2010

The Evolving Schizophrenic Nature of Labor Arbitration

Martin H Malin, *Chicago-Kent College of Law*

JOURNAL OF DISPUTE RESOLUTION

CENTER FOR THE STUDY OF DISPUTE RESOLUTION
SCHOOL OF LAW
UNIVERSITY OF MISSOURI

The Evolving Schizophrenic Nature of Labor Arbitration

*Martin H. Malin**

I. INTRODUCTION

Collective bargaining agreements (CBAs) between unions and employers commonly provide for paid time off on specified holidays.[1] Such agreements also commonly require that, to be eligible for holiday pay, employees must work their last regularly scheduled shift prior to arnd first regularly scheduled shift after the holiday.[2] Assume that a holiday falls on a Friday. An employee is injured on the job through no fault of the employee on the Tuesday of the week containing the holiday. The employee is taken to an employer-selected doctor for treatment. The doctor restricts the employee from working for the remainder of the week. The employee follows the doctor's orders and returns to work the following Monday. The employer denies the employee holiday pay for failing to work on Thursday, the employee's last regularly scheduled shift prior to the holiday. The employee feels that he or she has been treated unjustly and complains to the union. Such holiday pay disputes are common.[3]

Under the typical CBA, the union will file a grievance on behalf of the employee protesting the denial of holiday pay. If the parties are unable to resolve the grievance through bilateral negotiations established in the CBA's grievance procedure, the union will demand that the dispute be submitted to a mutually selected neutral arbitrator whose decision will be final and binding on the parties.

Why is grievance arbitration the almost universal method contained in CBAs for resolving such claims? Section 301 of the Labor Management Relations Act confers jurisdiction on federal district courts to hear claims of breaches of contracts between employers and labor organizations.[4] A union[5] or an employee[6] may bring a breach of contract claim under section 301. The amount of damages in the holiday pay dispute, however—one day's pay—would not justify the time or expense of a federal lawsuit. One might surmise that because many claims for breach of a CBA will be similarly of low value, the parties would rationally agree to devise a forum for adjudicating those claims that would be faster and less expensive than federal court litigation.

---

* Visiting Professor of Law, University of Michigan Law School; Professor of Law and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology. The author gratefully acknowledges financial support for this article from the Marshall-Ewell Research Fund at Chicago-Kent College of Law.

1. *See* Roger I. Abrams & Dennis R. Nolan, *Resolving Holiday Pay Disputes in Labor Arbitration*, 33 CASE W. RES. L. REV. 380, 381 (1983).
2. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1067-70 (6th ed. 2003).
3. Arbitrators have reached varying results in resolving such disputes. *Id.* at 1069-70.
4. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (2006).
5. *See* Groves v. Ring Screw Works, 498 U.S. 168 (1990).
6. *See* Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

The speed and cost efficiency of grievance arbitration might explain why a union would want to provide for it, but an employer may rationally conclude that the high cost of litigation will deter the bringing of low-value claims. Why, then, do employers so readily agree to grievance and arbitration procedures in CBAs? The traditional answer has been that employers do not fear litigation in the absence of a grievance and arbitration procedure. They recognize that unions are not likely to sue; rather, unions are likely to resort to strikes or other job actions to enforce their contracts. Thus, grievance arbitration is unlike most other forms of arbitration that provide substitutes for litigation. As recognized by the Supreme Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,[7] one of three cases comprising the seminal *Steelworkers Trilogy*:[8]

> [A]rbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts towards arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.[9]

For a half century, the traditional view of labor arbitration has been that it is part of a private process of union-employer workplace self-governance and a substitute for workplace strife rather than a substitute for litigation. This view of labor arbitration reached its zenith in 1974 when the Supreme Court in *Alexander v. Gardner-Denver Co.* declared labor arbitration to be separate from and to operate independently of the public legal system.[10] In *Gardner-Denver,* the Court held that employees need not resort to the CBA's grievance and arbitration procedure before bringing a lawsuit under Title VII of the Civil Rights Act of 1964 and may proceed with their lawsuits even though they have grieved and arbitrated under the CBA and lost. To the Court, the labor arbitration process was completely different from the public adjudication process. The Court observed:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . .[11]

On April 1, 2009, in *14 Penn Plaza, L.L.C. v. Pyett*,[12] the Court, in apparent disregard of a half century of precedent, held that a "collective-bargaining agree-

7. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

8. The other two cases are United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960) and United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

9. *Warrior & Gulf*, 363 U.S. at 578.

10. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53-54 (1974).

11. *Id.* at 53.

12. 129 S. Ct. 1456, 1474 (2009).

ment that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act (ADEA) claims is enforceable as a matter of federal law."[13] Finding such a clear and unmistakable waiver of the judicial forum in the CBA that covered Pyett's employment, the Court held that Pyett was obligated to raise his claim under the ADEA through the grievance and arbitration procedure. The Court reasoned:

> In this instance, 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 claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between the Union and the RAB easily qualifies as a conditio[n] of employment that is subject to mandatory bargaining under [the National Labor Relations Act].[14]

The Court continued, "Parties generally favor arbitration precisely because of the economics of dispute resolution. . . . As 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."[15] Completely absent from the Court's opinion in *Pyett* is any discussion of labor arbitration's role in a private system of workplace self-governance. Also absent is a half century of recognition that labor arbitration is a substitute for strikes and other workplace strife. Instead, the Court in *Pyett* regards labor arbitration as just another substitute for litigation.

Commentators have rightly criticized *Pyett* for its complete disregard of decades of established precedent.[16] In this article, however, I situate the *Pyett* decision in the context of an ongoing evolution in labor arbitration as that institution has tried to accommodate the intrusion of public law claims into a private system of workplace self-governance. I suggest that labor arbitration has developed a kind of schizophrenic existence, preserving its role as a substitute for strikes and other workplace strife in a private system of self-governance while accommodating an additional role as a substitute for litigation of public law claims. Nevertheless, I find the decision in *Pyett* misguided and assess its implications for the institution of labor arbitration's ability to cope with its evolving schizophrenia.

---

13. *Id.* at 1474.

14. *Id.* at 1464 (internal quotation omitted).

15. *Id.* (citing *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.")).

16. *See, e.g.*, Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-9 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 274-77 (2009); Alan Hyde, *Labor Arbitration of Discrimination Claims after* 14 Penn Plaza v. Pyett: *Letting Discrimination Defendants Decide Whether Plaintiff May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. (forthcoming 2010).

II. THE TRADITIONAL ROLE OF LABOR ARBITRATION AS A TOOL OF WORKPLACE SELF-GOVERNANCE

Congress enacted the National Labor Relations Act (NLRA) in 1935,[17] as part of the New Deal reaction to the Great Depression. Part of the New Deal strategy was to more equitably distribute wealth and income, thereby spurring demand for goods and services and inoculating the economy against another depression. Thus, section 1 of the NLRA declares, inter alia:

> [T]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the free flow of commerce and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry . . . .[18]

Congress could have pursued its goal of more equitable distribution of income by directly setting wages and terms and conditions of employment for workers. It chose not to do so. Instead, it opted for a much more conservative, laissez-faire approach. It empowered workers to pool their bargaining power through self-organization and to use that collective bargaining power to negotiate their own terms, which it presumed would be more equitable for workers than the terms the workers could secure individually.[19] As the Supreme Court observed:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[20]

The system of collective bargaining produces a private agreement. Government may supervise the process, but it may not intervene in the substance of the negotiations. Grievance arbitration plays a critical role in this essentially private process. Arbitrators derive their authority from the parties, and arbitrators are responsible to the parties. As Harry Shulman, the first umpire for the Ford-UAW labor agreement and Dean of Yale Law School, observed, the underlying premise

17. Pub. L. No. 74-129 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

18. 29 U.S.C. § 151 (2006).

19. *See* Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 514 (1986); Martin H. Malin, *The Canadian Auto Workers—Magna International, Inc. Framework of Fairness Agreement: A U.S. Perspective*, 54 ST. LOUIS U. L.J. (forthcoming 2010).

20. H. K. Porter Co. v. N.L.R.B., 397 U.S. 99, 103 (1970).

of American collective bargaining is "that wages and other conditions of employment be left to autonomous determination by employers and labor."[21] Dean Schulman described and helped define the role of the arbitrator within this autonomous system created by the parties:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective bargaining agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.[22]

In the *Steelworkers Trilogy*,[23] the Supreme Court quoted Shulman's article and relied upon his idea of arbitration as part of the parties' system of self-governance. In these landmark decisions, in which the Court established the legal framework of labor arbitration, the Court described the collective bargaining agreement as "an effort to erect a system of industrial self-government."[24] Furthermore, according to the Court, it is because labor arbitration is an integral part of the collective bargaining process that it is due significant deference by the courts.

Judicial respect for the role that arbitration plays in the parties' system of self-governance mandates that courts not consider the merits of a grievance when deciding whether to compel arbitration. In deciding whether to compel arbitration, courts must give "special heed . . . to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve."[25] Consequently, courts "have no business weighing the merits of the grievance"[26] in deciding whether to compel arbitration because "[t]he processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."[27] To avoid becoming enmeshed in the merits of the underlying grievance, a court is to compel arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[28]

Similarly, after the arbitrator has ruled, courts are to show great deference to the arbitrator's award.

---

21. Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000 (1955).

22. *Id.* at 1016.

23. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960).

24. *Warrior & Gulf*, 363 U.S. at 580.

25. *Am. Mfg.*, 363 U.S. at 567.

26. *Id.* at 568.

27. *Id.*

28. *Warrior & Gulf*, 363 U.S. at 582-83.

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[29]

Therefore, a court is to enforce the award "so long as it draws its essence from the collective bargaining agreement."[30] Arbitral findings of fact are completely off limits to judicial review. "'[I]mprovident, even silly factfinding' does not provide a basis for a reviewing court to refuse to enforce the award."[31]

The collective bargaining process, which continues during the life of the CBA through the grievance and arbitration procedure, enables the parties' relationship "to be governed by an agreed-upon rule of law [rather than] leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces."[32] The Court has characterized the grievance and arbitration procedure as the quid pro quo for the union's agreement not to strike during the term of the CBA.[33] David Feller, whose briefs as a lawyer successfully arguing the *Trilogy* cases were relied upon by the Court and who later became a renowned arbitrator and labor law professor, has theorized that the true essence of a CBA consists of the grievance-arbitration procedure and the no-strike clause.[34] In other words, the union's concession that it will not strike is the basis for the employer's concession that it will be bound by the grievance and arbitration procedure.

The grievance and arbitration procedure prevents strikes and other job actions in several ways. First, as illustrated by the hypothetical dispute over whether the injured employee was entitled to holiday pay, unions would be more likely to resort to job actions rather than litigation to resolve disputes that arise mid-contract if there were no provision for binding arbitration. Second, the availability of grievance arbitration during the term of the CBA facilitates the parties' ability to reach agreement on the CBA in the first instance by deferring potential disputes to case-by-case negotiation through the grievance procedure with the understanding that if the parties are unable to reach agreement in any particular case, they will be bound by the decision of their mutually selected arbitrator.

Some matters cannot readily be reduced to specific, detailed contract provisions. For example, parties likely would find it difficult to reach agreement on the specifics of a detailed disciplinary code. Even if they could reach agreement, they would find it highly impracticable to devise a code that would cover every circumstance of employee misfeasance or malfeasance. To resolve such matters, parties routinely agree that discipline and discharge will only be imposed for just cause. By so doing, they leave refinement of this necessarily indefinite term to

29. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).

30. *Id.* at 597.

31. Major League Baseball Players' Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (quoting United Paper Workers v. Misco, 484 U.S. 29, 39 (1987)).

32. *Warrior & Gulf*, 363 U.S. at 580.

33. Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 248 (1970).

34. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL L. REV. 663 (1973).

case-by-case negotiation through the grievance procedure, with ultimate resolution, in the absence of agreement in any particular case, by the arbitrator.

In other circumstances, parties find that they disagree in principle over how a particular term of employment should be governed but realize that their abstract disagreement may not result in disagreements in practice and is not worth a strike or otherwise impeding agreement on the terms of the CBA. For example, parties commonly provide that, in filling vacancies in a bargaining unit, qualifications will govern, but where candidates' qualifications are relatively equal, the senior candidate will prevail. This very common CBA provision often results from union and employer disagreement over the appropriate relative mix of qualifications and seniority in filling vacancies and recognition that the disagreement may never arise in practice, as the employer may end up deciding that the senior candidate is also the most qualified, or a rejected senior candidate may not want to pursue the matter. It makes no sense to preclude agreement on a CBA over an abstract dispute that may never develop into a real issue. The grievance and arbitration procedure enables the parties to defer their abstract disagreement to case-by-case negotiation with ultimate resolution by the arbitrator if it ever becomes a real issue, even though the parties recognize that they attach different meanings to the term "relatively equal."

III. ARBITRATION'S ACCOMMODATION OF THE INCREASING PRESENCE OF PUBLIC REGULATION

David Feller has spoken of arbitration's "golden age," a time when "the sole source of law in industries in which the grievance and arbitration machinery was well-established was the collective agreement."[35] Feller lamented that the wave of new statutes that began in the 1960s—with Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act and the Age Discrimination in Employment Act—would "necessarily undermine the unitary—or almost unitary—system of governance under the agreement of which the institution of arbitration and its special status are the products."[36]

But arbitrators wrestled with the role of public law in their private system long before the wave of statutory regulation in the 1960s and early 1970s. In a 1952 address to the eighth annual meeting of the National Academy of Arbitrators, Professor Archibald Cox discussed three issues: grievances based on CBA provisions that violate the public law, grievances based on public law obligations rather than those found in the CBA, and the extent to which legal principles should be relied on by arbitrators in resolving grievances.[37]

With respect to the first question, Cox observed that arbitrators frequently encountered the problem in the aftermath of World War II when senior employees were laid off ahead of their junior colleagues who had served in the armed forces

35. David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 PROC. OF THE NAT'L ACAD. OF ARB. 97, 108.

36. *Id.* at 109.

37. *See* Archibald Cox, *The Place of Law in Labor Arbitration*, *in* THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NAT'L ACAD' OF ARB., 1948-1954, at 76, 76.

because the Selective Selective Act required veterans be given preference over non-veterans in the year following the veterans' discharge from the armed forces.[38] Cox observed that when facing such cases, "[m]ost arbitrators treated the statute as controlling and dismissed the grievance."[39] He recognized legitimate concerns that arbitrators, as creatures of the contract, should follow the CBA rather than the statute but concluded that weightier considerations supported arbitral adherence to the public law over the contract, averring, "It is either futile or grossly unjust to make an award directing an employer to take action which the law forbids . . . ."[40]

With respect to the second question, whether arbitrators should entertain grievances founded on the public law rather than the CBA, Cox suggested that the answer would depend on the scope of the grievance procedure as defined in the CBA.[41] Finally, with respect to the question of whether arbitrators should be bound by public law doctrines when resolving issues of procedure, evidence, or interpretation of the CBA, Cox opined that arbitrators should apply a legal rule when "the policy behind the legal rule holds true," but "[i]f the policy is unimportant, the legal rule may safely be disregarded."[42]

Nevertheless, the significant expansion of public law regulation of the workplace that began in the 1960s and 1970s gave the question of how to accommodate public law in the private arbitration system new prominence. The renewed concern with these issues gave rise to the "Meltzer-Howlett" debate over the role of "external law" in labor arbitration, so named after a famous exchange between Professor Bernard Meltzer and arbitrator Robert Howlett at the twentieth annual meeting of the National Academy of Arbitrators.[43] Meltzer acknowledged that where an arbitrator faces two interpretations of a collective bargaining agreement, one of which is repugnant to a statute, "the statue is a relevant factor for interpretation."[44] However, he continued, "Where . . . there is an irrepressible conflict, the arbitrator, in my opinion, should respect the agreement and ignore the law."[45] Howlett, on the other hand, argued that "arbitrators *should* render decisions on the issues before them *based on both contract language and law*."[46] He maintained that the law is incorporated into every agreement,[47] and that "[t]he law is part of the 'essence [of the] collective bargaining agreement' to which Mr. Jus-

38. *Id.* at 77.
39. *Id.*
40. *Id.* at 78.
41. *Id.* at 80-83.
42. *Id.* at 86.
43. Bernard D. Meltzer, *Ruminations about Ideology, Law and Labor Arbitration*, 20 PROC. OF THE NAT'L ACAD. OF ARB. 1 (Dallas L. Jones ed. 1967); Robert G. Howlett, *The Arbitrator the NLRB and the Courts*, 20 PROC. OF THE NAT'L ACAD. OF ARB. at 67.
44. Meltzer, *supra*, note 43, at 15. Meltzer's essay is reprinted at 34 U. CHI. L. REV. 545 (1967).
45. Meltzer, *supra* note 43, at 16.
46. Howlett, *supra*, note 43, at 83 (emphasis in original).
47. *Id.* at 85 (citation omitted).

tice Douglas has referred."[48] Their exchange touched off a wide-ranging, ongoing dialogue to which numerous arbitrators and scholars have contributed.[49]

Meltzer's position found support in dicta in the *Trilogy*. In *Enterprise Wheel*, after setting forth its "essence test" for enforcing arbitration awards, the Court turned to the award at issue. It observed that the award was ambiguous. The Court explained:

> It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to "the law" for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.[50]

The *Enterprise Wheel* dicta may be considered the first dominant approach to preserving the private nature of grievance arbitration while reconciling it with the public law. Arbitrators may look to the public law as an aid to their interpretation and application of the private CBA, but they do so in their traditional role as components of private systems of workplace governance. They do not adjudicate public law claims. The Court of Appeals for the District of Columbia Circuit, in an opinion authored by Judge Harry Edwards, who was a renowned labor law scholar and labor arbitrator prior to his appointment to the bench, has explained:

> When construction of the contract . . . requires an application of "external law," . . . the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship between the parties.[51]

The consequences of maintaining the arbitrator's strictly private role are several. It leaves the adjudication of public law rights to the courts and administrative agencies. Even if the arbitrator makes findings, such as an absence of a discriminatory motive, that would appear to resolve the public law claim, a party may litigate the matter de novo in a public law forum. Furthermore, the private arbitrator may, and perhaps is obliged to, adopt the Meltzer view of ignoring the law and applying the contract where there is an irreconcilable conflict between the CBA and the public law. Finally, a public law claimant may bypass the private

---

48. *Id.* at 83. Howlett did express one caveat to his position. Where the parties advise the arbitrator that they are reserving statutory questions for presentation to an external forum, the arbitrator should avoid the statutory issues or withdraw from the case. *Id.* at 87.

