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Revisiting the Meltzer-Howlett Debate on External Law in Labor Arbitration: Is It Time for Courts to Declare Howlett the Winner?

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I. Introduction

Assume that a collective bargaining agreement provides, "All leaves of absence and any extensions thereof shall be without pay."[1] Assume further that the contract provides, "Vacations shall be scheduled in accordance with the needs of the Company and employee preferences in accordance with seniority." For many years, the parties have followed a procedure whereby in early January, the company decides the maximum number of employees who may be on vacation on any given day and distributes vacation preference forms. Employees complete the forms specifying the dates they wish to take vacation and the company grants those requests by seniority until it reaches the maximum for any given date.

Walter Worker's length of service entitled him to four weeks of vacation per year. He participated in the vacation scheduling process and received vacation scheduled for two weeks in mid-August, and the three days before Thanksgiving as well as two days following the Thanksgiving weekend. He retained one week of his entitlement to use at a future time. The practice was to allow employees who did not schedule their entire vacation entitlement through the formal scheduling process to take vacation days at any time as long as the employee gave at least forty-eight hours' notice, and the maximum number of employees on vacation for the requested date had not yet been met.

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1. *See, e.g.*, In re Union Hosp., 108 Lab. Arb. (BNA) 966, 970 (1997) (Chattman, Arb.).

In early May, Worker's minor child was severely injured in an accident. Worker took time off to be with his child, exhausting his three weeks of accumulated sick leave. Shortly thereafter, his child was scheduled for surgery for the last week of June and could expect a lengthy recovery period with the most critical time being two weeks after surgery. Worker applied for and was granted family medical leave under the Family Medical Leave Act (the FMLA) to care for his minor child. He requested to substitute his paid vacation time for the otherwise unpaid FMLA leave. However, because the three weeks in late June and early July were filled with the maximum number of employees scheduled for vacation, the company denied his request.

Worker filed a grievance against the company. After the company denied the grievance at every preliminary step of the grievance procedure, the union demanded arbitration. The arbitrator sustained the grievance. If the company sues to vacate the arbitrator's award, will and should a court enforce the award? Will and should it matter how the arbitrator arrives at and crafts the award? For example, will and should it make a difference if the arbitrator finds that the collective bargaining agreement (the "CBA") allowed the company to deny Worker's vacation request, but the denial violated Worker's FMLA right to substitute accrued paid vacation time for unpaid FMLA leave, resulting in the arbitrator ordering the company to grant the request? Alternatively, what if the arbitrator interpreted the vacation selection provision to require scheduling of vacations in accordance with the company's needs, including the need to comply with the FMLA? What if the parties, recognizing that the date of surgery was fast approaching, agreed to an expedited procedure whereby they submitted facts to the arbitrator, argued the matter orally, and had the arbitrator issue a short form award within forty-eight hours? What if the arbitrator gave no rationale but sustained the grievance?

If one looks to established judicial precedent in an effort to answer the above hypothetical, one finds a great deal of confusion. Under some case authority, the arbitrator's award will not be enforced. Under other authority, it may be enforced depending on how the arbitrator crafted the award. The hypothetical, of course, raises the question of the appropriate role of external public law in labor arbitration. The issue is often referred to as the "Meltzer-Howlett debate," after the famous exchange between Professor Bernard Meltzer and arbitrator Robert Howlett at the twentieth annual meeting of the National Academy of Arbitrators.[2]

2. Bernard D. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration, in* THE ARBITRATOR, THE NLRB AND THE COURTS: PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (Dallas L. Jones ed. 1967) Robert G. Howlett, *The Arbitrator, the NLRB and the Courts, in* PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, *supra* at 67.

Although, years ago, the Supreme Court appeared to endorse Meltzer's position in *Alexander v. Gardner-Denver Co.*,[3] the Court's view of the role of the arbitrator has evolved immensely since then.

