity to read and understand the forum waiver policy before signing it); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1368 (11th Cir. 2005) (holding that the forum waiver policy need not be signed to be binding).

119. See, e.g., *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972-73 (6th Cir. 2007) (holding that an employee is bound to an arbitration agreement by continuing to work after its effective date); *McClendon v. Sherwin Williams, Inc.*, 70 F. Supp. 2d 940, 943 (E.D. Ark. 1999) (continuing to work after receiving handbook with arbitration policy binds employee); *Okocha v. Hosp. Corp. of Am.*,

informed of the forum waiver policy may be sufficient assent to form a unilateral contract. When these principles are extrapolated to unionized workers, the default would be indirect assent grounded in the employer's lawful managerial prerogatives at impasse.

By giving employers the legal prerogative to implement forum waiver policies after bargaining to impasse, *Pyett* makes statutory forum waiver possible any time an employer wants it. This interpretation is also consistent with the Court's pronouncement that the *Gilmer* principles are equally applicable to unionized workers. It therefore makes sense for unions to bargain for the best possible concessions that are available for giving up this valuable employee right. But the interests of unions and that of their members do not always align on the issue of discrimination.

B. *The Tension Between Individual Rights and Collective Interests*

The dispute in *Pyett* demonstrates the tension between individual rights and collective interests. In *Pyett*, the union consented to the employer contracting out work, which resulted in the demotion of some employees.¹²⁰ The employees argued that their work was outsourced because they were old and this constituted age discrimination.¹²¹ The union grieved the age claim but dropped it prior to arbitration.¹²² Because the union was the exclusive representative and controlled which claims would be advanced, the employees were left without a representative or forum to make their age claim.¹²³ Such a response by the union is arguably tantamount to a prohibited waiver of the employees' substantive rights.¹²⁴ In effect, the employees were left guessing about if and how they may proceed with their age claim.

The availability of the arbitral forum should not be left as an unanswered question in the arbitration agreement between the union and employer. Antidiscrimination law requires that employees be provided an opportunity to vindicate their statutory rights.¹²⁵ Anything short of this

Inc., No. 3:10-CV-1763-D, 2011 WL 4944577, at *2 (N.D. Tex. Oct. 18, 2011) (stating that an employee with notice of an arbitration policy who continues employment is bound by the policy).

120. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 252 (2009).

121. *Id.* at 253.

122. *Id.* The union could not make a good faith allegation of discrimination to an arbitrator because it had consented to the reassignments presumably for legitimate reasons unrelated to their age. *See id.*

123. *See id.* at 253-55. But the Court decided that even though the union bowed out prior to arbitration, it was mere speculation that the forum was lost. According to the Court, the real issue in such a case is whether the *contract* bars the employees from the arbitral forum. *Id.* at 273-74.

124. Prior to the *Pyett* decision, the law was generally settled that union members could not prosecute or advance their grievances on their own. *See Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69-70 (holding that union members do not have independent bargaining rights).

125. *See Pyett*, 556 U.S. at 273 (“[A] substantive waiver of federally protected civil rights will not be upheld . . .”).

would be an illegal deprivation of rights conferred by statute. Employment discrimination laws set the parameters for claims. Some claims will not be meritorious or require a full trial; however, antidiscrimination law guarantees a forum for the claimant.¹²⁶ The key to vindication is the availability of a forum in which to prosecute the claim. The employee may proceed *pro se*, through his union representative or with counsel.¹²⁷ But without a forum, vindication is not possible.

Any discretion to drop the claim prior to arbitration should be vested in the employee exclusively. The Court in *Pyett* noted that although the union dropped the discrimination grievances prior to arbitration, it permitted the employees to go it alone, and presumably the employer was willing to arbitrate directly with the workers.¹²⁸ But this answer is not sufficient because the employer is not legally required to arbitrate employee claims that a union has dropped.¹²⁹ Some courts say that such *post hoc* modifications to the forum waiver agreement are permissible.¹³⁰ Yet, not all judges agree.

Arbitration contracts have to be interpreted and enforced as written. In *Kravar*, the judge said that the only agreement that binds the employee to the arbitral forum is the one originally made in the collective bargaining contract.¹³¹ Arguably, because the union and employer control bargaining about this issue, then it is their prerogative to modify the arbitration provision to comply with the obligation to provide the forum without the union.¹³² If the union and employer cannot agree to a modification guaranteeing the forum, then employees are left without a forum, and the waiver agreement is illegal.¹³³ The prospect of having their forum waiver deal invalidated militates in favor of contractually guaranteeing the arbitral forum *ab initio*.

The next issue is the union's prosecution of the claim. As long as unions carefully consider the merits of the employee's claim and make a good faith attempt at resolution, they should be free to drop it short of

126. *See id.* Although the default forum is court, the court determined that non-judicial remedies are appropriate as long as Congress did not preclude them. *Id.* at 258.

127. *See id.* at 247-48 (chronicling employees' steps to bring their age discrimination claims after union had withdrawn them).

128. *See id.* at 273-74.

129. *See Emporium Capwell Co.*, 420 U.S. at 69-70 (holding that an employer may have "strong and legitimate objections to bargaining on several fronts" over the issue of employment discrimination).

130. *See Gildea v. Bldg. Mgmt.*, No. 10 Civ. 3347 (DAB), 2011 U.S. Dist. LEXIS 93662, at *13-16 (S.D.N.Y. Aug. 16, 2011).

131. *Kravar v. Triangle Servs., Inc.*, No. 1:06-cv-07858-RJH-FM, 2009 U.S. Dist. LEXIS 42944, at *9-11 (S.D.N.Y. May 19, 2009).

132. *See id.*

133. *See supra* note 80.

arbitration.¹³⁴ Unions cannot be required to arbitrate every discrimination claim, no more than the EEOC or private counsel can be required to prosecute every case.¹³⁵ This is not an attribute of vindication. Unions can therefore satisfy their representation obligations without taking every case to arbitration or facing unfair representation lawsuits. Once the union declines to pursue a claim after properly evaluating its merits, the employee must be released to find private counsel or proceed *pro se*.¹³⁶ Unlike contract disputes, the union cannot deny employees the opportunity to appear before an arbitrator, even if it assesses the claim as frivolous, because that is their non-waivable statutory right. But while private or *pro se* advocacy is the employee's legal right, sanctions remain a real concern if the case is not prosecuted properly.¹³⁷ The prospect of sanctions will therefore affect the union's, the employee's, or the private counsel's decision whether to undertake advocacy. An employee is not entitled to a

134. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (holding that unions have a duty of good faith when processing grievances, and this prohibits unions from ignoring meritorious claims or processing them in a perfunctory way).