49. For further discussion see Martin H. Malin & Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199, 208-12 (2005).

50. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)..

51. Am. Postal Workers Union v. U.S. Postal Serv., 789 F.2d 1, 6 (D.C. Cir. 1986).

grievance and arbitration procedure and bring a public law claim in a public law forum.

The Supreme Court endorsed this approach in *Alexander v. Gardner-Denver Co.*[52] Gardner-Denver discharged Alexander from his position as a drill operator trainee purportedly for producing an excessive amount of defective parts that had to be scrapped.[53] Alexander grieved his discharge as violative of the CBA's requirement of proper cause.[54] While his grievance was pending, Alexander filed a charge of racial discrimination with the Colorado Civil Rights Commission which referred it to the U.S. Equal Employment Opportunity Commission (EEOC).[55]

The union advanced Alexander's grievance to arbitration. At the arbitration hearing, Alexander and the union maintained that the discharge was racially discriminatory. Alexander claimed that others had scrapped as much as or more than he did and were not discharged. The union urged that the plant had a practice of transferring unsatisfactory drill operator trainees to their former positions rather than terminating their employment.[56] The arbitrator denied the grievance, finding that the company terminated Alexander for just cause, not discussing the racial discrimination claim but observing that the union had failed to produce sufficient evidence of a practice of transferring rather than discharging unsatisfactory trainees.[57]

Approximately seven months after the arbitration award was issued, the EEOC found no reasonable cause to believe that Title VII had been violated and issued Alexander a right-to-sue letter. Alexander then brought suit under Title VII.[58] The trial court and the Court of Appeals for the Tenth Circuit held that Alexander's Title VII claims were precluded by his unsuccessful grievance arbitration. The Supreme Court reversed.[59]

The Court rejected the lower courts' reliance on the doctrine of election of remedies, reasoning that the grievance and the Title VII claim were independent of each other.[60] The Court further rejected the argument that Alexander had waived his Title VII claim, either through the collective bargaining agreement or by contesting his discharge through the grievance and arbitration procedure. The Court distinguished collective rights, such as the right to strike, that a union may waive on behalf of employees from individual rights, such as those conferred in Title VII, that may not be waived prospectively.[61] Relying on the writings of

---

52. 415 U.S. 36 (1974).
53. *Id.* at 38.
54. *See id.* at 39.
55. *Id.* at 42.
56. *Id.*
57. *Id.* at 42-43.
58. *Id.* at 43.
59. *Id.*
60. *Id.* at 49.

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

Id.

61. *Id.* at 52.

Meltzer and Shulman and the *Enterprise Wheel* dicta, the Court reasoned that the arbitral function within the parties' system of workplace self-government that required arbitral fidelity to the parties and their private agreement rather than the public law illustrated why "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee."[62]

The Court faced a second issue in *Gardner-Denver*: whether to adopt a rule of deferral to an arbitration award where a Title VII plaintiff had chosen to grieve and arbitrate the adverse employment action that was the subject of the lawsuit. Deferral could apply even though the arbitrator was limited to the contractual issue. The Court rejected a deferral rule primarily because it viewed arbitration, with its less formal hearings, rules of evidence, and discovery, as an inappropriate forum for vindicating statutory employment rights.[63] The Court also rejected a deferral rule because of the different roles played by arbitrators and judges:

> [T]he arbitrator['s] task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.[64]

The Court concluded "that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy

---

62. *Id.*

63. *Id.* at 57-58.

> [T]he factfinding process in arbitration usually is not equivalent to judicial factufinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

Id. (citations and footnote omitted).

64. *Id.* at 57. The Court also expressed concern over potential conflicts of interest between the aggrieved employee and the union which exercises exclusive control over the grievance and arbitration machinery. *Id.* at 58 n.19.

under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo."[65] The Court observed that the arbitration award could be introduced as evidence in subsequent Title VII litigation and, in a famous footnote, suggested factors to consider in weighing such evidence:

> Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.[66]

In two subsequent cases, the Court reaffirmed the holding and rationales of *Gardner-Denver*. In *Barrentine v. Arkansas-Best Freight System, Inc*,[67] the Court held that employees could pursue their claims under the Fair Labor Standards Act in court, even though they had lost a grievance over the same issue before a joint employer-union arbitration board. The Court distilled its *Gardner-Denver* holding:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.[68]

Concern over potential conflicts between the interests of the union and the aggrieved employee, cited in a footnote in *Gardner-Denver*, advanced to become a primary reason justifying allowing the employees to proceed in court.[69] In *McDonald v. City of West Branch*,[70] the Court strongly suggested that its *Gardner-Denver* holding and rationales applied across the board to litigation under all federal statutes; it reversed a lower court ruling that had held that an arbitration award upholding McDonald's discharge barred his lawsuit under 42 U.S.C. §

65. *Id.* at 59-60.
66. *Id.* at 60 n.21.
67. 450 U.S. 728 (1981).
68. *Id.* at 737.
69. *Id.* at 747.
70. 466 U.S. 284 (1984).

1983 alleging that he was terminated in retaliation for exercising his First Amendment free speech rights.

Thus, under *Gardner-Denver* and its progeny, the privately ordered workplace of collective bargaining accommodated the rush of public law regulation by confining them to different spheres. Arbitration remained a component of the parties' system of workplace self-governance and a substitute for strikes and other job actions rather than litigation. Arbitrators remained agents of the parties' private ordering, deriving authority from and remaining accountable to the parties and their CBA, while issues of public law were to be resolved in public tribunals. Arbitrators might look to public law for guidance in interpreting and applying the CBA, but in so doing they used the public law in much the same way as they used other sources external to the written terms of the CBA, such as the parties' past practices and industry practice and experience. As explored in the next part, however, subsequent developments strained and then shattered the barriers between the public and private spheres of workplace regulation.

IV. THE EVOLVING SCHIZOPHRENIA

Three developments before *Pyett* greatly eroded the boundaries between the private common law of the workplace developed by labor arbitrators and the public law of employment regulation. This part explores these developments: the evolution of the public policy exception to the enforcement of arbitration awards, the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*[71] and its progeny that hold that individual pre-dispute agreements to arbitrate public law employment claims are enforceable, and the enactment of the Family Medical Leave Act (FMLA).[72]

A. Development of the Public Policy Exception

In *W. R. Grace and Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers*,[73] the Supreme Court recognized for the first time that a court may refuse to enforce an arbitration award that draws its essence from the collective bargaining agreement on the ground that the award violates public policy. The EEOC found reasonable cause to believe that the employer had discriminated against African-Americans and women in hiring in violation of Title VII of the 1964 Civil Rights Act, and invited the employer and the union to participate in conciliation talks. The union declined to participate.[74]

The employer and the EEOC entered into a conciliation agreement that provided, inter alia, that in the event of layoffs, the employer would maintain the existing percentage of women in the bargaining unit.[75] The employer conducted a reduction in force and, pursuant to the conciliation agreement, laid off more senior male employees while retaining junior female employees, even though the CBA

71. 500 U.S. 20 (1991).
72. 29 U.S.C. §§ 2601-54 (2006).
73. 461 U.S. 757 (1983).
74. *Id.* at 759.
75. *Id.* at 760.

provided for layoffs in reverse order of seniority. The males grieved and the employer refused to arbitrate,[76] as it had previously refused to arbitrate grievances from men protesting that their shift preferences had been subordinated to those of junior women.[77]

The employer sought to enjoin arbitration of all grievances that conflicted with the conciliation agreement. The union sought to compel arbitration, the employer joined the EEOC as a defendant, and the EEOC sought a declaration that either the conciliation agreement superseded the CBA or that the seniority system was not bona fide and was not protected by Title VII's exception for bona fide seniority systems.[78]

The district court held that the seniority system was subject to modification under Title VII, that the conciliation agreement was binding on all parties, and ordered all parties to abide by the conciliation agreement.[79] The union appealed, and with the appeal pending, the employer again laid off male employees ahead of junior women and the men grieved.[80] The Court of Appeals for the Fifth Circuit reversed the district court and the employer reinstated the male grievants. The parties proceeded to arbitrate whether the senior men were entitled to back pay.[81]

In the first case to reach an award, the arbitrator denied the grievance, reasoning that although the grievant was entitled to an award under the CBA, it would not be equitable to penalize the employer for complying with the district court's order.[82] A second grievance proceeded before a different arbitrator. The second arbitrator concluded that the first arbitrator had exceeded his authority under the CBA and the second arbitrator was not bound by the first arbitrator's award. The second arbitrator then considered the merits of the grievance, accepted the employer's concession that it had violated the CBA and the employer's representation that it had acted in good faith, found that the CBA provided no exceptions for good faith breaches of the seniority provisions and sustained the grievance.[83]

The Supreme Court found that the second arbitrator's holdings that he was not bound by the first arbitrator's award and that the CBA did not recognize an exception for good-faith breaches of the seniority provisions drew their essence from the CBA.[84] The Court's analysis did not stop there, however. The Court observed:

> As with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the second arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained by refe-

76. *Id.* at 761.
77. *See id.* at 760.
78. *Id.* at 760-61.
79. *Id.* at 761.
80. *Id.* at 761-62.
81. *Id.* at 762.
82. *Id.*
83. *Id.* at 763-64.
84. *Id.* at 764-66.