This article urges that it is time for courts to declare Howlett the winner, at least insofar as enforcing arbitration awards that rely on external law is concerned. Under the thesis herein, it does not matter how the arbitrator crafts the award in Walter Worker's case; the court should enforce it unless the parties expressly prohibited the arbitrator from relying on external law. Part II provides a brief review of the Meltzer-Howlett debate and the Supreme Court's acceptance of Meltzer's view in *Gardner-Denver*. Part III examines the evolution of the court's view on arbitral authority to interpret external public law. Part IV examines case law that bears on whether the award sustaining Worker's grievance will be enforced. Part V examines developments that have placed enormous pressure on labor arbitrators to rely on external public law. Part VI makes a case for enforcing the award sustaining Worker's grievance regardless of how it was crafted.

II. A Brief Review of the Meltzer-Howlett Debate and the Supreme Court's Acceptance of Meltzer's Position

Labor arbitration developed at a time when the collective bargaining agreement was the major source of regulation of the workplace. Apart from the very few public laws governing the workplace, primarily the National Labor Relations Act (the NLRA), the Fair Labor Standards Act, and the state workers' compensation statutes, the workplace was governed by private law developed by parties through collective bargaining. The grievance and arbitration process played, and still plays, an indispensable function in workplace self-governance.

Harry Shulman, the first umpire for the Ford–United Auto Workers ("UAW") labor agreement and Dean of Yale Law School, suggested that the underlying premise of American collective bargaining is "that wages and other conditions of employment be left to autonomous determination by employers and labor."[4] He 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

3. 415 U.S. 36, 59–60 (1974).

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

> of law established by their collective 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.[5]

In what is known as the *Steelworkers Trilogy*,[6] the Supreme Court explicitly included the quote above from 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 defined the legal framework of labor arbitration, the Court described the collective bargaining agreement as "an effort to erect a system of industrial self-government."[7] 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. Labor arbitration, the Court noted, is not simply an alternative method of dispute resolution in the way that commercial arbitration is a substitute for litigation. Instead, the Court stated:

> [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 toward arbitration of commercial agreements has no place here. For arbitration of collective disputes is part and parcel of the collective bargaining process itself.[8]

David Feller referred to this era as "Arbitration's Golden Age," in which, essentially, "the sole source of law in industries in which the grievance and arbitration machinery was well-established was the collective agreement."[9] According to Feller, even the effect of the NLRA was primarily procedural, *i.e.*, designed to protect the process by which the parties' system of self-governance was created. Other laws that created substantive rights, such as the Fair Labor Standards Act, were not that important, he argued, because they set only minimum standards.

This situation changed starting in the mid-1960s, when Congress enacted a number of laws creating substantive rights for employees, such as, the Equal Pay Act,[10] Title VII of the Civil Rights Act of 1964,[11] the Occupational Safety and Health Act,[12] and the Employee Retirement

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5. *Id.* at 1016.

6. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 46 L.R.R.M. (BNA) 2414 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 L.R.R.M. (BNA) 2416 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 46 L.R.R.M. (BNA) 2423 (1960).

7. *Warrior & Gulf Navigation Co.*, 363 U.S. at 580.

8. *Id.* at 578.

9. David Feller, *The Coming End of Arbitration's Golden Age, in* ARBITRATION 1976: PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97, 108 (Barbara D. Dennis & Gerald G. Somers, eds., 1976).

10. 29 U.S.C. § 206(d) (2000).

11. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

12. 29 U.S.C. §§ 651–78 (2000).

Income Security Act ("ERISA").[13] Although arbitrators had expressed concern over the interplay between external public law and the arbitration process even before the *Trilogy*,[14] the flurry of new public laws, particularly Title VII, ignited a debate within the profession over the arbitrator's role with respect to interpreting and applying public law.