135. See *id.* The duty of fair representation was formulated with the unions' financial resources in mind. The Court granted unions broad discretion to drop some claims in order to avoid the financial oppression of processing all grievances through arbitration. See also *Jones v. Omnitrans*, 125 Cal. App. 4th 273, 282-83 (Cal. Ct. App. 2004) (noting that in order for collective bargaining to be effective, unions need discretion in determining which grievances to arbitrate).

136. See Judiciary Act of 1789, 28 U.S.C. § 1654 (2012) (“[P]arties may plead and conduct their own cases personally or by counsel . . .”). Plaintiffs in employment discrimination cases have utilized this option with little success in an attempt to vindicate their rights. See, e.g., *Campbell v. United States*, 375 F. App'x 254 (3d Cir. 2010) (sex discrimination case in which employer got summary judgment); *Roberts v. Napolitano*, 792 F. Supp. 2d 67 (D.D.C. 2011) (sex discrimination case lost at summary judgment); *Jowers v. Family Dollar Stores*, No. 09 Civ. 2620 (WHP), 2010 WL 3528978 (S.D.N.Y. Aug. 16, 2010) (race claim lost at summary judgment); *Harris v. Root*, No. 1:08CV803, 2010 U.S. Dist. LEXIS 58316 (M.D.N.C. June 11, 2010) (race discrimination case in which employer was granted summary judgment); *Cornell v. Potter*, No. 8:09-cv-1171-T-30TBM, 2010 WL 1997772 (M.D. Fla. May 19, 2010) (disability and retaliation case dismissed for lack of jurisdiction). However, there is some sentiment to the contrary. The magistrate judge in the *Gildea* case concluded that employees should not get a “free pass” to go to court after their union had properly evaluated their cases and decided to drop them because they lack merit. See *Gildea v. Bldg. Mgmt.*, No. 1:10-cv-03347-DAB -MHD, Doc. No. 32, at *35 (S.D.N.Y. Aug. 16, 2011) (Bloomberg). The judge concluded that if an exception to *Pyett* existed to guarantee employees a forum irrespective of the merits of their cases, “this rule would have the perverse result of making frivolous claims easier to bring in federal court than meritorious claims, which the union would be more likely to pursue in arbitration.” *Id.* As support for this conclusion, the judge relied on a long line of precedents that permit unions to drop meritless claims. See *id.* at *29-36. The flaw with this reasoning, however, is that nearly all of the precedents cited by the judge dealt with the union's power to drop contract claims, not statutory ones. See *id.* Unlike contract disputes, employees must be afforded a forum when they assert statutory rights, even when those assertions are frivolous.

137. See *Harris*, 2010 U.S. Dist. LEXIS 58316, at *22-23 (granting summary judgment and awarding fees to an employer in a Title VII case because the *pro se* employee-plaintiff failed to comply with discovery rules); *Thomas v. Progress Energy Florida, Inc.*, No. 4:09cv433-RH/WCS, 2010 U.S. Dist. LEXIS 125310, at *11 (N.D. Fla. Oct. 20, 2010) (holding that fees and costs may be appropriate against *pro se* plaintiff). But see *Buckley v. Doha Bank Ltd.*, No. 01 Civ. 8865 (AKH), 2002 U.S. Dist. LEXIS 13769, at *9 (S.D.N.Y. July 25, 2002) (holding that courts should be lenient with *pro se* plaintiffs whose pleadings are procedurally deficient).

representative as an attribute of vindication when the claim is not meritorious.¹³⁸

By reading *Pyett* as requiring the union to deliver the arbitral forum in the waiver agreement, employees are protected from poor or bad faith evaluations or claim-dropping prior to arbitration. If the union does not believe that the employee's claim has merit and drops it, the forum waiver agreement will permit the employee to proceed *pro se* or with private counsel, and a claim for the breach of the duty of fair representation is available if the union's decision was not made in good faith. This formulation allows unions to waive their member's judicial forum and deliver bias-free representation without significant additional costs.

C. The Ability of Unions to Advance Discrimination Claims

The historic and continuing problem of union leadership engaging in or condoning discriminatory practices presents another important challenge to realizing *Pyett*'s potential. Even as unions struggled for legal recognition and judicial non-interference in labor disputes at the turn of the 20th century, they simultaneously excluded and oppressed black workers.¹³⁹ Racially discriminatory practices continued after unions were empowered by the National Labor Relations Act and the Railway Labor Act to be the exclusive representative when chosen by a majority of workers.¹⁴⁰ Unions' use of their bargaining powers to subordinate black workers remains a concern today.¹⁴¹

Even after Title VII of the 1964 Civil Rights Act was passed to prohibit discriminatory union practices, unions continued to reject the equal treatment mandates of the law.¹⁴² Opposition to fair treatment was not limited to union leadership but extended to the general membership.¹⁴³ Unions also supported seniority systems that made blacks "new employees"

138. See *Harris v. Chem. Leaman Tank Lines, Inc.*, 437 F.2d 167, 171 (5th Cir. 1971) (noting that unions can sift through grievances and drop or settle the ones they deem frivolous or without merit).

139. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 101-06 (1977).

140. See *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 194-97 (1944) (detailing how the union used its power as exclusive bargaining agent to rob black workers of their jobs, promotions, and other employment opportunities).

141. See Complaint at 9, *Smith v. Consol. City of Jacksonville*, No. 3:12-CV-345-J-32MCR, 2013 WL 1296247 (M.D. Fla. Mar. 30, 2013) (No. 3:12cv00491). The EEOC alleged that the union supported an employer exam requirement with the knowledge that it harmed the promotion opportunities of black firefighters. *Id.*

142. See, e.g., *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 426-31 (1986) (documenting a more than two decades-old legal battle a union waged against the antidiscrimination principle in order to insulate its own discriminatory practices).