> renced to the laws and legal precedents and not from general considerations of supposed public interest.[85]

The Court recognized that public policy calls for obedience to court orders.[86] It found, however, no conflict between that policy and the arbitration award. It observed that the employer, wanting to reduce force in the face of conflicting commands from the CBA and the conciliation agreement as enforced by the district court order, faced a dilemma of its own making. It further observed that the award did not require the employer to violate the court order; it merely retrospectively required the employer to pay damages for its breach of contract.[87] The Court indicated in dicta that the arbitrator could have refused to enforce the CBA because of its conflict with the conciliation agreement and district court order under the contract doctrine of impossibility of performance, but was not required to do so.[88]

Thus, *W. R. Grace* made two inroads on the confinement of labor arbitration and public law to separate spheres. First, the *W. R. Grace* dicta retreated from the dicta in *Enterprise Wheel* and *Gardner-Denver* that arbitrators may not rely on the public law as the basis for their decisions and that when faced with contractual provisions that violate the public law, they are required to follow the contract. *W. R. Grace* afforded arbitrators the option but did not require them to refuse to enforce CBA provisions that violate the public law under the contract doctrine of impossibility of performance. Essentially, *W. R. Grace* suggested that arbitrators are authorized to follow either the Meltzer or the Howlett approach in such circumstances.

Second, *W. R. Grace* subjected the outcome of the parties' private system of dispute resolution to the scrutiny of the public law for compliance with public policy. This is significantly different from the de novo trial that the *Gardner-Denver* Court held aggrieved employees are entitled to on their Title VII claims; this is direct review and, in appropriate circumstances, refusal to enforce an arbitration award that draws its essence from the CBA. Although the Court in *W. R. Grace*, indicated that the public policy issue was for judicial, rather than arbitral, resolution,[89] and in subsequent cases, the Court has made clear that the "public policy exception" to enforcement under the essence test is extremely narrow,[90] some state courts have, in cases arising in the public sector, given the exception a more expansive reading. At least two have imposed on arbitrators the duty to apply the public law in their awards.[91]

In *AFSCME v. Department of Central Management Services*,[92] an Illinois Department of Children and Family Services (DCFS) caseworker represented in a progress report that she had seen three of her assigned children in February 1990

---

85. *Id.* at 766 (internal quotations and citations omitted).
86. *Id.* at 766.
87. *Id.* at 767-69.
88. *Id.* at 767 n.10.
89. *Id.* at 766 ("the question of public policy is ultimately one for resolution by courts").
90. *See* E. Assoc. Coal Co. v. United Mine Workers, 531 U.S. 57 (2000).
91. For a sample of state court approaches, see JOSEPH R. GRODIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 400-04 (2004).
92. 671 N.E.2d 668 (Ill. 1996).

and that they were "doing fine,"[93] when in fact, the children had died in an accidental fire a month earlier.[94] Six months later, the caseworker's replacement discovered the deaths. An internal investigation was completed in December 1990, but DCFS did not initiate disciplinary action until seven months thereafter. Ultimately, DCFS fired the caseworker, who grieved her discharge.[95] The arbitrator sustained the grievance and awarded that DCFS reinstate the caseworker and make her whole for lost wages.[96] The arbitrator found that the seven-month delay between completion of the investigation and initiation of disciplinary proceedings violated the CBA's provision that "[d]iscipline shall be imposed as soon as possible after the Employer is aware of the event giving rise to the discipline and had a reasonable period of time to investigate the matter."[97]

The Illinois Supreme Court held that the arbitrator's interpretation of the CBA and his determination of remedy for its violation were entitled to deference.[98] Nevertheless, the court held that the award was contrary to public policy and denied enforcement.[99] Although the parties never raised the public policy issue before the arbitrator,[100] the court criticized the arbitrator for not considering the public policy issues:

> The arbitrator's remedy for the violation of the contract's time provision caused him to fully reinstate a DCFS child welfare specialist—charged with both falsifying a uniform progress report intended for submission to the Juvenile Court and neglecting to compile required family service plans for three years—without any determination that the welfare of the minors in the DCFS system will not be compromised by such a reinstatement. Rather, he avoided discussion of the charges against DuBose. He did not take any precautionary steps to ensure the misconduct at issue here will not be repeated, and he neither considered nor respected the pertinent public policy concerns that arose from them. Thus, the remedy in this case violates public policy in that it totally ignores any legitimate public policy concerns.[101]

Arbitrators in the public sector in Illinois have heeded the court's admonition to consider the public policy issues raised by grievances presented to them for resolution. As the arbitrator whose award was vacated by the court has observed:

> As a result . . . whether raised or not (and most often it is not), arbitrators hearing public sector cases in Illinois now have an *affirmative* obligation in cases where we reinstate a public employee to: (1) take precautionary steps in our remedies to ensure the public that the misconduct will not

93. *Id.* at 671.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 673.
98. *Id.*
99. *Id.* at 675-80.
100. *See* Edwin H. Benn, *A Ride into the Legal Abyss*, 58 PROC. OF THE NAT'L ACAD. OF ARB. 321 327 (2005).
101. *AFSCME*, 671 N.E.2d at 678.

> happen again; and (2) explain why the public can be reasonably assured that it will not happen again. . . . Therefore, although not specifically saying so, what the justices of the Illinois Supreme Court really did . . . was to shift public policy determinations from the legislature and the courts to arbitrators.[102]

Illinois is not the only jurisdiction that appears to have imposed on arbitrators a duty, independent of the parties, to consider the impact of external law on the disputes before them. In *Racine County v. International Association of Machinists and Aerospace Workers District 10*,[103] the union represented a bargaining unit that included family court social workers/case managers.[104] The county circuit court's director of family court counseling services advised two members of the bargaining unit that they would be laid off but that if they retired, they could continue to provide services as independent contractors. They agreed to retire and returned as independent contractors. The director advised a third employee that she would be reduced to part-time status and her alternatives were to exercise her bumping rights or be laid off. She opted for a voluntary layoff.[105] Thereafter, the director entered into independent contracts with the two retirees and with a third former employee who had previously retired.[106]

The union grieved and an arbitrator sustained the grievance, finding that the county breached the CBA's recognition clause. The arbitration award required the county to cease contracting with independent contractors to perform the work of bargaining unit positions.[107]

The Wisconsin Supreme Court vacated the award on the ground, inter alia, that the award conflicted with a Wisconsin statute which gave directors of family court services authority to contract for the performance of statutorily required services such as mediation and custody placement study services.[108] Although, apparently, the employer never raised the statute before the arbitrator,[109] the court held that the arbitrator exceeded her authority and displayed manifest disregard for the law by failing to consider the statute.[110] Thus, in Wisconsin, as in Illinois, arbitrators of public sector grievances have a duty that is independent of the parties to consider and apply the public law.[111]

---

102. Benn, *supra* note 100, at 331-32 (footnotes omitted) (emphasis in original).
103. 751 N.W.2d 312 (Wis. 2008).
104. *Id.* at 313.
105. *Id.* at 314.
106. *Id.* at 315.
107. *Id.* at 315-16.
108. *Id.* at 318-23 (citing WISC. STAT. § 767.405).
109. *See id.* at 326 & n.3 (Bradley, J., dissenting).
110. *Id.* at 323-24 (majority opinion).
111. A similar duty has existed for quite some time for arbitrators of grievances in the federal sector. *See* George Birch, *Collective Bargaining and Arbitration in the Federal Sector: An Update*, *in* TAKING STOCK IN A NEW CENTURY: PROCEEDINGS OF THE 59TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 360 (Stephen F. Befort & Paul F. Gerhart eds. 2007); Malin & Vonhof, *supra* note 49, at 213-17.

B. Gilmer, *Its Progreny and Its Fallout*

It is perhaps ironic that the court decision that has had the most impact thrusting the public law into the private labor arbitration forum arose outside of a collective bargaining setting. A number of non-unionized employers, particularly in the securities industry, required employees, as a condition of employment, to agree to arbitrate, rather than litigate, all claims arising out of their employment relationship, including claims arising under federal statutes. All circuits that considered the issue except for the Fourth Circuit relied on *Gardner-Denver* and its progeny to hold such pre-dispute agreements to arbitrate statutory employment claims unenforceable.[112] In *Gilmer v. Interstate/Johnson Lane Corp.*,[113] the Supreme Court sided with the outlier Fourth Circuit and held that an agreement contained in a securities exchange's registration obligating the employee to arbitrate all claims against his employer was enforceable with respect to the employee's claim under the Age Discrimination in Employment Act. The Court extended its holding beyond securities exchanges' registrations to employment contracts generally in *Circuit City Stores, Inc. v. Adams*.[114]

Gilmer distinguished *Gardner-Denver* as a case arising under a collective bargaining agreement where the arbitrator's authority was limited to interpreting and applying the CBA and did not extend to resolving statutory claims.[115] A major tenet of *Gardner-Denver*'s reasoning, however, was the Court's view that the arbitral forum was poorly suited for resolving statutory claims. The *Gilmer* Court flatly rejected that portion of the rationale:

> The Court in . . . *Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitration process," however, has been undermined by our recent arbitration decisions. "We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[116]

Gilmer's rejection of a major portion of the *Gardner-Denver* rationale would ultimately lead to the Court's decision in *Pyett*. The road to *Pyett* is discussed in the next part. However, *Gilmer* had a profound effect on injecting public law into the private grievance arbitration process long before *Pyett*.

