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Panel: Discrimination and Harassment Issues in Higher Education - Law and Litigation

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Employment Discrimination

Law and Litigation

by Merrick T. Rossein

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Discharge

VI. TENURE DENIAL AS A FORM OF DISCHARGE

§ 9:12 Generally

American academia has largely, though not universally, adopted the institution of tenure. Tenure amounts to lifetime employment after a lengthy probationary period, usually six years, for teachers in higher education. Consequently, decisions not to grant tenure provide the setting for some of the most subtle and difficult cases where employment discrimination is alleged.

The institution of tenure developed in the early part of this century through the efforts of organizations of educators. The American Association of University Professors (AAUP) has for decades worked to defend tenure to preserve academic freedom and economic security for professors. Under conventions that have developed over the years, the tenure

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1At most institutions, tenure is accompanied by promotion from assistant to associate professor, and those holding the ranks of “associate” or “full” professor are considered senior faculty. However, a few institutions separate the tenure and promotion decisions, permitting a tenured rank of assistant professor, while a few others grant the title of associate professor to untenured faculty, often after a lateral transfer.

2In 1940 the AAUP and the Association of American Colleges (a body representing undergraduate colleges and run by their top administrators) jointly published the 1940 Statement on Academic Freedom and Tenure, which has, along with commentaries and interpretations known as “recommended institutional regulations” (or RIRs) become a sort of constitution against which the actions of academic institutions can be judged.
decision is based on an evaluation of three areas: teaching, scholarship, and service to the institution and profession (the first two are usually most important).

It is typical for departmental peers of the tenure candidate to undertake the task of conducting an in-depth review of the candidate’s teaching, service and scholarship, often assisted in the latter task by experts in the field from outside the candidate’s institution. In many institutions, after such a review, tenure recommendations issue from several levels, including the candidate’s department, college-wide and/or university-wide faculty or faculty/administration committees, deans and other administrators, and the process culminates in a final decision by the president or board of trustees. Many institutions include elaborate appeal procedures of negative recommendations or decisions along the way. Tenure, once acquired, generally means employment until retirement or dismissal for cause, the latter but rarely pressed.

Less technically viewed, tenure constitutes acceptance into a particular profession. It denotes recognition by peers in the profession that the scholar has attained a certain level of seriousness and maturity; frequently, tenured professors will decline transfers to other institutions that do not involve tenured appointments or at most a pro forma review soon after arrival at the new institution. Accordingly, many scholars view tenure denial as more than just a failure of promotion or loss of a job; it usually means the scholar must leave the institution within a year, and makes some scholars consider leaving their profession altogether, especially if

The full text of the 1940 Statement and subsequent RIRs, as well as advice about tenure matters, may be secured from the AAUP, One Dupont Circle, Washington, D.C. See generally Metzger, Walter P., “Academic Tenure in America: A Historical Essay,” in Faculty Tenure, San Francisco, Jossey-Bass (1973), pp. 93-159. See also 53 Law and Contemporary Problems, passim (Summer 1990) (special issue on the fiftieth anniversary of the 1940 Statement of Principles).

Quite often, institutional rules restrict such appeals to cases alleging “procedural” irregularities, variously defined. Some institutions define “procedural” narrowly; other include such matters as improper consideration of race, sex, age or other inappropriate characteristics, or unfair application of institutional regulations under the “procedural” rubric. The breadth of the grounds of appeal may influence a decision whether to pursue internal remedies instead of or prior to litigation. See § 9:13.

AAUP regulations adopted in a large portion of academia provide that a professor’s probationary period should not exceed seven years.
they have failed to secure the support of their peers. Even where scholarly peers have praised the unsuccessful tenure candidate’s work, the stigma of tenure denial may derail or end the candidate’s career.

All too often, discrimination has played a role in a negative tenure decision. Proving this, under laws prohibiting discrimination, and securing an appropriate remedy have been exceedingly difficult for individuals challenging tenure denials. This section discusses strategies for winning cases where discrimination is alleged to have been a factor in the denial of tenure.

§ 9:13 Choice of forum

Tenure cases are exceptionally difficult to win in court. Between 1972, when Title VII was extended to cover private universities, and 1990, only a handful of individuals had managed to prove they were denied tenure in violation of Title VII. Of these, not all emerged with tenure. Before investing years of time, thousands of dollars, and untold

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emotional energy into an uncertain court suit, disappointed
tenure candidates should always consider other available
means of redress or reconsideration by an impartial body.
Appeals to an administration that has already said no may
not be fruitful, but access, such as through a grievance pro-
cedure, to a board of outside experts, an ad hoc faculty com-
mittee, or a labor arbitrator, may result in a favorable result,
either in the form of a decision binding on the institution, or
in the form of a nonbinding but politically inviolable recom-
mandation. In fact, one court has recently held that at-
torneys’ fees are available pursuant to Title VII for work
done in a state university’s appeals procedure. Another op-
tion is to litigate in the less formal setting of state adminis-
trative bodies charged with enforcing state antidiscrimina-
tion statutes.

The decision whether to pursue such private or administra-
tive procedures instead of a court action turns on a host of
factors, some legal and some political: What opportunity is
there for input into selection of new decision-makers or
arbitrators? What will their powers be? Will the newly
involved decision-maker or recommending body be truly in-
dependent? What evidence may be discovered or considered?
Will the institution be compelled to follow a favorable recom-
mendation, either by its own rules, or in response to political
realities? Does pursuit of a grievance or appeal foreclose
(practically or otherwise) later resort to the courts? What re-
course exists if the institution declines to follow its own
procedures?

Even if filing a grievance does not seem promising, the
faculty member must face the difficult question of what

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It is noteworthy that two of these cases (Ford and Planells) involved
white males; the other three involved white females. For the time period
1970–84, two researchers who made an exhaustive survey counted 42 ten-
ure discrimination cases decided on the merits, see LaNoue and Lee,
Academics in Court, University of Michigan Press, 1987, table 1. Only in
Kunda, supra, did the plaintiff prevail in the years surveyed.

3 See, § 9:16 on remedies.

4 See, e.g., Swift, Becoming a Plaintiff, 4 Berkeley Women’s L.J. 245
(1980–90) (tenure grievance settled by referral of case to outside review
committee which recommended tenure; institution implemented
recommendation).

5 See Duello v. Board of Regents of University of Wisconsin System,
170 Wis. 2d 27, 487 N.W.2d 56, (Wis. App. 1992) (nonretention of faculty
member into tenure review year).
If tenure is the goal, and some sort of meaningful, independent, de novo review is available outside the court system, the faculty member would be wise to utilize it if at all possible. The only category of case better tried in court is one heavily dependent on evidence available only in that forum, such as a case based on access to confidential materials that the institution refuses to disclose and that are unavailable to the faculty member through other means.

§ 9:14 Proving the case—Discovery

The typical academic employer’s response to charges that it discriminated in denying tenure is that nothing of the sort occurred, that it was merely exercising institutional academic freedom—which, the institution will doubtless remind the court, includes the right to “determine for itself, on academic grounds, who may teach”—and that for reasons best known to itself, the tenure candidate simply did not stack up. Variations on this theme include the refrain that although the tenure candidate had strong peer support, “reasonable minds can differ” about such intangibles as academic quality, promise or creativity; or, conversely, that since the candidate’s peers did not support the candidate, her or his work is deficient in quality; or that standards are rising and the institution has a right to improve itself; or that while the candidate’s teaching was excellent, her or his

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5See, e.g., Academics in Court, supra, passim.