143. See, e.g., *Local 23, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 509 (1986) (noting that the union membership voted down a consent decree intended to remedy discrimination against black and hispanic firefighters, even though the union participated in settlement negotiations and got substantial concessions from the parties).

when they were finally allowed to transfer into desirable “white jobs” although this system permanently locked senior black workers behind recently hired whites.¹⁴⁴ Furthermore, unions opposed the Department of Labor’s efforts to require government contractors to set goals and timetables to correct historic exclusion of minorities and women from their labor force.¹⁴⁵

Charges filed with the EEOC against unions offer a glimpse at the continuing tension between unions and their members in this regard. Between 1999 and 2011, 10,789 charges were filed.¹⁴⁶ This ranged from a low of 572 charges in 2002 to a high of 1,917 charges in 2003.¹⁴⁷ Race discrimination continues to be the leading complaint against unions, although in some years, age complaints exceeded those of race.¹⁴⁸ The conflict between unions and the employees they represent is not limited to race and age issues. Statistics from the EEOC show that employees alleging discrimination on the basis of sex, national origin, religion, color and disability also filed complaints.¹⁴⁹

This disharmony of interests takes many forms that may prevent employees from vindicating statutory rights when the union is the exclusive representative. For example, if a union is antagonistic to a particular protected group, it may treat members of that group in a way prohibited by law. This occurred in *Maalik v. International Union of Elevator Constructors*, where the court found that the union “was at best indifferent and at worst complicit” in allowing senior union members to deny a co-worker on-the-job training because of her race.¹⁵⁰ The denial of training prevented a pay increase award, and union officials falsely told Ms. Maalik that there was nothing they could do although they knew they could fine and expel the discriminating members.¹⁵¹

A disparity of interests can also be seen in the way unions react to and process discrimination complaints. For example, in *Morris v. Temco Service Industries*, an employee repeatedly appraised her union

144. See Alfred W. Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 INDUS. REL. L.J. 313, 318-19 (1984).

145. See *id.* at 327.

146. See Equal Employment Opportunity Commission, *Charges Filed Against Labor Unions From 10/01/1998 Thru 09/30/2011* (2012) [hereinafter EEOC Statistics] (on file with author). This information was provided in response to a Freedom of Information Act request, No. 510-2012-151235, dated January 13, 2012.

147. *Id.*

148. *Id.* In 2005, race claims comprised more than half of all claims filed against unions at 51.3%. *Id.*

149. See *id.* Sex discrimination claims averaged about 19.8% per year, and disability claims averaged about 20.4% per year. *Id.*

150. 437 F.3d 650, 652, 654 (7th Cir. 2006).

151. See *id.* at 653 (“Local 2 may not have abetted the mechanics’ discriminatory refusal to train Maalik, but it made a conscious decision to do nothing, thus allowing the discriminators to prevail.”).

representative that she believed her termination was the result of her complaints to the union and the EEOC about racially discriminatory treatment.¹⁵² The union did not investigate these complaints.¹⁵³ The employee repeated her claims of discrimination to the union's lawyer, who was preparing her case for arbitration, and also provided a list of witnesses to corroborate her claim.¹⁵⁴ The union's lawyer ignored all claims or evidence of discrimination, and pursued the case on a theory that the employer lacked "just cause."¹⁵⁵ However, counsel for the union permitted the employee to testify about discriminatory conduct on the job.¹⁵⁶

The arbitrator ruled for the company, noting that the union was not claiming discrimination, and the employee's perception of a hostile work environment could not be credited.¹⁵⁷ When the employee contended that the union prevented the arbitration of her discrimination claims, the union turned on her and argued, among other things, that she withdrew her discrimination claims, did not ask union counsel to arbitrate them, and failed to provide corroborating evidence of discrimination.¹⁵⁸

The court rejected the union's position, finding it to be both incredible and implausible.¹⁵⁹ The court found that despite repeated attempts to get the union to focus on discrimination, the union abandoned those claims by failing to investigate or speak to the witnesses it was provided.¹⁶⁰ Other similar lawsuits against unions demonstrate continuing discriminatory behavior by union members and union officials that can impede the union's ability to evaluate discrimination claims fairly or advocate for its members effectively.¹⁶¹

152. No. 09 Civ. 6194 (WHP), 2010 U.S. Dist. LEXIS 84885, at *3-5 (S.D.N.Y. Aug. 12, 2010). The employee, Morris, initially grieved, claiming that her supervisor and another employee were treating her discriminatorily. *Id.* at *3-4. About a month and a half later, with nothing done by the union, she filed a charge with the EEOC. *Id.* at *4. Two days after the charge was filed, she was terminated for insubordination. *Id.* Additionally, see *Garcia v. Frank*, 09 Cv. 4599(BSJ) 2010 U.S. Dist. LEXIS 142619, at *4-5 (S.D.N.Y. July 28, 2010), where an employee claimed his union did not make discrimination allegations in his grievance despite three requests to do so.

153. *Morris*, 2010 U.S. Dist. LEXIS 84885, at *4-5. The union representative, Foti, only spoke to the company which denied any allegation of discrimination. *Id.*

154. *Id.* at *7.

155. *Id.*

156. *Id.* at *8.

157. *Id.*

158. *Id.* at *5-7.

159. *Id.* at *8-9.

160. *Id.* at *13.

161. See *Alexander v. Local 496, Laborers' Int'l Union of N. Am.*, 177 F.3d 394, 401 (6th Cir. 1999) (black workers sued to protest racially discriminatory referral policies and practices of the union); *Mitchell v. Plumbers & Steamfitters Local Union No. 157*, No. 2:08-cv-00230-JMS-WGH, 2010 U.S. Dist. LEXIS 93906, at *2-7, 9 (S.D. Ind. Sept. 7, 2010) (black employee sued to protest race discrimination by white co-workers and union officials); *Franklin v. Sheet Metal Workers Int'l Ass'n Local Union No. 2*, 572 F. Supp. 2d 1095, 1102-03 (W.D. Mo. 2008) (black employees sued to protest union job referral policies that had a discriminatory impact on them); *Phillips v. Int'l Bhd. of Elec.*

Equally telling is the prevalence of retaliation charges filed against unions. On average, 24 percent of all claims filed against unions between 1999 and 2011 were for retaliation.¹⁶² This translated into 2,199 complaints in thirteen years and 169 per year.¹⁶³ The sheer number of EEOC complaints reveals the continuing mistrust union members have towards the union leadership.