---

112. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990), *vacated by* 500 U.S. 930 (1991); Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989); Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544 (10th Cir. 1988); Johnson v. Univ. of Wisconsin-Milwaukee, 783 F.2d 591 (7th Cir. 1986). The sole authority holding a pre-dispute agreement to arbitrate a statutory employment claim enforceable was the Fourth Circuit's opinion in *Gilmer*. *See* Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).

113. 500 U.S. 20 (1991).

114. 532 U.S. 105 (2002).

115. *Gilmer*, 500 U.S. at 34.

116. *Id.* at 34 n.5 (quoting Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 626-26 (1985)).

A major distinction between *Gilmer* and *Gardner-Denver* was that in the former case, the aggrieved employee had complete control over the decision to arbitrate and over presentation of the case in arbitration, whereas in the latter case, the employee was dependent on the union in those matters. The *Gilmer* Court distinguished *Gardner-Denver*, in part, on that basis.[117] Post-*Gilmer*, courts have compelled aggrieved parties to submit their public law claims to the CBA's grievance and arbitration machinery where the aggrieved party maintained control over the proceeding.

For example, in *Interstate Brands Corp. v. Teamsters Local 550*,[118] Interstate Brands sued the union under section 303 of the Labor Management Relations Act for damages resulting from an alleged secondary boycott. The CBA's grievance procedure provided for the parties to arbitrate "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly."[119]

The Second Circuit, the same court that the Supreme Court reversed in *Pyett*, held that Interstate was obligated to arbitrate its statutory claim. The court reasoned that concerns with unions waiving individual employees' rights did not apply to an employer's agreement in a CBA to arbitrate its statutory claims.[120]

For a brief period of time, public employees in Alaska were required to take their statutory claims through their CBA's grievance and arbitration procedures. In *Barnica v. Kenai Peninsula Borough School District*,[121] an equally divided Alaska Supreme Court affirmed a trial court's decision requiring an employee to arbitrate his state statutory sex discrimination claim pursuant to the CBA's grievance and arbitration procedure. The contract contained a non-discrimination clause,[122] and a clause defining a grievance as "a claim by a grievant that there has been an alleged violation . . . of the Agreement."[123] The court's dispositional decision noted, inter alia, that grievance arbitration in public employment CBAs was mandated by Alaska statute[124] and that under Alaska state law, the union has less control over the proceeding because the employee has a right to proceed to arbitration on demand.[125] By a 3-2 vote, the Alaska Supreme Court backed away from *Barnica* in *Hammond v. State*.[126] However, the notion that a standard more deferential to arbitration should apply when the employee has greater control over the process than in the typical CBA has not been lost on other courts.[127]

Gardner-Denver's holding that an employee who lost in grievance arbitration is entitled to a trial de novo in subsequent statutory litigation, with the arbitration

117. *Id.* at 34 ("because the arbitration in [*Gardner-Denver*] occurred in the context of a collective bargaining agreement,the claimants there were represented by their unions in the arbitration proceedings. An important concern there was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.").
118. 167 F.3d 764 (2d Cir. 1999).
119. *Id.* at 765.
120. *Id.* at 767-68.
121. 46 P.3d 974 (Alaska 2002).
122. *Id.* at 977 n.9.
123. *Id.* at 977 n.11.
124. *Id.* at 977.
125. *Id.* at 980 n.48.
126. 107 P.3d 871 (Alaska 2005).
127. *See, e.g.*, Serafin v. State, 2005 U.S. Dist. LEXIS 3603 (D. Conn. Mar. 9, 2005).

award simply one piece of evidence whose weight depends on the circumstances, has largely eroded. A leading example again comes from the Second Circuit. In *Collins v. New York City Transit Authority*,[128] the plaintiff was fired after he allegedly assaulted his supervisor. He grieved and a tri-partite arbitration board upheld his termination. Plaintiff sued alleging that his discharge was the result of his race and his prior EEO complaints, in violation of Title VII. The district court granted the defendants' motion for summary judgment,[129] and the Second Circuit affirmed. The court placed particular weight on the arbitration award upholding the plaintiff's discharge. The court opined:

> [A] decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link [between the adverse employment action and the allegedly illegal motive]. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact—*e.g.*, new evidence not before the tribunal—or that the impartiality of the proceeding was compromised.[130]

Gilmer has inspired broad judicial deference to arbitral authority to base grievance awards on public law. For example, in *Costal Oil of New England, Inc. v. Teamsters Local 25*,[131] the CBA provided, inter alia, that the employer would either maintain workers' compensation insurance or provide injured employees with the same benefits as provided for in the Massachusetts worker's compensation statute.[132] The CBA covered only one of the employer's three facilities. The same union represented the employees at the other two facilities, but each facility had its own CBA.

An employee covered by the CBA was injured on the job. Following his recovery, he sought reinstatement but was advised that there were no openings. The union and employer agreed that the employee would be reinstated to the next available opening. Subsequently, the employee learned of an opening at one of the other two facilities. When the employer refused to award him that position, he grieved and the union took the claim to arbitration.

The arbitrator, relying on the Massachusetts Worker's Compensation Law, ordered the employer to reinstate the grievant to the position at the other facility which was covered by a different CBA. The First Circuit upheld the arbitrator's authority to do so. Relying on *Gilmer* and its progeny, the court gave the employer's attack on the arbitrator's authority short shrift:

> How can the arbitrator, in determining whether appellant lived up to the contractual obligations mandated by . . . the Revere agreement, fail to address whether the provisions of the Massachusetts Worker's Compensation Law incorporated into that agreement . . . have been met?

128. 305 F.3d 113 (2d Cir. 2002).
129. *Id.* at 117-18.
130. *Id.* at 118. For discussion of additional cases, see Malin & Vonhof, *supra* note 49, at 226-28.
131. 134 F.3d 466 (1st Cir. 1998).
132. *Id.* at 468.

> The response to this question as well as to appellant's challenge to the arbitrator's authority to interpret the aforementioned Massachusetts statute is self evident. Obviously, the arbitrator acted properly and within the scope of his delegated authority. We can perceive of no valid reason why the parties could not also agree to have statutory rights enforced before an arbitral forum.[133]

C. The Family Medical Leave Act

The FMLA covers employers who employ fifty or more employees on each regular working day for twenty or more weeks during the current or preceding calendar year.[134] The Act applies to employees who have worked for their employers for at least twelve months, have worked at least 1,250 hours in the preceding twelve months, and are employed at a site where the employer employs at least fifty employees within a seventy-five mile radius.[135] Covered employees are entitled to twelve weeks of unpaid leave in any twelve month period for the birth or adoption of a child, for the employee's serious health condition, or to care for a spouse, parent, or minor or disabled child who has a serious health condition.[136]

Although a major impetus for the FMLA was to provide job-protected leave following childbirth, most litigation under the act has focused on leave for an employee's serious health condition.[137] This is not surprising. The requirement of providing leave within twelve months following the birth of a child is relatively straight-forward. In contrast, the term "serious health condition" requires interpretation. Furthermore, most FMLA leaves are taken for serious health conditions.[138]

The FMLA has had a greater impact on labor arbitration than any other employment statute. Absenteeism presents one of the most frequent discipline problems encountered by employers.[139] Employers frequently respond with attendance control plans that assess occurrence points for absence, tardiness, early departure, and failure to notify of an absence or anticipated late arrival. Discipline is im-

---

133. *Id.* at 469-70; *see also* Butler Mfg. Co. v. United Steelworkers of Am., 336 F.3d 629 (7th Cir. 2003) (upholding arbitrator's authority to rely on Family Medical Leave Act in awarding relief). *But see* Roadmaster Corp. v. Prod. & Maint. Employees' Local 504, 851 F.2d 886 (7th Cir. 1988) (vacating award where arbitrator found no violation of CBA but awarded relief for violation of the National Labor Relations Act); Sheriff of Suffolk County v. AFSCME Council 93, 856 N.E.2d 194 (Mass. App. 2006) (vacating award where arbitrator found CBA did not cover issue and relied on statute as basis for awarding relief). Elsewhere, I have criticized the latter two cases. Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 27-29 (2008).

134. 29 U.S.C. § 2611(4) (2006). Employees are counted as long as they are on the payroll on a given workday. They need not be physically working that day. Consequently, part-time employees are counted the same as full-time employees. *See* Walters v. Metropolitan Educ. Enter., Inc., 519 U.S. 202 (1997).

135. 29 U.S.C. §§ 2612(2)(A), (B) (2006).

136. *Id.* § 2612(A).

137. *See* STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 172, tbl. 7.8. (2001).

138. *See* DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE § 2.1, tbl. 2.3 (2001).

139. *See* Barbara Zausner Tener & Ann Gosline, *Absenteeism and Tardiness*, *in* LABOR AND EMPLOYMENT ARBITRATION § 17.01[1] (Tim Bornstein et al., eds., 2d ed. 2009).

posed at increasingly severe levels upon accumulation of specified point totals. However, Department of Labor regulations prohibit employers from assessing points for FMLA-protected absences in their attendance control plans.[140] When designing an attendance control program, the FMLA is an elephant standing in the middle of the room that an employer simply cannot ignore.