6Courts tend to defer unduly to the “academic judgment” asserted by institutions of higher learning as grounds for denying tenure to faculty members. See, e.g., Kumar v. Board of Trustees, University of Massachusetts, 774 F.2d 1, 12, 27 Ed. Law Rep. 1051, 38 Fair Empl. Prac. Cas. (BNA) 1754, 38 Empl. Prac. Dec. (CCH) ¶ 35533 (1st Cir. 1985), cert. denied, 475 U.S. 1097 (1986) (“the district court . . . is [not] empowered to sit as a super tenure board. . . . Courts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding . . . factors that are not susceptible of quantitative measurement”). Scholars practiced in peer evaluation are unlikely to so defer to an institution’s initial tenure decision.

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scholarship was deficient (or the reverse); or that the institution could not have discriminated since it employs so many members of the faculty member’s sex, race, or ethnicity. In making this sort of argument, the institution will seek to elicit a deferential attitude from the court that will defeat all claims not supported with “smoking gun” evidence.\(^2\) To counter the factfinder’s anticipated deference, the faculty plaintiff must show the institution’s position to be insupportable, by all available means.

No matter what the strengths and weaknesses of the case, the plaintiff will invariably have to make the point that the issue is not whether he or she has faults, or could have done more, measured against an abstract Olympian concept of excellence, since everyone has faults and falls short of an absolute standard. Rather, the issue is whether he or she met the standards for the award of tenure at the defendant institution.\(^3\)

Showing that the plaintiff did so requires perseverance

\(^2\)The conventional wisdom is that academic personnel are too sophisticated to make blatantly sexist or racist remarks. However, this view underestimates the insensitivity of at least some university teachers and administrators. See, e.g., Jew v. University of Iowa, 749 F. Supp. 946, 64 Ed. Law Rep. 84, 57 Fair Empl. Prac. Cas. (BNA) 647, 55 Empl. Prac. Dec. (CCH) ¶ 40443 (S.D. Iowa 1990) (promotion denial and sexual harassment case).

\(^3\)To make out a prima facie case of discrimination in the tenure context, a plaintiff must show that she was a member of a protected class; that she was qualified for tenure in the sense that a decision awarding tenure would have been a reasonable exercise of discretion; that despite her qualifications she was rejected; and that tenure positions were being awarded at the institution at the time the plaintiff was denied. See Fields v. Clark University, 817 F.2d 931, 934, 39 Ed. Law Rep. 43, 43 Fair Empl. Prac. Cas. (BNA) 1247, 43 Empl. Prac. Dec. (CCH) ¶ 37141 (1st Cir. 1987). Fields cites to and restates the formulation stated in Banerjee v. Board of Trustees of Smith College, 495 F. Supp. 1148, 1155–56 (D. Mass. 1980), judgment aff’d, 648 F.2d 61, 62–63 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981). There, the connection to the defendant institution’s particular standards is explicit. The second prong of the prima facie case is stated as a requirement of a showing “that plaintiff was a candidate for tenure and was qualified under the particular college’s standards, practices and customs.” The court further explained that the plaintiff need show only that her qualifications “were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.” See also discussion in Powell v. Syracuse University, 580 F.2d 1150, 1154–56, 17 Fair Empl. Prac. Cas. (BNA) 1316, 17 Empl. Prac. Dec. (CCH) ¶ 8468 (2d Cir. 1978).
and creativity in discovery. Very few institutions utilize objectively measurable standards for tenure (e.g., a strict count of publications or of students or courses taught), nor would such a system be desirable, since obviously quality and quantity of effort should be considered. But assessments of quality are permeated by subjective judgment; the challenge to the plaintiff is to show the subjectivity was actually bias rather than a simple difference of opinion.

Where the institution asserts that the candidate’s scholarship lacks creativity, says nothing new, or the like, the plaintiff should see how other individuals with similar records fared. Now that the EEOC’s right to confidential peer materials is established, the plaintiff in any court action should seek such materials in discovery, involving both his or her own and other tenure candidates’ cases. To prevail, the plaintiff must discover in the files of reasonably contemporary successful tenure candidates who are not in the same protected class, comments at least as critical or praise no stronger than is found in plaintiff’s own file. Or plaintiff can show her file to be stronger overall than those of other, more successful candidates, giving rise to an inference of discrimination. To this end, the plaintiff should scrutinize all departmental and other recommendations regarding his or her case from inside the institution and compare them with those of previous successful tenure candidates from the same or other departments.

Letters from outside experts often provide useful

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5 Some defendants will undoubtedly argue that University of Pennsylvania applies only to agency subpoenas for documents, not to discovery requests by individuals. However, the language of the case is so broad, and its rejection of such shibboleths as an institution’s academic freedom privilege so unequivocal, that such defendants’ efforts should not succeed.

6 The AAUP has now endorsed a policy permitting broad access to relevant documents and files both generally and in the specific case of internal university review of discrimination complaints. See On Processing Complaints of Discrimination and Access to Faculty Personnel Files, in Academe, July–August 1992, at pp. 19–23 and 24–28, respectively. These policies may be cited as a statement of developing norms in the profession for purposes of internal university appeals.

7 The entire file, and the files of similarly situated but successful peers, should be scrutinized regardless of whether the negative tenure
ammunition. The plaintiff may find that the negative decision in his or her case rests on a quotation out of context or a lone negative remark in one of a dozen letters, whereas the fair-haired boy of a year previous received scathing and repeated criticism which the same university decision-makers chose to overlook. The plaintiff might find something as simple as a requirement that he or she produce a larger quantity of publications than was required of other candidates, or that his or her total number of publications exceeded in number and prestige of publication those of previous candidates.  

In reading letters of evaluation, one should be aware that those who write them utilize what amounts almost to a code. Overt criticism can usually be taken at face value, but words of praise fall into distinct categories. At some institutions it is sufficient to be “hard-working,” “thorough,” “interesting” or “competent” to earn tenure; at others, “insightful and creative” may not even suffice, and “brilliant,” “dazzling” and “the best of her generation” may be required. A faculty interpreter serving as an expert witness may be necessary. In institutions where tenure candidates’ published work is typically reviewed in the professional literature, it may be helpful to compare published reviews of the plaintiff’s work with those of successful tenure candidates. An expert can assist here to translate technical jargon and to assess the professional stature of reviewers.

In an institution that does not use outside evaluations, but which nonetheless considers scholarship in the tenure decision, the plaintiff will do well to solicit comparative outside reviews of him or herself and others, again through an expert. That individual could be asked to compare the plaintiff’s work to that of recent tenure recipients, with a view towards showing that the institution judged the plaintiff by a higher standard. If the institution denied tenure on the grounds of insufficiently excellent teaching, the same sort of comparative data described above in the context of scholarship should be

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examined. If it seems inescapable that the plaintiff scored lower on numerical student evaluations, the legitimacy of those evaluations as a measure of teaching quality should be investigated. A growing body of literature suggests that such numerical evaluation devices reflect societal prejudices, especially with regard to women. Unfortunately, peer visits are also suspect.

Other members of the plaintiff’s protected class should be surveyed for anecdotes of prejudiced actions or remarks. In many jurisdictions, such evidence is permitted to show a discriminatory environment or to bolster inferences of discrimination.

Finally, if the plaintiff is in a field such as women’s stud-

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ies or African American studies, and the plaintiff’s field of expertise is itself the subject of criticism or contemptuous remarks by those making a negative recommendation or decision, these too may constitute evidence of discrimination.\(^{12}\)

### § 9:15 Tactical considerations and common pitfalls

Almost as common as the defensive claim of institutional academic freedom, certain defense tactics turn up in tenure cases like clockwork. Predictably, claims of untimeliness top the list.