Court filings alleging retaliation further depict how unions continue to struggle with the national policy of equal workplace treatment for their members. In *Blue v. International Brotherhood of Electrical Workers*, the local union's business manager subjected Susan Blue, a secretary and administrative assistant, to repeated discipline, reduced job responsibilities and isolation, because she spoke up for a black electrician who was denied work while white workers were being signed up and referred out.¹⁶⁴ Similarly, in *Booth v. Pasco County*, the court found that the union retaliated against two of its members for filing race, national origin and religion claims with the EEOC against the union.¹⁶⁵ The court agreed with the two employees who alleged that a memo the union sent out after the charges were filed "constituted a call for reprisal; specifically, that it was intended to (and did) spur others, namely union members, to take concrete, discriminatory actions towards them in order to punish them for filing charges of discrimination."¹⁶⁶

These continuing lapses by unions support a concern that the interest of unions and that of their members are not always aligned. The prospect of wrongful sacrifice of statutory protection remains real, both in the context of evaluating and advocating discrimination claims. Further, confidence cannot be placed in the duty of fair representation because union abuses have continued in the face of this doctrine.¹⁶⁷ Employees, therefore, need protection of their statutory rights in the waiver contract itself so that the decision to advocate and the quality of advocacy is not left solely to union officials who must grapple with the competing demands of their members.

Workers, Local Union 159, No. 08-cv-307-bbc, 2008 U.S. Dist. LEXIS 105311, at *1 (W.D. Wis. Dec. 30, 2008) (black electrician sued to protest union's failure to refer him for work while contemporaneously referring out white workers).

162. See EEOC Statistics, *supra* note 146.

163. See *id.*

164. 726 F. Supp. 2d 1009, 1011-15 (W.D. Wis. 2010). Blue won her retaliation claim at trial and on appeal. See *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 580-82, 586 (7th Cir. 2012).

165. See 854 F. Supp. 2d 1166, 1168, 1177 (M.D. Fla. 2012).

166. *Id.* at 1176.

167. The duty of fair representation is a light duty placed on unions to ensure that they do not ignore their members' grievances or process them in a perfunctory way. See *Vaca v. Sipes*, 386 U.S. 171, 190-91 (1967) (holding that unions cannot process grievances in a manner that is arbitrary, discriminatory or in bad faith). And a union does not breach this duty even if it acts negligently. See *United Steelworkers v. Rawson*, 495 U.S. 362, 372-73 (1990).

D. The Forum Suitability Concern

Another critique of *Pyett* is that the decision forces legal disputes on neutrals who are only familiar with contract interpretation matters.¹⁶⁸ In reality, however, this is a non-issue. As the Court noted, arbitrators have long been handling complex commercial matters, and there is no reason why they could not be effective handling statutory discrimination cases.¹⁶⁹ Further, the informality of the arbitration process allows the parties to simplify and expedite the case, and this should not be viewed as a defect when compared to lengthier court procedures.¹⁷⁰ In fact, arbitrators have garnered a substantial body of experience handling antidiscrimination claims over the last twenty years.¹⁷¹

Since the *Gilmer* decision, employers have increasingly adopted forum waiver provisions for statutory disputes, and a substantial number of cases have been arbitrated under those policies.¹⁷² Those cases show that arbitrators are familiar with the statutory mandates, the proof responsibilities of the parties, and the remedial requirements of the law.¹⁷³ A review of awards reveals that arbitrators are working with antidiscrimination statutes in much the same way as judges, and that they

168. See Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975, 982-83 (2010).

169. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) (noting that an arbitrator's capacity to resolve complex legal and factual issues extends with equal force to the discrimination arena); see also Gregory & McNamara, *supra* note 30, at 451 ("Even assuming there ever was any legitimate basis to fear that prominent labor arbitrators notoriously lacked sufficient expertise in employment discrimination law, these concerns are simply not well-founded today.").

170. See *Pyett*, 556 U.S. at 269. The Court noted that the informality of arbitration is one of its chief advantages because the parties trade the formality of court procedures for informality, simplicity and speed of arbitration. *Id.*; see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; . . . it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . .") (citing H.R. REP. NO. 97-542, at 13 (1982)).

171. See Daniel B. Moar, *Arbitrating Hate: Why Binding Arbitration of Discrimination Claims is Appropriate for Union Members*, 10 DUQ. BUS. L.J. 47, 64-65 (2008).

172. See *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d. 1359, 1367 (11th Cir. 2005) ("[C]ompulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes."); see also Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) (noting a dramatic increase in employment arbitration since *Gilmer*).

173. See, e.g., *In re Meijer, Inc. v. Individual Grievant*, 130 Lab. Arb. Rep. (BNA) 331, 334 (2011) (Daniel, Arb.) (requiring grievant to establish prima facie case as required by Title VII); 2011 Am. Arbitration Ass'n Emp't LEXIS 80, at *7-9 (Apr. 26, 2011) (Kromer, Arb.) (applying the statutory burden-shifting rules in a disparate treatment case); 2011 Am. Arbitration Ass'n Emp't LEXIS 145, at *3-4 (Aug. 1, 2011) (Birch, Arb.) (applying the statutory standard for recovery in a hostile work environment case); 2009 Am. Arbitration Ass'n Emp't LEXIS 219, at *11-12 (Nov. 24, 2009) (LaMothe, Arb.) (applying the statutory severe and pervasive test in a sexual harassment case).

are guided by the national goal of deterrence and compensation when deciding cases.¹⁷⁴

E. The Demand on Union Resources

Pyett requires that unions do more when faced with forum waiver proposals or statutory discrimination grievances. Specifically, unions must create a process that ensures union members will be able to vindicate their statutory rights. This means that a specific procedure for processing statutory claims must be established. For instance, the short statute of limitations for contract disputes, which is often a few days or weeks, will not suffice.¹⁷⁵ The absence of discovery, which characterizes contract dispute arbitration, will also fail due process requirements for statutory claims.¹⁷⁶ While employees are not guaranteed the extensive procedural rules available in federal court, the *Gilmer* Court held that arbitral procedures must be sufficient to allow employees “a fair opportunity to present their claims.”¹⁷⁷

Further, unlike contract disputes, statutory claims are purely legal matters for which unions will have to hire and pay lawyers to do the advocacy.¹⁷⁸ As opposed to contract disputes, statutory claims require more

174. See Moar, *supra* note 171 (noting arbitral fidelity to effective statutory interpretation); see also W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1140 (2012) (concluding that the similarity between arbitral awards and judicial opinions is striking).