In many grievances that may also implicate the grievant's statutory rights, the CBA is more employee-protective than the statute. For example, the typical CBA requires just cause for discipline and discharge, provisions that arbitrators have uniformly interpreted place on the employer the burden to prove its justification for the adverse action, whereas antidiscrimination and other statutes merely prohibit basing such adverse action on the employee's protected status or conduct and place the burden on the employee to prove the employer's improper motive. In discipline and discharge grievances with overtones of statutory rights' violations, arbitrators usually may concentrate on whether the employer proved just cause, regarding evidence of improper motive as impeaching the employer's purported justification. In such cases, the arbitrator need not delve into the minutia of statutory law.

Discipline and discharge for attendance infractions constitute a significant portion of labor arbitrators' dockets.[141] The FMLA made major inroads on employer attendance control plans, forcing employers to alter them significantly to achieve compliance.[142] Consequently, many acts of discipline or discharge, which prior to the FMLA conformed to attendance control plans and satisfied the CBA's just cause standard, have been rendered illegal by the FMLA. Discipline and discharge that violates the FMLA cannot meet the contractual just cause requirement. In contrast to other discipline and discharge grievances that implicate the public law, where the focus is on the employer's justification for the action and evidence of the employer's animus toward the employee's protected status or protected behavior may operate in the background primarily serving to impeach the justification, in attendance cases the statutory issue will often determine the outcome. In such cases, arbitrators are compelled to interpret and apply the public law to be able to resolve the contractual issue of just cause—the Seventh Circuit has expressly upheld the arbitrator's authority to do so.[143] It is not surprising that the most recent edition of the leading treatise on labor arbitration observes, "In the majority of cases involving the FMLA, arbitrators rely on the provisions of the FMLA and the Department of Labor regulations without regard to whether the collective bargaining agreement says anything about the FMLA."[144]

Thus, even before *Pyett*'s holding that under some circumstances employees are required to bring their statutory claims through the CBA's grievance and arbitration procedure, the public law had intruded deeply into the labor arbitration process. Regardless of how the Court would have decided *Pyett*, labor arbitration, out of necessity, had developed a case of schizophrenia, continuing to serve as a tool of parties' self-governance in a privately ordered workplace while expanding

140. 29 C.F.R. § 825.220(c) (2009).

141. *See* Tener & Gosline, *supra* note 139, at § 17.01[1].

142. *See* Jeanne M. Vonhof & Martin H. Malin, *What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans*, ILL. PUB. EMP. REL. REP., Fall 2004 at 1.

143. Butler Mfg. Co. v. United Steelworkers of Am., 336 F.3d 629 (7th Cir. 2003).

144. ELKOURI & ELKOURI, *supra* note 2, at 520

to become a forum for the resolution of public law disputes. *Pyett*, however, reflects a very troubling change in the Supreme Court's attitude toward labor arbitration and has the potential to greatly aggravate the evolving schizophrenic nature of labor arbitration. The following part explores these developments.

V. THE ROAD TO *PYETT* AND BEYOND

A major premise of *Gardner-Denver* and its progeny was that arbitration, with its informality, was an inadequate forum for the resolution of public law claims. Such claims called for judicial resolution. *Gilmer* expressly rejected that premise, declaring, "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[145]

After *Gilmer*, many employers argued that their employees were obligated to bring their statutory employment claims through the grievance and arbitration procedures of their CBAs. Almost every circuit that considered the issue concluded that *Gardner-Denver* remained good law and denied employer motions to dismiss or compel arbitration.[146] The Fourth Circuit was again the outlier and required employees to pursue their statutory claims through the CBA's grievance arbitration procedures.[147]

The Fourth Circuit's approach came before the Supreme Court in *Wright v. Universal Maritime Service Corp.*[148] Wright, a longshoreman in Charleston, South Carolina, was injured on the job and pursued a claim for permanent disability under the Longshore and Habor Workers' Compensation Act, which he eventually settled for $250,000. Three years later, armed with a letter from his doctor releasing him to work, Wright returned to the union's hiring hall and received several referrals to jobs, where he performed without complaint. However, when the employers comprising the South Carolina Stevedores Association, the multiemployer group that was party to the CBA with Wright's union, discovered that Wright had settled a claim for permanent disability benefits, they maintained that Wright was not qualified to work and refused to employ him further. After resorting to administrative proceedings required under the Americans with Disabilities Act (ADA), Wright brought suit for violation of the ADA. The district court dismissed the case on the ground that Wright had failed to bring his claim under the CBA's grievance procedures and the Fourth Circuit affirmed.[149]

Writing for a unanimous Court, Justice Scalia defined the issue presented as, "[W]hether a general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA)."[150] In answering that

145. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 n.5 (1991).
146. *See* Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997); Varner v. Nat'l Super Mkts., 94 F.3d 1209 (8th Cir. 1996); Tran v. Tran, 54 F.3d 115 (2d Cir. 1995).
147. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).
148. 525 U.S. 70 (1998).
149. *Id.* at 72-76.
150. *Id.* at 72 (citation omitted).

question in the negative, the Court rejected the employers' argument that the *Steelworkers Trilogy*'s presumption of arbitrability encompassed Wright's ADA claim. The Court observed that it had previously recognized a similar presumption of arbitrability under the Federal Arbitration Act,[151] and had applied that presumption in *Gilmer* to compel arbitration of an ADEA claim pursuant to an arbitration clause covering "any dispute, claim or controversy,"[152] but reasoned that the *Trilogy*'s presumption of arbitrability "does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*."[153] The Court opined that even if the CBA expressly incorporated the statute by reference, "thereby creating a contractual right that is coextensive with the federal statutory right,"[154] the presumption of arbitrability still would not apply because "the ultimate question for the arbitrator would not be what the parties have agreed to but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement."[155]

Having rejected a presumption that the CBA required the arbitration of statutory employment claims, the Court effectively adopted a presumption against it. Without deciding whether a CBA could ever bind an employee to submit statutory claims to the grievance and arbitration procedure, the Court held that if such a provision were to be effective, it must be clear and unmistakable.[156] The Court opined, "*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."[157]

Wright thus reaffirmed the special nature of labor arbitration as an instrument of self-governance in a privately ordered workplace. As the Court recognized in the *Trilogy* and reiterated in decades of jurisprudence through *Wright*, by virtue of the parties' joint selection, the arbitrator is vested with special institutional competence to further the parties' system of collective bargaining by resolving their disputes during the term of the CBA. The alternative to arbitration is workplace strife.[158]

---

151. *Id.* at 78 n.1 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 626 (1985)).

152. *Id.* at 80.

153. *Id.* at 78 (emphasis in original) (citations omitted).

154. *Id.* at 79.

155. *Id.*

156. *Id.* at 80.

157. *Id.*

158. The *Wright* Court reached the result urged on it by the National Academy of Arbitrators whose amicus brief emphasized the role of labor arbitration as a substitute for strikes rather than for litigation and the arbitrator's special status as the parties' designated reader of their bargain, and advocated that the Court find the statutory claim not arbitrable absent clear and unmistakable evidence that it was. The brief concluded:

> As labor arbitrators we are obviously interested in protecting and advancing the institution of grievance arbitration. We believe that it has served the interests of unions, employers and employees as an efficacious method of resolving workplace disputes and avoiding industrial strife. We also believe that a decision such as the one below does not advance the cause of grievance arbitration but, rather, diminishes it. We urge the Court to adopt the principle suggested in this brief to avoid that result.

Brief for the National Academy of Arbitrators as Amicus Curie, Wright v. Univ. Maritime Serv. Corp., 525 U.S. 70 (1998), 1998 WL 221374 at *15.

After *Wright*, most courts refused to compel arbitration of employees' statutory claims under their CBAs because of the absence of a clear and unmistakable waiver of the judicial forum.[159] True to form, the Fourth Circuit was quick to find clear and unmistakable waivers and to enforce them,[160] while the Second Circuit held that a CBA can never bind an employee to arbitrate statutory claims.[161] In *Pyett*, the Court resolved the circuit split and answered the question it left open in *Wright*.

Pyett and coworkers were covered by a CBA, which expressly incorporated federal, state, and local antidiscrimination statutes and provided, "All such claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations."[162] They were employed as night lobby watchmen, but their positions became superfluous when their union agreed with their employer to a contract providing for and covering licensed security guards who would staff the buildings' lobbies and entrances. Pyett and his coworkers were reassigned to lower-paying jobs, reassignments that they grieved. The grievances alleged age discrimination, seniority violations, and violation of the CBA's requirement that overtime be distributed equitably. At the arbitration, however, the union withdrew the age discrimination grievance because it believed it could not press it in light of its agreement to the security guard contract.[163] Pyett and coworkers then proceeded under the ADEA, ultimately filing suit in federal district court.[164]

In contrast to the unanimity in *Wright*, the *Pyett* decision came from a sharply divided Court. The majority declared that the decision to require that statutory claims proceed through the grievance arbitration procedure was a mandatory subject of bargaining under the National Labor Relations Act, reasoning, "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."[165] Citing *Circuit City*, the Court maintained that the CBA "favor[ed] arbitration precisely because of the economics of dispute resolution,"[166] and suggested that "a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer."[167]

The Court reasoned that Pyett and his coworkers were required to arbitrate their ADEA claims under the CBA unless the ADEA precluded arbitration. Ob-

159. *See, e.g.*, Fayer v. Town of Middlebury, 258 F.3d 117 (2d Cir. 2001); EEOC v. Ind. Bell Tel. Co., 256 F.3d 516 (7th Cir. 2001); Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000); Kennedy v. Superior Printing Co., 215 F.3d 650 (6th Cir. 2000); Bratten v. SSI Servs., Inc., 185 F.3d 625 (6th Cir. 1999); Quint v. A. E. Staley Mfg. co., 172 F.3d 1 (1st Cir. 1999).