The lead case in this area is not new. In *Ricks v. Delaware State College*,\(^1\) the Supreme Court made clear that the date which begins the Title VII clock’s ticking is the date the faculty member learned of the decision of the final authority in the tenure chain, typically either the institution’s board of trustees or president. The clock does not stop for Title VII purposes if the tenure candidate undertakes an appeal, no matter how elaborate, nor does it wait until the tenure candidate’s last day of work. If there is any chance a disappointed tenure candidate may wish to resort to the courts, he or she should be sure to file a timely administrative charge.\(^2\)

Institutional defendants generally, and academic institu-

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**[Section 9:15]**


tions in particular, have adopted a second popular litigation tactic: seeking to stymie the plaintiff's discovery by insisting that all institutional employees are somehow alter-egos for the institutional defendant, and that plaintiff's counsel will violate the legal code of ethics by seeking to interview these employees *ex parte* (outside the presence of defendant's counsel). 3 This argument rests on Disciplinary Rule 7-104(A)(1) of the ABA Code of Ethics, which prohibits counsel for a party from contacting any other party involved in the matter that is the subject of the first counsel's representation if that lawyer knows the second party is represented by another lawyer. The practical effect of the ethical rule is to compel plaintiff's counsel to forego informal discovery and investigation and to use depositions to gather evidence. In a tenure case this can be devastatingly expensive, since virtually all key witnesses are university employees. It also permits defendant's counsel to discover the plaintiff's case to his or her detriment.

The matter has been much litigated generally. Fortunately for plaintiffs, most courts have read the disciplinary rule narrowly to apply only to top decision-makers in an institution. In the tenure context, the one court that has addressed the matter head-on has permitted *ex parte* contact with faculty who served on various tenure review bodies. 4 However, *Morrison* has not stopped defendant's counsel from using the tactic to intimidate plaintiffs and cause them additional expense.

On the plaintiff's side, two current tactical developments bear comment. The first is the matter of trying a case to a jury rather than a judge. Prior to the enactment of the Civil Rights Act of 1991, plaintiffs in tenure cases making claims under Title VII could secure jury trials only if they taught at state-funded universities that could be sued under 42
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U.S.C.A. § 1983, or if they could add a pendent common law claim entailing a jury trial right. Significantly, in at least two such cases, the jury ruled for the plaintiff while the judge ruled for the institution on the Title VII claim.\(^5\)

The Civil Rights Act of 1991 extended the jury trial right to all Title VII plaintiffs seeking legal relief. However, in cases predicated on events pre-dating that change in law, alternate bases for a jury trial should be sought since the retroactive application of the new law is uncertain.

The second recent development that tenure case plaintiffs should keep in mind is the Supreme Court’s ruling in *Price Waterhouse v. Hopkins*.\(^6\) *Price Waterhouse* (now enshrined in Title VII pursuant to the Civil Rights Act of 1991) extended to Title VII cases the shifting burdens of proof discussed in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*.\(^7\)

In the tenure context, it is often difficult to decide whether to pursue a mixed-motive or a pretext strategy. The decision turns on the strength of the various pieces of evidence in the particular case, and how central to the tenure decision are any blatant instances of discrimination. Fortunately, as the Supreme Court made clear, a plaintiff need not make this strategic decision at the outset of the litigation.\(^8\)


\(^7\)Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). According to *Mt. Healthy*, once the plaintiff in a case involving a mixture of legitimate and unlawful motives demonstrates that impermissible factors contributed to the defendant’s adverse decision, the burden shifts to the defendant to prove that it would have made the same decision absent the discrimination.

\(^8\)Price Waterhouse, 109 S. Ct. at 1789, n.12. Regardless of which
§ 9:16 Tenure as a remedy

Since 1972 in only five reported cases have plaintiffs surmounted the barriers to proving that their institution discriminated in denying them tenure. One would expect, given the extreme difficulty of demonstrating liability, that these few prevailing plaintiffs would secure tenure as a matter of courts’ unquestioned right to order “make-whole” relief. How else but through an award of tenure can a faculty member denied tenure be made whole?

But some courts are uneasy imposing their will even on an institution guilty of discrimination. Preferring to view the acts of discrimination as an aberration rather than as part of a pattern endemic to academia, they reinstate the plaintiff in an untenured status and remand the case to the institution so that a different set of presumably less biased individuals will make a de novo review of the candidate’s credentials.¹

Other courts (those in Kunda, Brown and Planells)² can be called upon as authority for the appropriateness of tenure as a remedy. Brown in particular is significant because the institution there specifically disputed the quality of Brown’s scholarly work (unlike, e.g., Kunda, where even the defendant conceded the plaintiff was qualified though she lacked a required degree).³ But Brown may be limited to its own facts, since such a strong majority of the outside experts in Brown’s field, as well as an overwhelming majority of faculty evaluators (who numbered some forty individuals) supported a tenure award for her, against three administrators without route (pretext or mixed motive) the plaintiff follows, she must first establish a prima facie case.

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¹See, e.g., Gutzwiller, 860 F.2d at 1333 (tenure should be awarded by the court “only in the most exceptional cases . . . [w]hen the court is convinced that a plaintiff reinstated to her former faculty position could not receive fair consideration . . . of her tenure application”); Ford, 896 F.2d at 875–76 (same).

²See § 9:12.

³Indeed, in what may further down the road be revealed as overstatement, Brown has been hailed as “the realization of Title VII’s legislative intent” which “will have a significant impact on Title VII litigation.” Brammen, J., Lallo, D. and Ney, S., 17 J.C. & U.L. 551–63 (1991).
advanced training in her field. Brown may be just the sort of exceptional case the Gutzwiller court had in mind.\(^4\)

Developments in other employment settings may actually be more helpful to tenure plaintiffs than the rare successful tenure case. When courts declare themselves willing to upset negative partnership decisions regarding, for example, partnership candidates at accounting firms, and to order promotion to partnership in those settings, they thereby breach barriers almost as forbidding as the ivied walls of academe.\(^5\)

\(^4\)See the plaintiff’s brief to the Supreme Court in Brown opposing Boston University’s certiorari petition, wherein the facts of Brown are distinguished from those in Gutzwiller.

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Chapter 13

Defendant’s Motion To Dismiss and for Summary Judgment

§ 13:17 Collective bargaining agreements arbitration clauses

The Supreme Court in a 5-4 decision in 14 Penn Plaza LLC v. Pyett,¹ held that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. Since the union in this case refused to take it members’ claim of age discrimination to arbitration, the Court’s ruling effectively denied the union members a forum to challenge their employer’s alleged adverse action. Significantly, the Court declined to resolve the respondents’ claim that the CBA allowed the Union to prevent them from effectively vindicating their federal statutory rights in the arbitral forum, because that question required resolution of contested factual allegations that were not fully briefed and not fairly encompassed within the question presented.² Justice Souter’s dissent highlighted that “. . . the majority opinion may have little effect, for it explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration, which ‘is usually the

²2009 WL 838159 at *16.
This issue is likely to be hotly contested in future litigation where a union declines to arbitrate a member’s statutory discrimination claim.

The Respondents in this case were members of the Service Employees International Union, Local 32BJ (Union) and were employed as night lobby watchmen and in other similar capacities by Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. The Union was the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doormen. The Union had exclusive authority to bargain on behalf of its members over their “rates of pay, wages, hours of employment, or other conditions of employment,” and engaged in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB was contained in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA required union members to submit all claims of employment discrimination to binding arbitration under the CBA’s grievance and dispute resolution procedures.