175. See *Grievance Procedures*, 9 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. 2101, 2105-06 (1976-82) (noting that most contracts provide a time limitation of three to sixty days for the filing of grievances); see, e.g., *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 202 (3d Cir. 2010) (holding that a five-day statute of limitations for a statutory claim is unconscionable); *Plaskett v. Bechtel International*, 243 F. Supp. 2d 334, 341-42 (D.V.I. 2003) (holding that a thirty-day notice of claim requirement is unconscionable).

176. See *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 96-100 (Ct. App. 2004) (holding that the employer's limitation on discovery to two depositions is unconscionable).

177. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). Lower courts have adopted some minimum requirements to protect against employee loss of their substantive rights. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (requiring that mandatory arbitration policies provide for neutral arbitrators, more than minimal discovery, written awards, all types of relief that would be available in court, and that unreasonable costs or fees and expenses of arbitrators are not imposed as a forum access condition); see also *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669, 681-89 (Cal. 2000) (adopting the *Cole* requirements). But see *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 148 (D.D.C. 2007) (questioning the validity of a per se rule that would relieve all employees of the obligation to split the fees of the arbitrator with the employer). These new protocols essentially reject the *Gardner-Denver* Court's conclusion that due process protocols, which are necessary to ensure that employees may vindicate their statutory rights in the arbitral forum, “would tend to make arbitration a procedurally complex, expensive, and time-consuming process.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58-59 (1974).

178. Historically, unions have relied on non-lawyer union officials to do most of the advocacy in labor contract arbitrations. Apparently, no jurisdiction has declared such non-lawyer representation in contract disputes to be the unauthorized practice of law. See Joan C. Rogers, *Nonlawyers Still May Represent Unions In Labor Arbitrations In Rhode Island*, DAILY LAB. REP. (BNA), Feb. 24, 2012,

careful investigation and evaluation. These costs associated with forum waivers can be viewed as disincentives for unions that benefit from significant administrative flexibility when processing contract claims.¹⁷⁹ But statutory claims implicate not only the parties themselves, but also the national policy of non-discrimination and therefore cannot be equated with contract disputes such as the wrongful denial of overtime work or discipline for tardiness. The inclusion of a lawyer provides an additional check on arbitrary decision making by union officials.¹⁸⁰ This reality has to be incorporated into the parties' cost calculations when they adopt arbitral resolution as their exclusive process. In any event, it is improbable that judicial resolution will be more efficient than an arbitral process that guarantees employees their substantive rights.¹⁸¹

Cost concerns can be offset by the fact that a prevailing employee is entitled to attorney's fees and costs.¹⁸² This means that union attorneys should get fees in cases they successfully prosecute.¹⁸³ The fee rules also

available at <http://news.bna.com>. Some jurisdictions expressly permit such representation. *Id.* But discrimination claims are grounded in federal and state statutory schemes, not contractual promises between the parties, and this makes their advocacy the practice of law for which legal representation is required. *See In re Little Compton*, 37 A.3d 85, 93 (R.I. 2012) (noting that "informality, flexibility, speed, efficiency and economy" are some of the benefits that undergird the exemption for non-lawyers advocating in contract disputes, although such advocacy technically falls within the definition of law practice (citing COMMITTEE REPORT, Labor Arbitration and the Unauthorized Practice of Law, 30 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, at 427-28 (1975))).

179. Unions have broad discretion in deciding which grievances to pursue. *See Vaca v. Sipes*, 386 U.S. 171, 191 (1987). They also are permitted to use non-lawyers to advocate even though their representation mimics the practice of law. *See supra* note 178 and accompanying text.

180. Although when unions provide lawyers to represent workers the union and not the employee is the client, the lawyer can serve as a filter for arbitrary or misguided representation by union officials. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2012). This rule provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." *Id.* at § (a). If union officials instruct a lawyer to drop a meritorious claim or process it in a perfunctory way, the lawyer should be able to ignore those instructions as harmful to the best interests of the union. *See id.* at § (b). Because such bad faith instructions expose the union to liability under the NLRA, Title VII, and Section 301 of the LMRA, the lawyer can also raise the matter with the highest authority in the organization. *Id.* Should the union's top leadership fail to effectively address the matter, the lawyer is relieved of the confidentiality rules governing the lawyer-client relationship. *Id.* at §§ (c)(1)-(2); *see also* Prof'l Servs. Indus., Inc. v. Kimbrell, 758 F. Supp. 676, 683-84 (D. Ks. 1991) (noting that when the organization's interests and that of its constituents become adverse, the lawyer must disclose that the organization is the true client and cease representation).

181. *See Gilmer*, 500 U.S. at 31 (finding that arbitration's narrow procedural guarantees translate into more expeditious resolution of claims); *see also* William M. Howard, *Arbitrating Claims of Employment Discrimination*, 50 DISP. RESOL. J. 40, 45 (1995) (estimating that it costs \$96,000 to litigate an employment discrimination claim versus \$20,000 to arbitrate, based on a survey of management lawyers); Colvin, *supra* note 172, at 8 (reporting that cases in arbitration take about half the time to resolve as they would in litigation).

182. *See* 42 U.S.C. § 2000e-5(k) (2012).