160. *See, e.g.*, Aleman v. Chugach Support Servs., Inc., 485 F.3d 206 (4th Cir. 2007) (mandating arbitration even though employee had limited English skills and CBA was available only in English); Safrit v. Cone Mills Corp., 247 F.3d 306 (4th Cir. 2001) (dismissing plaintiff's Title VII suit even though her union refused to file a grievance and advised her to seek redress outside of the CBA).

161. Pyett v. Penn. Bldg. Corp., 498 F.3d 86 (2d Cir. 2007), *rev'd sub nom* 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456 (2009).

162. 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009).

163. *Id.* at 1461-62.

164. *Id.* at 1463.

165. *Id.* at 1464.

166. *Id.*

167. *Id.*

serving that *Gilmer* held that an employee may be required to arbitrate an ADEA claim pursuant to his securities exchange registration statement, the Court opined:

> 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. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective bargaining agreement. . . . The CBA under review here meets that obligation.[168]

The Court limited *Gardner-Denver* and its progeny to their facts, characterizing them as holding only that the arbitration awards did not preclude subsequent statutory litigation because the CBAs did not cover statutory claims.[169] In response to concerns stemming from the union's control over the collective bargaining and grievance machinery, raised in a footnote in *Gardner-Denver* but elevated to textual prominence in *Barrentine*, the Court asserted:

> It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily demands. Respondents' argument that they were deprived of their right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable . . . .[170]

In perhaps a signal of things to come, the Court noted that "*Gardner-Denver* would appear to be a strong candidate for overruling . . . ."[171]

Pyett radically rewrites fifty years of Supreme Court jurisprudence concerning the nature and function of labor arbitration, jurisprudence that has been accepted and relied on by unions, employers, and arbitrators. Beginning with the *Trilogy* and continuing through *Wright*, the Court has regarded labor arbitration as a substitute not for litigation, but for workplace strife and as a vital component of the collective bargaining process in a privately ordered workplace. Unions negotiate for and participate in grievance arbitration as representatives of the bargaining unit as a whole and employers agree to be bound by arbitration awards in exchange for unions' agreement not to strike during the term of the CBA. Under *Pyett*, however, the union is regarded as an agent of the individual employee in negotiating the agreement to arbitrate public law claims. Furthermore, the agreement to arbitrate is no longer viewed as an employer concession given in exchange for the no strike clause. Rather, it is something given by the union in exchange for other concessions from the employer. Moreover, arbitration is no longer regarded as a substitute for strikes and other workplace strife in the continuing process of collective bargaining but is instead provided for because of its efficiency advantages over litigation. Anyone with even an elementary know-

168. *Id.* at 1465.
169. *Id.* at 1467-58.
170. *Id.* at 1472-73.
171. *Id.* at 1469 n.8.

ledge of or experience with labor relations must regard the Court's radical reconception of labor arbitration as bizarre.

Although the *Pyett* Court purported to carry on from the point where the *Wright* Court left off, *Pyett* appears to significantly undermine *Wright*. As discussed previously, *Wright* held that a CBA may bind employees to arbitrate their statutory claims, if at all, only where such a provision is clear and unmistakable. In so holding, the Court rejected application of the strong presumption of arbitrability under a CBA established in the *Trilogy*, even though the Court had also recognized a strong presumption of arbitrability under the Federal Arbitration Act in individual employment contracts. The Court premised its requirement of a clear and unmistakable waiver of the judicial forum on the special nature of labor arbitration as a substitute for workplace strife rather than a substitute for litigation and as a vital component of the collective bargaining process in a privately ordered workplace.[172] With *Pyett's* radical reconception of the labor arbitration process as a substitute for litigation to which the union, as agent for the individual employees, agrees in exchange for other employer concessions, the principled basis for *Wright*'s rejection of the presumption of arbitrability for statutory claims appears to evaporate. Indeed, the *Pyett* Court itself opined that, with respect to ADEA claims, "[n]othing 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."[173] With the principled basis for the clear and unmistakable test apparently eradicated, the requirement of clear and unmistakable language appears to be just a pretext for distinguishing *Gardner-Denver*, a case that the *Pyett* Court marked as a "strong candidate for overruling."[174]

In dissent, Justice Souter suggested 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."[175] Early returns are mixed with district courts in New York dividing over whether to compel arbitration under the same CBA as was before the Court in *Pyett*.[176] Also mixed are the early returns on the effect of *Pyett* on the already eroded *Gardner-Denver* holding that employees who lose in grievance arbitration are entitled to trials de novo in

172. *See supra* notes 148-55 and accompanying text.

173. *Pyett*, 129 S. Ct. at 1465.

174. *Id.* at 1469 n.8. Ironically, the Massachusetts Supreme Judicial Court has relied on *Pyett* for support of its holding that an individual employment contract will obligate the employee to arbitrate claims under state antidiscrimination statutes only where the language purporting to subject such claims to arbitration is clear and unmistakable. Warfield v. Beth Israel Deaconess Med. Ctr., 910 N.E.2d 317 (Mass. 2009). And the NLRB's Office of General Counsel has suggested that *Pyett* may undermine the NLRB's standards for deferring unfair labor practice charges to the parties' grievance and arbitration procedures. NLRB Office of General Counsel, Division of Operations Management Memo OM 10-13 CH (Nov. 3, 2009), *available at* http://www.nlrb.gov/shared_files/OM%20Memo/2010/OM%2010-13%28CH%29%20Casehandling%20Regarding%20Application%20to%20Spielberg%20Olin%20standards.pdf.

175. *Pyett*, 129 S. Ct. at 1481 (Souter, J., dissenting) (internal quotation marks and citation omitted).

176. *Compare* Kravar v. Triangle Servs., Inc., 186 L.R.R.M. (BNA) 2565 (S.D.N.Y. May 19, 2009) (refusing to compel arbitration) *with* Borrero v. Rupert Housing Co., No. 08 CV 5869 (HB), 2009 WL 1748060 (S.D.N.Y. June 19, 2009) (compelling arbitration) and Beljakovic v. Melohn's Properties, Inc., No. 2:04-cv-03694-RJH-GWG, 2009 U.S.Dist. LEXIS 83600 (S.D.N.Y. May 11, 2009) (same).

subsequent statutory litigation.[177] Regardless of how these issues play out, however, it is the *Pyett* Court's radical revision of the conception of labor arbitration as a substitute for litigation rather than a vehicle for workplace self-governance that may have the most profound impact on that institution.

To understand the potential radical impact of *Pyett* on the institution of labor arbitration, one must examine the Court's jurisprudence in employment, consumer, and commercial arbitration, where the justification of the federal policy favoring arbitration derives from arbitration's role as a cost-effective and efficient substitute for litigation. In *Gilmer*, the Court endorsed arbitration of statutory employment claims only to the extent that the arbitral forum allowed employees to effectively vindicate their statutory claims.[178] In *Green Tree Financial Corp. v. Randolph*,[179] the Court held that whether provisions of the arbitration agreement precluded the arbitral forum from allowing the plaintiff to effectively vindicate her statutory rights had to be determined on a case-by-case basis. Specifically, the Court rejected the view of several lower courts that an arbitration agreement which imposed on the consumer or employee responsibility for a share of the arbitrator's fees beyond the filing fee the plaintiff would have to pay to initiate a lawsuit impeded the effective vindication of statutory rights. Instead, the Court opined, that the party resisting arbitration has the burden to prove in her individual case that excessive fees preclude her from effectively vindicating her statutory rights in arbitration.[180]

In a series of decisions, the Court has signaled a trend that such issues as those raised in *Randolph* are for arbitral, rather than judicial, resolution. In *PacifiCare Health Systems v. Book*,[181] the Court reversed lower court decisions that refused to enforce arbitration agreements because those agreements' provisions that precluded the award of punitive damages prevented the plaintiffs from effectively vindicating their rights under RICO to treble damages. The Court held that the issue was one for the arbitrators to resolve.

In *Green Tree Financial Corp. v. Bazzle*,[182] the Court held that whether class actions were available was one for arbitral, rather than judicial resolution. In *Buckeye Check Cashing, Inc. v. Cardegna*,[183] the Court held that whether a con-

177. *Compare* Tewolde v. Owens & Minor Distribution, Inc., 106 Fair Emp. Prac. Cases (BNA) 895 (D. Minn. June 10, 2009) (holding that plaintiff who grieved and arbitrated his denial of a promotion was bound by arbitral finding that he was not minimally qualified for the position in subsequent Title VII national origin discrimination litigation) *and* Mathews v. Denver Newspaper Agency, LLP, 106 Fair Emp. Prac. Cases (BNA) 597 (D. Colo. May 4, 2009) (holding that plaintiff who presented discrimination claim in grievance arbitration was collaterally estopped from relitigating the claim under Title VII and 42 U.S. C. § 1981), *with* Jones v. Verizon Communications, Inc., No. 09-10525-RGS, 2009 U.S.Dist. LEXIS 98735 (D. Mass. Oct. 23, 2009); Markell v. Kaiser Found. Health Plan, No. CV 08-752-PK, 2009 U.S. Dist. LEXIS 95891 (D. Ore. Sept. 14, 2009), *aff'd*, 2009 U.S. Dist. LEXIS 95887 (D. Ore. Oct. 15, 2009); Dunnigan v. City of Peoria, No. 09-CV-1064, 2009 U.S. Dist. LEXIS 71797 (C.D.Ill. July 15, 2009); Catrino v. Town of Ocean City, 22 Amer. Disabilities Cases (BNA) 190 (D. Md. July 14, 2009); and St. Aubin v. Unilever HPC NA, 15 Wage & Hr Cases 2d (BNA) 34 (N.D. Ill. June 26, 2009) (all holding that prior unsuccessful arbitration award did not preclude statutory litigation).

178. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

179. 531 U.S. 79 (2001).

180. *Id.* at 90-91.

181. 538 U.S. 401 (2003).

182. 539 U.S. 444 (2009).

183. 546 U.S. 440 (2006).

tract calling for arbitration was void under state law was to be decided by the arbitrator rather than the court. The trend may continue, as the Court has granted certiorari to determine whether the unconscionability and hence unenforceability of an arbitration agreement is a matter for arbitral or judicial resolution.[184]

Chief Justice Roberts, while still a circuit court judge, read *Randolph* and *PacifiCare* to mean "that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with effective vindication of statutory rights has the burden of showing the likelihood of such interference, and . . . this burden cannot be carried by mere speculation about how an arbitrator might interpret or apply the agreement."[185] The Eighth Circuit has gone further, compelling arbitration of FLSA claims even though the arbitration agreement contained procedural and remedial limitations that, on their face, were inconsistent with the statute, reasoning, "When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply."[186]

CBAs contain numerous procedural and remedial provisions that facilitate labor arbitration's role as a substitute for strikes in the ongoing process of collective bargaining, which, in labor arbitration's reconceived role as a substitute for litigation of public law claims, may impede the litigant's ability to effectively vindicate statutory rights. For example, the typical CBA sets very short time limits for filing grievances and demanding arbitration, almost always shorter than statutes of limitations applicable to public law claims. The typical CBA provides that each party will bear its own costs and attorney fees, whereas many statutes provide for prevailing plaintiffs to recover costs and fees. CBAs commonly expressly or impliedly preclude the award of consequential and punitive damages, even though such remedies are available for many public law claims. Elsewhere, I have argued that the courts' failure to strictly police employment arbitration agreements to ensure that the arbitration is an effective forum for vindicating public law rights has placed tremendous pressure on arbitrators and arbitration appointing agencies to fill the vacuum.[187] Similarly, labor arbitrators may be called upon to disregard these staples of CBAs when serving as substitutes for litigation and adjudicating public law claims. Indeed, in declining to address the impact of the union's exclusive control over the grievance and arbitration machinery, the *Pyett* Court cited *Randolph*.[188] It is conceivable that labor arbitrators may be called upon to abrogate exclusive union control to ensure that the labor arbitral forum allows aggrieved employees to effectively vindicate their public law rights.

Despite the flood of public law into the labor arbitration process, the institution remains primarily one of workplace self-governance. CBAs continue to provide for filling vacancies based on qualifications with seniority to govern where qualifications are relatively equal, and to rely on the grievance and arbitration

184. Jackson v. Rent-A-Center, Inc., 581 F.3d 912 (9th Cir. 2008), *cert. granted* 130 S. Ct. 1133 (Jan. 15, 2010).

185. Booker v. Robert Haf Int'l, Inc., 413 F.3d 77, 81 (D.C. Cir. 2003) (internal quotations omitted).

186. Bailey v. Ameriquest Mortgage Co., 346 F.3d 821, 824 (8th Cir. 2003).

187. Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363 (2007).

188. 14 Penn Plaza, LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009).

machinery to determine what "relatively equal" means in any particular case. Although the FMLA has had a profound effect on some discipline and discharge arbitrations, most discipline and discharge arbitrations continue to be resolved based on the arbitral common law of the workplace rather than the public law. And unions continue to grieve and arbitrate many low-value claims and some high-value claims which, in the absence of the grievance and arbitration procedure, would have resulted in strikes rather than litigation.[189]

Labor arbitration thus has developed an acute case of schizophrenia, part private instrument of workplace self-governance and part substitute for litigation of public law claims. Can the institution preserve the former role or will the latter role undermine it? There is definite cause for concern. For example, David Feller rued the influx of public law into the labor arbitration process, arguing that it marked the end of arbitration's golden age and would:

> necessarily undermine the . . . unitary—or almost unitary—system of governance under the agreement of which the institution of arbitration and its special status are the products. Arbitration is not an independent force . . . and to the extent that the collective agreement is diminished as a source of employee rights, arbitration is equally diminished.[190]

In the federal sector, arbitrators routinely interpret and apply the public law as well as the private contract, subject to review by the Federal Labor Relations Authority. The pervasive use of public law in federal sector labor arbitration has undermined the finality of federal sector awards. As one long-time federal sector management advocate candidly admitted, "We appeal almost everything."[191] In Canada, where labor arbitrators have been bound to interpret and apply the public law since 1975,[192] one commentator has observed:

> With these developments, Canadian labour arbitration appears to have become a much more legalistic endeavor, as evidenced by some of the following trends: the adjudication of constitutional rights at arbitration has increased the concern for procedural safeguards, increased the number of witnesses and types of evidence heard, and thus increased the need for legal representation at arbitration. Expert evidence in general is playing a more prominent role in regards to constitutional, human rights, and privacy issues. Finally, the increasing right to standing afforded to employees who are not the [grievant] expands both the scope and nature of a grievance, in terms of time and the presence of lawyers and legal arguments. All this serves to increase the cost of proceedings, reduce the efficiency and speed of the process, and often to aggravate rather than ease tensions between the employer, the union and the employee. And it is at

189. I personally have served as arbitrator in several multi-million dollar cases where it appeared clear to me that absent the no strike and arbitration provisions, the union would have struck for immediate relief rather than pursue litigation, which likely would have taken years to bear fruit.

190. Feller, *supra* note 35, at 109.

191. *Collective Bargaining and Arbitration in the Federal Sector: An Update, Panel Discussion*, 53 PROC. OF THE NAT'L ACAD. OF ARB. 369, 371 (2000) (remarks of David S. Orr).

192. *See* McLeod v. Egan, [1975] S.C.R. 517 (Can.).

> this level that the jurisprudential innovations of the last few decades have undermined the mediating role of labour arbitration, destroying its ability to protect the semi-autonomous processes of industrial justice in favor of the needs of the state's law.[193]

But, it need not be this way. Arbitrators can adapt and nimbly navigate the schizophrenia. Indeed, to preserve the institution of labor arbitration as a vehicle of workplace self-governance, arbitrators have no choice but to navigate the schizophrenia.

Arbitrator Jeanne Vonhof and I have given one example of how labor arbitrators may accommodate their judicially reconceived role as substitute for litigation of public law claims with their traditional role as substitute for strikes in a private system of ongoing collective bargaining. A staple of the private common law of the workplace has been that ungrieved discipline may not be collaterally attacked in a subsequent grievance over more severe discipline that resulted, in part, from the use of the ungrieved discipline to progress the penalty to a higher level. The focus of the arbitration over the new, harsher discipline is on the employee's conduct since the prior ungrieved discipline.[194]

This bedrock principle of the common law of the workplace may have to yield to accommodate the FMLA. The statute of limitations for FMLA claims is two years and increases to three years for willful violations.[195] Consequently, arbitrators presiding over discharge grievances under attendance control plans will likely face situations where the time for grieving a prior suspension has expired but the statute of limitations for litigating that suspension under the FMLA has yet to run. Arbitrator Vonhof and I have argued that to accommodate the FMLA, arbitrators facing such situations should allow the union and grievant to attack the prior suspension as violative of the FMLA because, to the extent that the discharge rested upon a prior suspension that violated the FMLA and the FMLA claim has not been waived because the statute of limitations has yet to expire, the discharge cannot be for just cause. However, we urged, arbitrators should refuse to hear any other claim that the prior suspension violated the CBA, such as a contention that tardiness on which the suspension was based resulted from a defective time clock.[196] Such an approach accommodates the arbitrator's new role as adjudicator of employees' public law claims with the traditional role as resolver of disputes under the private CBA.

The courts have thrust on labor arbitrators a new role as substitute for litigation in the adjudication of public law claims. Effectively, Howlett has won the debate. Arbitrators can no longer apply the contract and ignore the law. This poses a challenge for arbitrators to accommodate this new role while preserving, to the maximum extent, their traditional role as substitute for strikes in the continuous private process of collective bargaining. Arbitrators can and must rise to the occasion.

---

193. Claire Mummé, *Labour Arbitration as Translation: The Transformation of Canadian Labour Arbitration in the Twentieth Century from a Semi-autonomous Institution of the Shop to an Institution of the State* 20 (Jan. 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485682.

194. *See* ELKOURI & ELKOURI, *supra* note 2, at 985.

195. 29 U.S.C. § 2617(c) (2006).

196. Malin & Vonhof, *supra* note 49, at 217-18.