Petitioner 14 Penn Plaza LLC was a member of the RAB and owned and operated the New York City office building where the Respondents worked. After 14 Penn Plaza, with the Union’s consent, engaged a unionized security contractor affiliated with Temco to provide licensed security guards for the building, the respondents were reassigned to jobs as porters and cleaners. These reassignments led to a loss in income and were less desirable than their former positions. Respondents asked the Union to file grievances alleging, among other things, that petitioners violated the CBA’s ban on workplace discrimination by reassigning respondents on the basis of their age in violation of Age Discrimination in Employment Act of 1967 (ADEA). The Union requested arbitration under the CBA, but after the initial hearing, withdrew the age-discrimination claims on the ground that its consent to the new security contract precluded it from objecting to respondents’ reassignments as discriminatory. Respondents then filed a complaint with the EEOC alleging that petitioners had violated their ADEA rights, and the
EEOC issued each of them a right-to-sue notice. They then filed a civil action in federal district court, which denied petitioners' motion to compel arbitration of respondents' age discrimination claims. The Second Circuit affirmed, holding that *Alexander v. Gardner-Denver Co.*, forbids enforcement of collective-bargaining provisions requiring arbitration of ADEA claims. The *Gardner-Denver* decision is discussed below.

The court examined the two federal statutes at issue here, the ADEA and the National Labor Relations Act (NLRA), and for the Court yielded a straightforward answer to the question presented. It found that the Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including ADEA claims, would be resolved in arbitration. Therefore, this negotiated contractual term qualified as a “condition[n] of employment” subject to mandatory bargaining under the NLRA. Since a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer, the Court determined that the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep. Finding that it did not do so, it noted that the Court in *Gilmer v. Interstate/Johnson Lane Corp.* held that the ADEA does not preclude arbitration of claims brought under the statute. It therefore concluded that there is no legal basis for the Court to strike down the arbitration clause in this CBA.

The Court had to square its ruling with the *Gardner-
Denver line of cases. Respondents argued that Gardner-Denver and its progeny held that an agreement to arbitrate ADEA claims provided for in a collective-bargaining agreement cannot waive an individual employee’s right to a judicial forum under federal antidiscrimination statutes. In reviewing the facts underlying Gardner-Denver and its progeny, it interpreted the facts as revealing a narrow scope of the legal rule they engendered, noting those cases “did not involve the issue of the enforceability of an agreement to arbitrate statutory claims,” but “the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.” Thus, the Court concluded that Gardner-Denver did not control the outcome where, as here, the collective-bargaining agreement’s arbitration provision expressly covered both statutory and contractual discrimination claims.

The Court recognized that the Gardner-Denver line of cases included broad dicta highly critical of using arbitration to vindicate statutory antidiscrimination rights. However, it found that view was based on what it termed a misconceived view of arbitration that the Court has since abandoned. Further, it stated that the decision to resolve ADEA claims by way of arbitration instead of litigation is not tantamount to a waiver of the statutory right to be free from workplace age discrimination, but waives only the right to seek relief from a court in the first instance. Second, the majority noted that Gardner-Denver’s “mistaken suggestion” that certain informal features of arbitration made it a forum “well suited to the resolution of contractual disputes,” but “a comparatively inappropriate forum for the final resolution of

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9 2009 WL 838159, citing 415 U.S. at 51. Justice Souter in dissent responded to this statement: “I agree that Gardner-Denver’s ‘mistrust of the arbitral process’ . . . has been undermined by our recent arbitration decisions,” but if the statements are “dicta,” their obsolence is as irrelevant to Gardner-Denver’s continued vitality as their currency was to the case’s holding when it came down; in Gardner-Denver itself we acknowledged “the federal policy favoring arbitration,” , but nonetheless held that a union could not waive its members’ statutory right to a federal forum in a CBA. 2009 WL 838159 *10, note 3 (citations omitted).

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[employment] rights.”11 Third, the Court rejected Gardner-Denver’s concern that, in arbitration, a union may subordinate an individual employee’s interests to the collective interests of all employees in the bargaining unit,13 “cannot be relied on to introduce a qualification into the ADEA that is not found in its text.” Moreover, the Court termed the conflict-of-interest argument was an unsustainable collateral attack on the NLRA, which Congress, in its view accounted for the conflict in several ways, including that 1) union members may bring a duty of fair representation claim against the union,14 2) a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age,15 and 3) union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board.16

Significantly, the Court declined to resolve the respondents’ claim that the CBA allowed the Union to prevent them from effectively vindicating their federal statutory rights in the arbitral forum because that question required resolution of contested factual allegations that were not fully briefed and not fairly encompassed within the question presented. Respondents argued that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. Petitioners contested this characterization of the CBA, offering record evidence suggesting that the Union allowed respondents to continue with the arbitration even though the Union has declined to participate. “Thus, although a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from “effectively vindicating” their “federal statutory rights in the arbitral forum.”17

Justice Stevens, dissented, noting first that he joined

11 415 U.S. at 56.
13 415 U.S. at 58, n. 19.
15 2009 WL 838159 at *15.
16 2009 WL 838159 at *15.
17 2009 WL 838159 at *16.
Justice Souter's dissent which he noted explains why the Court's decision in *Gardner-Denver Co.*, answers the question presented in this case differently from the majority decision. However, he wrote to articulate his concern regarding the "Court's subversion of precedent to the policy favoring arbitration prompts these additional remarks."\textsuperscript{18} Justice Souter dissented joined by Justices Stevens, Ginsburg, and Breyer. Noteworthy, he highlighted that "... the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which 'is usually the case.'"\textsuperscript{19} Nevertheless, he found that the majority's opinion cannot be "reconciled with the *Gardner-Denver* Court's own view of its holding, repeated over the years and generally understood ... ."\textsuperscript{20}

Justice Souter extensively reviewed the Court's *Gardner-Denver* decision which considered the effect of a CBA's arbitration clause on an employee's right to sue under Title VII and unanimously held that "the rights conferred" by Title VII (with no exception for the right to a judicial forum) cannot be waived as "part of the collective bargaining process." Justice Souter noted that the Court had contrasted two categories of rights in labor and employment law, including "statutory rights related to collective activity," which "are conferred on employees collectively to foster the processes of bargaining[, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members," and "Title VII . . . [which] stands on plainly different [categorical] ground because "it concerns not majoritarian processes, but an individual's right to equal employment opportunities." Thus, Justice Souter concluded that the *Gardner-Denver* Court imposed a "seemingly absolute prohibition of union waiver of employees' federal forum rights."\textsuperscript{21} Moreover, Justice Souter found that *Gardner-Denver* "held that an individual's statutory right of freedom from discrimination and..."
access to court for enforcement were beyond a union’s power to waive.”

Further, Justice Souter both found that the majority evaded the precedent of *Gardner-Denver* ignoring it as long as it could and when the majority did speak to *Gardner-Denver*, it misread the case in claiming that it turned solely “on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims.”

Justice Souter was critical of the majority’s assurance that a union member is able to protect himself against union discrimination by availing himself to a duty of fair representation claim. He wrote: “This answer misunderstands the law, for unions may decline for a variety of reasons to pursue potentially meritorious discrimination claims without succumbing to a member’s suit for failure of fair representation.”

The Fifth Circuit in *Ibarra v. United Parcel Service* held that because the CBA did not clearly and unmistakably waive a union member’s right to bring a Title VII claim in a federal judicial forum, the district court erred when it concluded that the CBA required Ibarra to submit her Title VII claim to the Article 51 grievance process. The court came to this conclusion after examining Article 51 and Article 36 of the CBA. Article 51 describes grievance procedures and defines a grievance as “any controversy, complaint, misunderstanding or dispute arising as to interpretation, application or observance of any of the provisions of this Agreement.” It provides that “any grievance, complaint, or dispute” shall be handled in the manner specified in the Article. The procedures culminated in submission of a grievance to an arbitrator through the Federal Mediation and Conciliation Service, but only if the grievance “cannot be satisfactorily settled by a majority decision of a panel of the arbitrators.”