183. There appears to be no reported case in which a union was awarded fees in an employment discrimination arbitration. But the proposition that they should get such statutorily authorized fees seems sound. *See Int'l Ass'n of Firefighters, Local 46 v. Everett*, 42 P.3d 1265, 1267, 1270 (Wash. 2002) (holding that a union that successfully advocates for its members in arbitration is entitled to

expose unions to a fee penalty for bringing frivolous cases.¹⁸⁴ This coerces unions to carefully evaluate cases and drop those that lack merit. In effect, unions can drop meritless or weak claims with little risk of being sued, and they can also prosecute meritorious claims without worrying about the expense of investigation and advocacy. While there will be costs associated with bringing these claims, unions should not allow this fear to prevent them from agreeing to arbitration proposals for statutory claims.

III.

CONSOLIDATING UNION POWER THROUGH *PYETT*

Insistence on contract-based unionism ignores reality. Private-sector unionism has declined so dramatically that unions now lack the strength in numbers they once had.¹⁸⁵ The NLRA was designed around the power of collective strength.¹⁸⁶ Historically, by making unions the exclusive representative of large units of workers, employers were forced to take union demands seriously.¹⁸⁷ If a union chose to strike because of an employer's failure to bargain in good faith, companies had to face the harsh economic consequences. With large numbers of unionized workers, the strike weapon was potent.¹⁸⁸ So although employers were not required to

attorney fees under a state statute which provides that "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." The court also affirmed its holding in a prior case, noting that "an award of attorney fees to employees who successfully recover wages or salary owed should not be reduced by the amount contributed to the employees by their union." *Id.* at 1268.

184. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (holding that a prevailing employer is entitled to attorney's fees and costs if the employee's claim is frivolous, unreasonable, or without foundation); see also *Bailey v. Papa John's USA, Inc.*, 236 F. App'x 200, 204-05 (6th Cir. 2007) (granting fees to employer because employee's claim lacked merit).

185. In the private sector, the union membership rate fell from 24.2% in 1973 to 6.9% in 2010, the lowest level since 1901. Harry G. Hutchison, *Reclaiming the First Amendment Through Union Dues Restrictions?*, 10 U. PA. J. BUS. & EMP. L. 663, 671 (2008); News Release, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Union Members 2011* (Jan. 27, 2012) available at http://www.bls.gov/news.release/archives/union2_01272012.htm.

186. Eve I. Klein, Bruce J. Kasten & Joanna R. Varon, *The Employee Free Choice Act-What's an Employer to do?*, 81 N.Y. ST. B.J. 38, 40 (Sept. 2009) (noting that "the principles of the NLRA promote the right of employers and unions to engage in good-faith collective bargaining without any artificial restraints on free-market forces").

187. See Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1126 (1986) (noting that the Wagner Act contemplated a massive organizing campaign that would produce industry-wide unionism that placed all employers at the same competitive disadvantage).

188. The collective action by substantially all the workers—a strike—could bring the business to a halt in the short term as well as disrupt operations for a prolonged period of time. Michael J. Zimmer, *Unions & the Great Recession: Is Transnationalism the Answer?*, 15 EMP. RTS. & EMP. POL'Y J. 123, 134 (2011). While unions in collective bargaining can sometimes offer "carrots" to employers to improve business, the "stick" of a strike has been effective historically at getting employers to agree to collective bargaining agreements that improved wages and other terms and conditions of employment.

capitulate to union demands for wages and benefits above market rates, they did so out of economic necessity.

Now things have changed. Unions represent only a small percentage of the private-sector labor force,¹⁸⁹ and the NLRA still does not give workers any economic or contractual rights at the bargaining table.¹⁹⁰ Further, the economy has shifted full gear from manufacturing to service,¹⁹¹ and trade barriers have fallen giving employers more freedom to shift capital and operations abroad.¹⁹² The outsourcing of work will continue to displace millions of workers,¹⁹³ and global wage competition will continue

Id. Between 1969 and 1979, strikes involved around 950,000 workers every year, and the number of striking workers dropped to less than half a million workers every year between 1987 and 1996. Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. OF SOC. 95, 97 (1999). More recently, the number of workers involved in strikes has declined dramatically. For example, in 2011, there were 19 major strikes and lockouts involving 1,000 or more workers and lasting at least one shift, which idled 113,000 workers in comparison to 11 major work stoppages idling 45,000 workers in 2010. News Release, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *Major Work Stoppages in 2011* (Feb. 8, 2012). In 2009, there were record lows of 5 major work stoppages idling 13,000 workers. *Id.*

189. See *supra* note 185.

190. As originally enacted in 1935, the NLRA did not address the bargaining obligations of the parties once a union was recognized. See National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 452-53 (1935). In 1947, the Taft-Hartley Amendments imposed the narrow bargaining obligation to meet at reasonable times, and to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. See Labor Management Relations Act, ch. 120, sec. 101, § 8(d), 61 Stat. 136, 142-43 (1947); 29 U.S.C. § 158(d) (2012). But this provision also added that an employer need not agree to any union proposal, make any concessions, or sign a contract. See § 8(d), 61 Stat. at 142-43; 29 U.S.C. § 158(d).

191. In 1945, at the conclusion of the Second World War, the services industry accounted for 10% of nonfarm employment, compared with 38% for manufacturing. In 1982, services surpassed manufacturing as the largest employer among major industry groups. See Joseph R. Meisenheimer II, *The Services Industry in the 'Good' Versus 'Bad' Jobs Debate*, MONTHLY LAB. REV., Feb. 1998. By 2010, the services industry accounted for 78.8% of nonfarm employment, while manufacturing represented only 8.1% of the economy. See Richard Henderson, *Industry Employment and Output Projections to 2020*, MONTHLY LAB. REV., Jan. 2012.

192. See Karen Vossler Champion, *Who Pays for Free Trade? The Dilemma of Free Trade and International Labor Standards*, 22 N.C. J. INT'L L. & COM. REG. 181, 183 (1996) (noting that companies are allowed to take advantage of "trade without barriers" by shifting production to developing economies in an effort to circumvent the higher production costs in the United States); Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and A Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993) (describing the concerns of American labor with respect to a shift in production to Mexico as a result of the passage of the North American Free Trade Agreement); see also Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253 (1988) (describing U.S. efforts to link trade with labor standards in an effort to curb unfair competition in the international marketplace); JOHN C. MCCARTHY, NEAR-TERM GROWTH OF OFFSHORING ACCELERATING 5 (2004).