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22 2009 WL 838159 at *21.
23 See 2009 WL 838159.
24 2009 WL 838159, citing Barrentine, 450 U.S. at 742 (“[E]ven if the employee’s claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration”).
26 2012 WL 4017348, at *5.
[Southern Regional Area Parcel Grievance Committee] and Deadlock Panel.’’

Article 36 is a nondiscrimination provision. It stated:

The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual’s race, color, religion, sex, sexual orientation, national origin, physical disability[,] veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law, nor will they limit, segregate or classify employees in any way to deprive any individual employees of employment opportunities because of race, color, religion, sex, national origin, physical disability, veteran status or age in violation of any federal or state law, or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act.

Noteworthy for the court, Article 36 mentioned no specific federal or state statutes and made no reference to the grievance procedures set forth in Article 51. The CBA contained no express waiver of a judicial forum for claims brought pursuant to Title VII.

Relying on Penn Plaza and Gardner-Denver, confirmed for the Fifth Circuit that the language of Article 51 and Article 36 was insufficient to waive Ibarra’s right to a judicial forum for statutory discrimination claims. It recognized that the Penn Plaza collective bargaining agreement clearly and unmistakably waived union members right to pursue ADEA claims in a judicial forum and further included a nondiscrimination provision that expressly provided for the arbitration of claims brought pursuant to the ADEA and other federal statutes. Like Article 36, the Penn Plaza provision stated that the employer would not discriminate against the employee on the basis of any characteristic protected by law.27 However, unlike Article 36, the Penn Plaza provision explicitly incorporated “claims made pursuant to . . . the Age Discrimination in Employment Act” and specified that such claims “shall be subject to the [CBA’s] grievance and arbitration procedure . . . as the sole and exclusive remedy for violations,”28 cross-referencing the relevant CBA articles.

27Penn Plaza, 556 U.S. at 252.
28Alexander v. Gardner-Denver Co., 415 U.S. 36, 56, 94 S. Ct. 1011,
In *Mathews v. Denver Newspaper Agency LLP*, the Tenth Circuit rejected a district court’s finding that an arbitration provision covering disputes regarding the contract applied to an employee’s statutory discrimination claims merely because “actions or omissions that would otherwise constitute statutory violations [were] also violations of [the] agreement.” *Mathews* involved a collective bargaining agreement that prohibited discrimination on various bases “in accordance with and as required by applicable state and federal laws.” The Tenth Circuit found that, even read in conjunction with the agreement’s nondiscrimination provision, a requirement that disputes regarding “interpretation, application, or construction of the contract” be resolved through arbitration was not sufficient to waive an employee’s right to a judicial forum for his statutory discrimination claims, explaining that “unionized employees . . . subjected to discriminatory treatment hold two similar claims, one based in statute, and one based in contract.” The Tenth Circuit reasoned that to waive employees’ rights to pursue statutory discrimination claims in a judicial forum, an arbitration provision must “expressly grant[ ] the arbitrator authority to decide statutory claims.” Other courts have expressed similar views.


36 649 F.3d at 1202.

34 649 F.3d at 1206.

33 649 F.3d at 1206 (citing *Penn Plaza*, 556 U.S. at 264, 129 S.Ct. at 1469; *Wright*, 525 U.S. at 70-80, 119 S.Ct. 391).

32 See *Cavallaro v. UMass Memorial Healthcare, Inc.*, 678 F.3d 1, 7 & n.7, 193 L.R.R.M. (BNA) 2019, 18 Wage & Hour Cas. 2d (BNA) 1732, 162 Lab. Cas. (CCH) P 10475 (1st Cir. 2012) (“Several Supreme Court cases indicate that, at least where federal statutory claims are concerned, an arbitration clause [in a collective bargaining agreement] can waive a judicial forum . . . only if such waiver is ‘clear and unmistakable.’ . . . A broadly-worded arbitration clause . . . will not suffice; rather something closer to specific enumeration of statutory claims to be arbitrated is required.” (citations omitted)); *Powell v. Anheuser-Busch Inc.*, 457 Fed. Appx. 679, 680 (9th Cir. 2011) (unpublished) (“We will not interpret a CBA to waive an individual employee’s right to litigate statutory discrimination claims unless the CBA waiver ‘explicit[ly] incorporat[es]...
The Supreme Court in *Alexander v. Gardner-Denver* rejected an employer's argument that a Title VII race discrimination claim should be barred because the aggrieved employee already had arbitrated his discharge under the provisions of a collective bargaining agreement. It held that "an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement." Thus, an agreement to arbitrate contained in a union contract did not insulate an employer from statutory claims of employment discrimination.

The *Gilmer* Court specifically distinguished, not overruled, *Alexander v. Gardner-Denver* and its progeny, emphasizing that the *Alexander* cases involved the issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of the statutory claims where the statutory claims are not within the scope of the labor arbitrator's jurisdiction. In contrast, the *Gilmer* plaintiff, in a nonunion setting, specifically agreed to arbitrate all disputes, including statutory claims. The *Gilmer* Court distinguished *Gardner-Denver* on three grounds.

First, the Court again noted that an employee’s contractual rights under a collective bargaining agreement are distinct from an employee’s statutory rights. While an individual employment contract may address both contractual and statutory rights, a collective bargaining agreement may only address the contractual rights of the members of the bargaining unit. Second, the Court noted that *Gardner-Denver*...
involved arbitration in a context of union representation under a collective bargaining agreement, where there may exist a tension between collective representation and individual statutory rights.\textsuperscript{39} It expressed its continuing “concern that in collective bargaining arbitration the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.”\textsuperscript{40} The Gilmer Court ignored the potential paradox that a greater strain may be placed on individual statutory rights in the Gilmer context, where an unrepresented individual signs a predispute arbitration agreement, than in the Alexander situation, where an individual elects postdispute to invoke the power of collective representation. Third, the Court noted that Gardner-Denver and its progeny, unlike Gilmer, were not decided under the FAA.

After Gilmer, where the employer sought to preclude statutory claims based on prior arbitration of contractual issues arising under a collective bargaining agreement, seven courts of appeals ruled that general arbitration clauses in collective bargaining agreements do not bar employees from filing law suits under antidiscrimination statutes.\textsuperscript{41} Only the Fourth Circuit in Austin v. Owens-Brockway Glass Container,
Inc. became the first court of appeals to require arbitration of a statutory discrimination claim under a collective bargaining agreement. The Third Circuit upheld the exclusivity of the arbitration remedy in a collective bargaining agreement case, but limited its holding to agreements which empower the employee to pursue arbitration without the approval of the union, and which explicitly provide for arbitration of statutory discrimination claims, instead of only contract claims.

The Supreme Court in Wright v. Universal Maritime Service Corp., unanimously held that the collective bargaining agreement general arbitration clause did not require Wright to use the arbitration procedure for alleged violation of the ADA. Wright, a longshoreman, was subject to a collective bargaining agreement and a Longshoreman Seniority contract containing arbitration clause—union having agreed for employee during collective bargaining does not count; (2) agreement must authorize arbitrator to resolve contract claims, even if factual issues arising from those claims overlap with statutory claim issues; and (3) agreement must give employee right to insist on arbitration if federal statutory claim is not resolved to his/her satisfaction in any grievance process. None of the requirements were met in this case, thus the district court's order compelling arbitration was reversed.; Brown v. Trans World Airlines, 127 F.3d 337, 74 Fair Empl. Prac. Cas. (BNA) 1675, 156 L.R.R.M. (BNA) 2481, 71 Empl. Prac. Dec. (CCH) ¶ 45012, 134 Lab. Cas. (CCH) ¶ 10069 (4th Cir. 1997); Penny v. United Parcel Service, 128 F.3d 408, 24 A.D.D. 744, 7 A.D. Cas. (BNA) 718, 156 L.R.R.M. (BNA) 2618, 1997 FED App. 0315P (6th Cir. 1997) (Court of Appeals, [Lively, C.J.], held that: collective bargaining agreement did not obligate employee to obtain judicial determination of his ADA claims).

Defendant's Motion

Plan, both of which contained an arbitration clause. When the respondents failed to hire Wright following his settlement for a claim for permanent disability benefits for job-related injuries, he filed suit alleging violations of the ADA. The district court dismissed because Wright failed to pursue the arbitration procedure provided the CBA. The Fourth Circuit affirmed.

The court noted that the Fourth Circuit's conclusions that the CBA clause encompassed a statutory claim under the ADA and was enforceable brought into focus the tension be-

45Clause 15(B) of the CBA between the Union and the SCSA provided in part as follows: “Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48 hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee . . . .” If the Port Grievance Committee, which was evenly divided between representatives of labor and management, could not reach an agreement within five days of receiving the complaint, then the dispute must be referred to a District Grievance Committee, which was also evenly divided between the two sides. The CBA provides that a majority decision of the District Grievance Committee “shall be final and binding.” If the District Grievance Committee could not reach a majority decision within 72 hours after meeting, then the committee must employ a professional arbitrator. Clause 15(F) of the CBA provided as follows:

The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement. All past port practices being observed may be reduced to writing in each port.

Finally, Clause 17 of the CBA stated: “It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law.”

Wright was also subject to the Longshore Seniority Plan, which contained its own grievance provision, reading as follows: “Any dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation, shall be referred to the Seniority Board.” The Seniority Board was equally divided between labor and management representatives. If the board reached agreement by majority vote, then that determination was final and binding. If the board could not resolve the dispute, then the Union and the SCSA each choose a person, and this “Committee of two” makes a final determination. For subsequent history, see Local 1422, Intern. Longshoremen’s Ass’n v. South Carolina Stevedores Ass’n, 170 F.3d 407, 160 L.R.R.M. (BNA) 2701, 137 Lab. Cas. (CCH) P 10380, 1999 A.M.C. 1871 (4th Cir. 1999) (union’s action to compel arbitration on behalf of Wright was timely).
tween two lines of the court's case law—the Gardner-Denver and the Gilmer decisions. However, the question of the validity of a union-negotiated waiver of employees' statutory rights to a federal forum was not resolved in Wright. Instead, the Court announced, without deciding whether Gardner-Denver's "seemingly absolute prohibition of union waiver of employees' federal forum rights survives Gilmer," that in order for a union to waive employees' statutory antidiscrimination claims, the agreement to arbitrate such claims must be "clear and unmistakable." In Wright, the CBA's arbitration clause was very general, providing only for arbitration of "[m]atters under dispute," there was no explicit incorporation of statutory antidiscrimination requirements in the remainder of the CBA. The Court held that the CBA in Wright failed to contain a clear and unmistakable waiver of covered employees' rights to a judicial forum for federal claims of employment discrimination. It did not reach the question whether such a waiver would be enforceable.

The Second Circuit addressed an election of remedies question choice where the collective bargaining agreement provided that members raising EEO claims had to choose to either arbitrate their claims through the CBA grievance procedures or proceed before the state human rights agency.46 The union refused to arbitrate a discrimination claim that had been filed by a union member with the state agency. The Second Circuit upheld the enforceability of the CBA's election of remedies provision and rejected the claim that the union's failure to pursue arbitration constituted retaliation under Title VII.

Most post-Wright courts continued to follow the Gardner-Denver paradigm in considering statutory claims raised by employees subject to collectively bargained grievance remedies, holding that the contractual grievance machinery was insufficient to establish a "clear and unmistakable waiver" of statutory rights.47 These decisions addressed claims under

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47 For an excellent discussion of Gardner-Denver and Wright, and the lower courts subsequent application, see Mary K. O'Melveny, One Bite of the Apple and One of the Orange: Interpreting Claims that Collective Bargaining Agreements Should Waive the Individual Employee's Statutory

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Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the ADEA, and other statutes.


Post-Wright courts examined the explicit language of the collective bargaining agreements (CBA) in evaluating defense motions to dismiss and/or to compel arbitration of statutory claims in the unionized workforce. Frequently, more than one CBA provision relates to the waiver issue. Most CBA’s contains some form of grievance and arbitration process for the resolution of contractual disputes. Courts agree that no waiver will be found unless such clauses explicitly and specifically incorporate statutory nondiscrimination protections. A general clause referring to the arbitration of “all disputes” under the contract or providing that


The Fourth Circuit noted in Carson v. Giant Food, Inc., 175 F.3d 325, 331, 79 Fair Empl. Prac. Cas. (BNA) 976, 161 L.R.R.M. (BNA) 2129, 75 Empl. Prac. Dec. (CCH) ¶ 45847 (4th Cir. 1999), Wright suggested that the matter may be resolved by one of two separate approaches: (1) “drafting an explicit arbitration clause [providing that] employees agree to submit to arbitration all federal causes of action arising out of their employment” or (2) drafting “an explicit incorporation of statutory antidiscrimination requirements’ elsewhere in the contract.”

See Ciambriello, 292 F.3d at 322 to 33 (general CBA grievance/arbitration clause could not waive employee’s Fourteenth Amendment rights); Fayer, at 117, 121 to 23 (general grievance provision pertaining to “all disputes” cannot waive First Amendment rights); Rogers, 220 F.3d at 76; Carson, 175 F.3d at 331 to 32 (general arbitration clauses such as those referring to “all disputes” do not, taken alone, meet the Wright standard); Fowler v. Colfax Envelope Corp., 2002 WL 1676568 (N.D. Ill. 2002) (blanket arbitration provision did not incorporate ADEA claims); Neppl v. Signature Flight Support Corp., 234 F. Supp. 2d 1016, 1023-1025, 84 Empl. Prac. Dec. (CCH) ¶ 41375, 147 Lab. Cas. (CCH) ¶ 34676, 147 Lab. Cas. (CCH) ¶ 34676 (D. Minn. 2002) (reference to FMLA procedures in CBA did not incorporate Act into CBA’s arbitration clause); Fowler v. Transit Super. Org., 84 Fair Empl. Prac. Cas. (BNA) 322, 2000 WL 1726687 (S.D. N.Y. 2000) (§§ 1981 and 1983 claims not barred by general arbitration clause of CBA); Vasquez, 95 Cal. Rptr. 2d at 433-36, 80 Cal. App. 4th at 296-99 (general arbitration clause, read together with nondiscrimination clause, failed to contain explicit waiver of federal ADA claims or state FEHA claims). See, generally, Jacob E. Tyler, Mandatory Arbitration of Discrimination Claims Under Collective Bargaining Agreements: The Effect of Wright, 4 HARV. NEGOT. L. REV. 253 n.59 (discussing various circuit court decisions addressing waiver issue).
arbitration is intended to resolve all disputes "concerning the interpretation, application, or claimed violation of a specific term or provision of [the] Agreement" is insufficient.55 The grievance and arbitration clause must be considered together with other CBA provisions.

Virtually all CBAs contain some form of nondiscrimination clause, promising that employees will not be subject to discrimination.56 Many employers argue that an employee's statutory rights are waived because the CBA contains language prohibiting discrimination by the employer and the union against employees falling within various protected classes. Unless the nondiscrimination clause identifies the particular statutes by name or citation and clearly indicates the parties' intention to fully incorporate such statutes into the contract, including the pertinent statutory remedies, courts decline to find waiver.57 Examples of language found insufficient are discussed by a number of courts.58


One court concluded that statutory claims rights were incorporated into the CBA. It based its holding on the following language: “[The parties] agree that they will not discriminate against any employee with regard to race, color . . . . [and] that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964.” The court stated

age discrimination claims not included in contractual grievance and arbitration clauses; Collins, 71 F. Supp. 2d at 911-12 (CBA provision stating that company “may take any action necessary to comply.”