193. See Steve Lohr, *Many New Causes for Old Problem of Jobs Lost Abroad*, N.Y. TIMES, Feb. 15, 2004, <http://www.nytimes.com/2004/02/15/us/many-new-causes-for-old-problem-of-jobs-lost-abroad.html> (citing a report that predicted that an estimated 3.3 million service industry jobs would be offshored between 2002 and 2015); see also Tyson B. Roan, *Anything But Doomed: Why Restrictions on Offshoring are Permissible Under the Constitution and Trade Agreements*, 13 EMP. RTS. & EMP. POL'Y J. 209 (2009) ("Of course, for each job outsourced, one person in the U.S. loses his or her job.").

to depress compensation for American workers.¹⁹⁴ These factors have combined to make unions nearly impotent as contract-makers and contract-enforcers.

Today, it is extremely difficult for unions to consummate a first contract.¹⁹⁵ And in cases of contract renewal, unions increasingly face demands for concessions by employers.¹⁹⁶ Roles are reversed now, and the NLRA does not prohibit it. Employers have the luxury of high unemployment, which makes replacement workers readily available at compensation levels lower than what their collective bargaining contracts provide.¹⁹⁷ Employers also have the flexibility to move their businesses to low-wage regions or countries if their demands for cutbacks are not taken

194. See Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L.J. 427, 428-30 (2010) (observing that global competition has coerced employers to cut labor costs).

195. One response to the contract-making woes of unions was the Employee Free Choice Act of 2009. S. 560, 111th Cong. (2009). This proposed amendment to the NLRA included a provision which stated:

If after the expiration of the 90-day period beginning on the date on which bargaining is commenced, or such additional period as the parties may agree upon, the parties have failed to reach an agreement, either party may notify the Federal Mediation and Conciliation Service of the existence of a dispute and request mediation. Whenever such a request is received, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement. If after the expiration of the 30-day period beginning on the date on which the request for mediation is made . . . the Service is not able to bring the parties to agreement by conciliation, the Service shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service. The arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the parties for a period of 2 years, unless amended during such period by written consent of the parties.

Id. at § 3. This legislation failed to garner sufficient support to pass both houses of Congress. See Christopher Kupka, *Remediation of Unfair Labor Practices and the EFCA: Justifications, Criticisms, and Alternatives*, 38 RUTGERS L. REC. 1, 2 (2010-2011).

196. Employers are influenced by how bargaining will affect their net profits. "In refusing a union demand or in making a concessionary demand of its own, an employer is telling the union at the bargaining table that (a) it cannot pass the cost of meeting a union's wage demand onto a customer in the form of a price increase; (b) it cannot absorb the union's demands as an additional operating cost; or (c) it cannot absorb or pass on costs and still maintain a desirable profit level." Christopher T. Hexter, *Duty to Supply Information Nielsen Lithographing Co. Revisited: The Board's Retreat from Collective Bargaining as a Rational Process Leading to Agreement*, 8 LAB. LAW. 831, 844-45 (1992). Today, concession bargaining is a very common practice. For example, Verizon took this approach during its latest contract renewal negotiations. See Steven Greenhouse, *4-Year Deals for Unions at Verizon*, N.Y. TIMES, Sept. 19, 2012, at B1, available at http://www.nytimes.com/2012/09/20/business/verizon-workers-reach-4-year-tentative-pacts.html?_r=0.

197. As Michael J. Zimmer writes:

Where workers can be replaced or the work outsourced and/or offshored, the higher the level of protection of the right of freedom of association and collective bargaining by law, the greater the incentive employers have to escape unionization by using those techniques or by engaging in illegal activity that, under the National Labor Relations Act, is not of great consequence even when the law is enforced.

Zimmer, *supra* note 188, at 145.

seriously.¹⁹⁸ Under these circumstances, the strike weapon is not a viable option.

This dramatic decline of unions' contractual authority necessitates an expansion of the union's role to legal disputes. Antidiscrimination rights provide one of the few checks on growing employer discretion to buy labor at competitive or efficient prices.¹⁹⁹ Older workers, women, minorities, and others facing job loss or compensation cutbacks need more representation to protect dwindling workplace rights and diminishing economic security.²⁰⁰ *Pyett* permits unions to play a critical role in preserving these rights.

The success of the *Trilogy* principles flowed in part from their connection to a national policy promoting private resolution of labor disputes. By emphasizing the validity of parties' privately struck bargains and the private process they established to resolve disputes, the Court advanced the national goal of limited judicial intervention in labor disputes.²⁰¹ The exclusivity and finality principles of the *Trilogy* forced the parties to resolve their differences on a continuing basis, and without the strife or costs associated with litigation.²⁰² At first blush, the *Pyett* decision does not seem to provide similar benefits. In practice, however, it can.

Unions are well-equipped to represent their members with antidiscrimination claims. For example, unionized employees have an experienced bargainer to negotiate their forum waiver provision. Having a union representative working in this capacity protects against employer

198. See Mikva, *supra* note 187, at 1131-32 (noting that the NLRA always permitted employers to use cheaper labor markets such as at-will employees to underbid unions, but the increasing availability of foreign low-wage labor has exasperated the plight of unions at the bargaining table); Virginia Doellgast, Ursula Holtgrewe & Stephen Deery, *The Effects of National Institutions and Collective Bargaining Arrangements on Job Quality in Front-line Service Workplaces*, 62 INDUS. & LAB. REL. REV. 489, 494 (2009) ("[O]utsourcing may be used to check the growth of unions and to weaken the bargaining power of workers by moving operations outside the coverage of collective agreements and 'escaping' traditional legal and negotiated constraints on the employment relationship."); Janet Walsh & Stephen Deery, *Refashioning Organizational Boundaries: Outsourcing Customer Service Work*, 43 J. MGMT. STUD. 557, 559-60 (2006) (finding outsourcing as a common strategy used to segment call center work or to pursue a more cost-focused strategy, as it allows firms to avoid collective agreements and economize on the costs of employment benefits).

199. See Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 573-74 (2001) (discussing how antidiscrimination laws have reshaped the workplace by removing barriers that denied employment opportunities to women, minorities and immigrants).