One nondiscrimination clause provided as follows: “Both parties acknowledge their respective obligations under Title VII of the Civil Rights Act and agree that neither will discriminate against any employee or applicant for employment because of race, color, religion, sex, age, veteran status, disability or national origin.” Birch, 207 F. Supp. 2d at 382-84 (holding that reference to Title VII in contract was “not sufficiently explicit to waive” plaintiff’s ADA claim, particularly since the contract did “not identify the ADA in any way”). See also Brown, 183 F.3d at 322 (finding that a similar nondiscrimination clause could not waive statutory rights). Such a clause “constitute[s] merely an ‘agreement not to commit discriminatory acts’ rather than an ‘agreement to incorporate, in toto, the antidiscrimination statutes that prohibit those acts.’” Brown, 183 F.3d at 320. Another clause provided that “[t]here shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability” and that “employees are entitled to all provisions of the Family and Medical Leave Act of 1993 . . . that are not specifically provided for in this agreement.” It was held inadequate to bar the employee’s ADA and FMLA claims. Rogers, 220 F.3d at 74. These provisions did not meet the Wright requirement of “explicit” incorporation of statutory claims, including statutory remedies, because they were not conferring benefits that were “coextensive with the federal statutory right.” Rogers v. New York University, 220 F.3d 73, 76, 146 Ed. Law Rep. 75, 164 L.R.R.M. (BNA) 2854, 6 Wage & Hour Cas. 2d (BNA) 379, 78 Empl. Prac. Dec. (CCH) P 40131, 141 Lab. Cas. (CCH) P 10768, 141 Lab. Cas. (CCH) P 34124 (2d Cir. 2000) (abrogated by, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009)) at 76 (citing, Wright, 525 U.S. at 79). See also Neddl, 234 F. Supp. 2d at 1019-24 and n.13 (holding that referring to FMLA regulations and other guidance in CBA did not incorporate the Act into contract for dispute resolution purposes, and reviewing various authorities); Collins, 71 F. Supp. 2d at 910-11 (CBA language stating that “Company may take any action necessary to comply with the [ADA]” and providing that “if the parties cannot otherwise resolve any dispute regarding the ADA ‘the matter may be submitted to the grievance and arbitration process . . . .’” did not effectuate waiver; term “may” leaves open issue of whether employees are informed that they cannot enforce ADA rights in court).

it was “hard to imagine a waiver that would be more definite or absolute.”

Courts considered waiver or preclusion issues in the context of claims arising under one specific statute, such as the ADA, where the CBA provision made specific reference to another, such as Title VII. Most courts rejected explicit incorporation of a statutory scheme simply because the clause references protected a status such as “disability” but not the ADA or other statute itself.

In one case, neither the arbitration clause nor the general nondiscrimination clause contained definitive waiver language; however, the court examined a separate clause, which prohibited sexual harassment and set forth express grievance-handling methods for resolving such claims, and

75, 164 L.R.R.M. (BNA) 2854, 6 Wage & Hour Cas. 2d (BNA) 379, 78 Empl. Prac. Dec. (CCH) P 40131, 141 Lab. Cas. (CCH) P 10768, 141 Lab. Cas. (CCH) P 34124 (2d Cir. 2000) (abrogated by, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009)) at 76 (citing, Wright, 525 U.S. at 79). See also Neddl, 234 F. Supp. 2d at 1019-24 and n.13 (holding that referring to FMLA regulations and other guidance in CBA did not incorporate Act into contract for dispute resolution purposes and reviewing various authorities); Collins, 71 F. Supp. 2d at 910-11 (CBA language stating that “Company may take any action necessary to comply with the [ADA]” and providing that “if the parties cannot otherwise resolve any dispute regarding the ADA ‘the matter may be submitted to the grievance and arbitration process...’” did not effectuate waiver; term “may” leaves open issue of whether employees are informed that they cannot enforce ADA rights in court).

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Safrit v. Cone Mills Corp., 248 F.3d 306, 308, 85 Fair Empl. Prac. Cas. (BNA) 833, 167 L.R.R.M. (BNA) 2070 (4th Cir. 2001) at 308. The Court's ruling was based on Fourth Circuit precedent holding that “a collectively bargained agreement to arbitrate a statutory discrimination claim is enforceable.” Safrit v. Cone Mills Corp., 248 F.3d 306, 308, 85 Fair Empl. Prac. Cas. (BNA) 833, 167 L.R.R.M. (BNA) 2070 (4th Cir. 2001) (citing Brown, 183 F.3d at 321; Carson, 175 F.3d at 331). Similarly, another Fourth Circuit case, Singleton v. Enersys, Inc., 57 Fed. Appx. 161 (4th Cir. 2003), held that a waiver was effectuated by the following language in a nondiscrimination clause: “Any and all claims regarding equal employment opportunity or provided for under this Article of the Agreement or under any federal or state employment law shall be exclusively addressed by an individual employee or the Union under the grievance and arbitration provisions of this Agreement.”

61See, e.g., Bratten, 185 F.3d at 627-28, 631-32 (CBA provision stating that parties would “comply with Executive Order 11246 and Title VII” and that they would not discriminate based on “disability or handicap” insufficient to incorporate ADA claims).
concluded that this particular language should be construed as requiring plaintiffs to arbitrate their harassment claims under the contract rather than pursue them in court. One decision did set forth specific guidance on what is required to demonstrate an enforceable waiver in the Fourth Circuit.

The evidentiary value of arbitration rulings is another possible argument to impose a waiver. Neither Gardner-Denver nor Wright resolved the question of what weight, if any, should be given to those arbitration decisions that do consider an employee’s discrimination claim. Even where the CBA has not clearly and unmistakably waived statutory assertion of such claims, some courts have accorded preclusive, or at least highly deferential, weight to these rulings. One New York district court, for example, gave preclusive effect to the arbitrator’s ruling against plaintiffs asserting sexual harassment claims because the arbitration process had been fair and provided significant procedural protections that it viewed as comparable to those available in a judicial proceeding. A Connecticut district court refused to hold that a plaintiff’s ADA and Connecticut FEP claims were barred by a prior arbitrator’s ruling, citing Gardner-Denver’s analysis of the “comparatively inferior” arbitration process and the dangers that the union and the individual might not have the same “harmony of interest.” However, most courts continue to reject claims that individual employees should

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62 Clark, 98 F. Supp. 2d at 323, 332-336 (according preclusive effect to prior arbitration decision denying plaintiffs’ sexual harassment claims in subsequent Title VII and New York Human Rights Act claims).

63 Carson, 175 F.3d at 331-32. The court stated:

The CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment. Such a clear arbitration clause will suffice to bind the parties to arbitrate claims arising under a host of federal statutes, including Title VII.

64 Clarke, 98 F. Supp. 2d at 323, 332-37. The court looked carefully at the arbitration process and concluded that it had been both fair and adequate. Among the items cited by the court in reaching its decision were that the arbitration hearing took place over five days, the rules of evidence had been applied, and a written transcript was made of the proceedings. In addition, testimony was given under oath and subjected to cross-examination, and “all parties had broad rights of discovery and compulsory process, pursuant to a provision of the CBA.” Clarke v. UFI, Inc., 98 F. Supp. 2d 320, 334-35, 82 Fair Empl. Prac. Cas. (BNA) 1681, 164 L.R.R.M. (BNA) 2388 (E.D. N.Y. 2000) at 334-35.

65 Beason, 37 F. Supp. 2d at 131-33 (arbitration ruling denied union’s
be bound by prior arbitration proceedings where the issues raised were not coextensive with the statutory guarantees raised in the lawsuit. These decisions also look carefully at the procedural differences between arbitration and litigation.66

In *Carson v. Giant Food, Inc.*67 current and former African-American employees of the supermarket food chain Giant Food filed suit claiming that Giant and its officers and managers discriminated against employees on the basis of race, age, and disability. They alleged numerous individual and class claims, including claims under Title VII, 42 U.S.C.A. § 1981, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). In response, defendants asserted that four different unions, which had entered into four different Collective Bargaining Agreements (CBAs), represented the named plaintiffs. Defendants argued that each of those CBAs required the arbitration of employee statutory discrimination claims. They based their argument on two clauses—a nondiscrimination clause and an arbitration clause—that appear in each CBA.68 In addition to the nondiscrimination provisions, the four CBAs also contain arbitration clauses defining the scope

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66See, e.g., Shtab, 173 F. Supp. 2d at 260-63 (declining to give preclusive effect in FMLA lawsuit to arbitration award addressing leave denials under CBA and discussing cases); also see infra note 178; Beason, 37 F. Supp. 2d at 131-33; Tout v. County of Erie, 1998 WL 683770 (W.D. N.Y. 1998); Slaughter, 64 F. Supp. 2d at 329-31 (dismissing affirmative defense of collateral estoppel, finding that issues resolved in grievance hearing and arbitration were distinct from those involved in FMLA action).


68The nondiscrimination provisions in the four CBAs are similar. The CBA negotiated by the United Food and Commercial Workers Union, Local 400, includes a clause in the preamble:
of arbitrable matters. Defendants moved for summary judgment, asserting that the language of these agreements.

Applying the “clear and unmistakable” test set out in Wright, the court found that the broad, general language in the CBA’s was not sufficient to meet the level of clarity required to effect a waiver in a CBA. In the collective bargaining context, the court noted that the parties “must be particularly clear” about their intent to arbitrate statutory discrimination claims. Here, the parties were not that clear. The Fourth Circuit read the Supreme Court’s opinion in Wright as indicating that the requisite degree of clarity can be achieved by two different approaches. The first simply involves drafting an explicit arbitration clause. Under this approach, the CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment. The second approach is applicable when the arbitration clause is not so clear. “General arbitration clauses, such as those referring to ‘all disputes’ or ‘all disputes concerning the interpretation of the agreement,’ taken alone do not meet the clear and unmistakable requirement of Universal Maritime.” Therefore, the court ruled that when the parties use such broad but nonspecific language in the arbitration clause, they must include an “explicit incorporation of statutory antidiscrimination requirements” elsewhere in the contract. If another provision, like a non-discrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims. Since the CBAs in this case failed to follow either approach, the arbitration clauses in the CBA’s did not commit to arbitration the resolution of the employees’ federal statutory discrimination claims.

WHEREAS, the Employer and the Union in the performance of this Agreement agree not to discriminate against any employee or applicant for employment because of race, color, religious creed, origin, age or sex.

The CBAs for Locals 639, 730, and 922 each state that “[s]hould any grievance or dispute arise between the parties regarding the terms of this Agreement, [the parties will try to resolve the matter]. . . . If agreement cannot be reached, the parties agree that within five (5) days they shall select a neutral and impartial arbitrator . . . . The arbitration clause negotiated by Local 400 is slightly different, requiring arbitration of any “controversy, dispute or disagreement . . . concerning the interpretation of the provisions of this Agreement.”
The Seventh Circuit in *EEOC v. Board of Governors of State Colleges & Universities*,\(^7^0\) held that Section 4(d) of the ADEA\(^7^1\) prohibits a collective bargaining agreement that provides that grievances will proceed to arbitration only if the employee refrains from exercising rights under the ADEA. The court noted that the *Gilmer* court distinguished its holding from cases “occurring in the context of collective bargaining agreements.”\(^7^2\) Other courts of appeals addressed arbitration clauses in CBA’s.\(^7^3\)

In *New England Health Care Employees Union, Dist. 1199, SEIU, AFL-CIO v. Rhode Island Legal Services* (the Union)\(^7^4\) the Union and Rhode Island Legal Services (“RILS”) are parties to a collective bargaining agreement (“the CBA”). Among the CBA’s many provisions is Article 20.3(f), which provides that “RILS shall not be required to arbitrate any dispute which is pending before any administrative or judicial


\(^{71}\)29 U.S.C.A. § 623(d).

\(^{72}\)EEOC v. Board of Governors of State Colls. & Univs., 957 F.2d at 431 (citing 111 S. Ct. at 675).

\(^{73}\)Rogers v. New York University, 220 F.3d 73, 146 Ed. Law Rep. 75, 164 L.R.R.M. (BNA) 2854, 6 Wage & Hour Cas. 2d (BNA) 379, 78 Empl. Prac. Dec. (CCH) ¶ 40131, 141 Lab. Cas. (CCH) ¶ 10768, 141 Lab. Cas. (CCH) ¶ 34124 (2d Cir. 2000) (abrogated by, 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009)) (arbitration on a discharged employee’s FMLA claim not compelled when agreement does not specifically make compliance with the FMLA a contractual commitment that is subject to the arbitration clause); Brown v. ABF Freight Systems, Inc., 183 F.3d 319, 161 L.R.R.M. (BNA) 2769 (4th Cir. 1999) (court ruled that one clause in a CBA that ran nearly parallel to the language of some federal antidiscrimination statute, Title VII and the ADA specifically, and to arguably prohibit some of the same conduct was insufficient to constitute a waiver without explicit incorporation of the statutory materials); Kennedy v. Superior Printing Co., 215 F.3d 650, 10 A.D. Cas. (BNA) 1176, 164 L.R.R.M. (BNA) 2609, 2000, 2000 FED App. 0203P (6th Cir. 2000) (court ruled no res judicata bar to ADA claim when nothing in the collective bargaining agreement precluded plaintiff from pursuing an ADA claim in federal court and plaintiff’s agreement to arbitrate did not waive his substantive rights afforded to him under the ADA).

agency.” RILS terminated a Union member and the Union filed a grievance on the employee's behalf, pursuant to the CBA, alleging that he was terminated because of a disability. Four months later, the employee filed discrimination complaints with the Rhode Island Commission on Human Rights and the Equal Employment Opportunity Commission alleging that RILS terminated her because she is physically disabled. The Union’s grievance proceeded to arbitration, and the arbitrator found it was substantively non-arbitrable under Article 20.3(f) because the employee’s administrative complaints were still pending. After the Union petitioned the district court to vacate the arbitrator’s award, the district court upheld the award and granted summary judgment in the Union’s favor.

The First Circuit reviewed the district court’s legal determinations de novo, and applied the standard cited in Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17,75 for evaluating an arbitrator’s decision in the CBA context:

... both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as ‘just cause.’ They have ‘bargained for’ the ‘arbitrator’s construction’ of their agreement. And courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances. Of course, an arbitrator’s award ‘must draw its essence from the contract and cannot simply reflect the arbitrator’s own notions of industrial justice.’ ‘But as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,’ the fact that ‘a court is convinced he committed serious error does not suffice to overturn his decision.’ The court noted that a challenge to an arbitrator’s interpretation of an agreement can be successful only if the losing party meets the exceedingly strict standard of review by showing that the award is: “(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made

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such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.” The court held that “even assuming that public policy favors arbitration, we may not supplant the parties’ arms-length agreement and require RILS to submit to arbitration here. Finding no explicit, well-defined and dominant public policy to require a party to arbitrate claims it has agreed not to arbitrate, our inquiry comes to an end.”