200. For most workers, wages have declined or stagnated in recent years. See Larry Swisher, *Most Workers Saw No Wage Growth During 2000-2012*, 162 DAILY LAB. REP. (BNA), at A-15 (Aug. 21, 2013). And employer demands for compensation cutbacks from their unionized workers is now common. See Tiziano Treu, *General Report: Procedures And Structures Of Collective Bargaining At The Enterprise And Plant Levels*, 7 COMP. LAB. L. 219, 245 (1986) (noting that concession bargaining has become common).

201. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 566-68 (1960) (holding that judges must give the contract's grievance/arbitration provision "full play" and defer to the arbitrator's judgment, even when they deem a claim to be frivolous).

202. See *supra* note 19 and accompanying text.

overreaching that has been observed in the at-will context.²⁰³ Unions can ensure that employees' substantive rights are not diluted or eliminated in the forum waiver agreement.²⁰⁴ They can also ensure that procedural tricks are not used to tip the scales in favor of the employer.²⁰⁵ Such policing by the union will guarantee that the process for filing claims is fair, that substantive protections remain intact, and that the decision-maker is impartial. With respect to the "repeat player" problem, unions can provide continuity in monitoring whether arbitrators are biased in favor of employers who fund the forum by arbitrating multiple cases.²⁰⁶

Pyett also guarantees the employee his day before the arbitrator. In comparison, an at-will employee cannot be so sure he will get his day in court. Because of the EEOC's limited resources, most complaining employees will not get representation from this agency to pursue meritorious claims.²⁰⁷ Private attorneys are also not readily available because the prospects for success in antidiscrimination cases are very low.²⁰⁸ High burdens of proof combined with increasing judicial hostility to discrimination claims deter lawyers from taking discrimination cases.²⁰⁹ But under the *Pyett* rules, the employee gets to see the arbitrator, and have his case heard and decided on the merits every time. This opportunity to vindicate antidiscrimination rights greatly advances the statutory goals of deterrence and remediation.

203. See *supra* notes 50-52 and accompanying text.

204. Unlike at-will workers, unions can get legally recognized consideration for the forum trade, as opposed to the illusory promise of employment that many at-will workers receive. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260-64 (2009); *Alejandro v. L.S. Holding Inc.*, 130 F. App'x 544, 547 (3d Cir. 2005); *Sprinkle v. Gen. Dynamics Land Sys.*, No. C09-1672Z, 2010 U.S. Dist. LEXIS 43157, at *8-10 (W.D. Wash. Mar. 30, 2010).

205. Unions are very experienced in selecting arbitrators and can protect against employer attempts to construct a biased selection process. For examples of arbitration agreements in which employers attempted to construct a biased selection process, see *Hooters v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). In *Hooters*, the employer structured the selection process to guarantee the arbitrator of its choice. *Id.*

206. With the rise of mandatory arbitration, there has been increased concern that sophisticated employers who appear before arbitrators on multiple occasions and therefore provide them business, gain arbitrator bias over employees who are usually one-time players. See generally, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 205-09 (1997) (providing a study that shows low employee success rates against repeat player employers and raising the prospect that arbitrator bias may have played a role). See also Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 399-407 (2010) (discussing the repeat player concern in the broader context of all private neutrals).

207. See Nancy M. Modesitt, *Reinventing the EEOC*, 63 SMU L. REV. 1237, 1241-47 (2010) (discussing the limited resources of the EEOC to process, investigate, and litigate charges of discrimination).

208. See *id.* at 1244, 1248.

209. See Russel K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1152-55 (2008) (discussing negative judicial intuitions about discrimination claimants and their claims); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 517-18 (1987) (observing that proving that an employer intentionally discriminated is an exceptionally difficult task).

The *Pyett* principles guarantee delivery of all substantive antidiscrimination rights. Arbitrators must apply the relevant statutory rules and award the appropriate statutory remedies.²¹⁰ This further advances the statutory goal of equal treatment because prevailing employees will receive compensatory, and where appropriate, punitive damages provided by law when their rights are violated.²¹¹ Successful aggrieved workers can also expect an award of attorney's fees and costs.²¹² And while the reviewability of the arbitral awards may be limited,²¹³ any denial of substantive rights would make the award void as contrary to public policy.²¹⁴ Because the forum waiver agreement must deliver the employee before an arbitrator who is bound by the substantive law, vindication remains a robust proposition under *Pyett*.

CONCLUSION

The *Pyett* decision requires a leap of faith in much the same way the *Steelworkers Trilogy* did. Read appropriately, the decision permits workers to vindicate their antidiscrimination rights through a contractual process that delivers them into the arbitral forum with their substantive rights intact. The idea of unions litigating statutory grievances as a routine matter will take some getting used to. After all, unions are weary of the added costs and exposure to liability that come with protecting their members' legal rights.²¹⁵ Some unions are also still struggling to comply with the antidiscrimination mandates they are being called upon to protect. But this change is beneficial in two key ways: it can help unions who are struggling to prove their continuing importance in the workplace, and help workers who want a remedy for their discrimination claims but face long odds in court. When unions overcome their discomfort with the *Pyett* principles, they can start to realize its revolutionary potential.

210. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (requiring that mandatory arbitration policies guarantee employees their statutory remedies as an element of vindicating their rights in the arbitral forum); *Tewelde v. Owens & Minor Distrib., Inc.*, No. 07-4075(DSD/SRN), 2009 U.S. Dist. LEXIS 49098, at *27-28 (D. Minn. June 10, 2009) (discussing an arbitrator's power to consider statutory authority when appropriate).

211. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006) (compensatory and punitive damages advance the make-whole goal of antidiscrimination law); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 529-30 (1999) (discussing conditions for punitive damages).

212. See *New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54 (1980).

213. See *Shearson/American Express, Inc., v. McMahon*, 482 U.S. 220, 257-58 (1987) (holding that arbitral awards may be vacated on the limited grounds of fraud, bias or gross misconduct of arbitrators). See also Federal Arbitration Act, 9 U.S.C. § 10(a) (2012).

214. See *Pyett*, 556 U.S. at 265-66.

215. See Ann C. Hodges, *Fallout From 14 Penn Plaza v. Pyett, Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. DISP. RESOL. 19, 34 (2010).