The "Meltzer-Howlett debate" was triggered particularly by Title VII. Meltzer acknowledged that where an arbitrator faces two interpretations of a collective bargaining agreement, one of which is repugnant to a statute, "the statute is a relevant factor for interpretation."[15] However, he continued, "Where...there is an irrepressible conflict, the arbitrator...should respect the agreement and ignore the law."[16]

Meltzer reasoned that arbitrators could not be credited "with any competence, let alone any special expertise, with respect to the law, as distinguished from the agreement."[17] Arbitrators deciding cases on the law instead of the contract, in Meltzer's view, "would be deciding issues that go beyond not only the submission agreement but also arbitral competence. Arbitrators would, moreover, be doing so within a procedural framework different from that applicable to official tribunals. Finally, they would be impinging on an area in which courts or other official tribunals are granted plenary authority.[18]

In a subsequent article, Meltzer explained that his contention that arbitrators lack competence to resolve statutory claims referred to arbitrators' institutional competence rather than individual arbitrators' personal abilities.[19] The problem of institutional competence arose from the underlying purpose of arbitration. It is a vehicle for resolving disputes under a collective bargaining, and the arbitrator's presumed expertise and the parties' consent to be bound by the arbitrator's judgment were limited to the agreement. In addition, many arbitrators lacked legal training.[20]

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13. 29 U.S.C. U.S.C. §§ 1001–1461 (2000). To that list, we can now add the employment provisions of the Americans with Disabilities Act (42 U.S.C. §§ 12101–12213 (2000)), as well as the Family and Medical Leave Act (29 U.S.C. §§ 2601–2654 (2000)). In addition, state laws affecting the employment relationship in these areas also have increased since the 1960s.

14. In the first volume of published papers of the National Academy of Arbitrators, Archibald Cox authored a paper entitled *The Place of Law in Labor Arbitration, in* THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 1948–1954, at 76, 89 (1957). The paper discusses a conflict that arose frequently immediately after World War II between provisions of the Selective Service Act and seniority provisions of labor agreements.

15. Meltzer, *supra* note 2, at 15. Meltzer's essay is reprinted at 34 U. CHI. L. REV. 545, 557 (1967).

16. Meltzer, *supra* note 2, at 16.

17. *Id.*

18. *Id.* at 17 (footnotes omitted).

19. Bernard D. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 34 (1971).

20. *Id.*

Howlett, on the other hand, argued that "arbitrators *should* render decisions on the issues before them *based on both contract language and law*."[21] He maintained that the law is incorporated into every agreement[22] and that "[t]he law is part of the 'essence [of the] collective bargaining agreement' to which Mr. Justice Douglas has referred."[23]

Meltzer's position found support in dicta in the *Trilogy*.[24] In *Enterprise Wheel*, after setting forth its famous "essence test" for enforcing arbitration awards, the Court turned to the award at issue.[25] The Court observed that the award was ambiguous.[26] 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.[27]

The Supreme Court appeared to endorse Meltzer's position in *Alexander v. Gardner-Denver Co.*[28] Gardner-Denver Company discharged employee Alexander, who grieved and lost in arbitration. Alexander also sued under Title VII.[29] The Court of Appeals for the Tenth Circuit held that Alexander's unsuccessful grievance arbitration precluded his Title VII litigation.[30] The Supreme Court reversed, holding that the grievance arbitration and the Title VII litigation were independent of each other.[31] The Court relied on Meltzer's writings concerning the arbitrator's lack of institutional competence to resolve public law claims.[32]

III. The Court's Evolving View on Arbitral Interpretation of Public Law

The Supreme Court's view of the authority of arbitrators to interpret and apply public law has come a long way since the *Enterprise Wheel* dicta and *Gardner-Denver*. The first step in this evolution was

21. Howlett, *supra* note 2, at 83 (emphasis in original).
22. *Id.* at 85 (citations omitted).
23. *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.
24. *See, supra* note 6.
25. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.
26. *Id.*
27. *Id.*
28. *Gardner-Denver Co.*, 415 U.S. at 43.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 52–53 n.16.

somewhat unseen. In *W. R. Grace & Co. v. Rubber Workers Local 759*, the Court held that an award of back pay to male employees laid off ahead of junior female employees pursuant to a conciliation agreement between the employer and the Equal Employment Opportunity Commission (the EEOC) was not contrary to public policy and, therefore, enforceable.[33] The Court reasoned that the award did not require the employer to violate the conciliation agreement since it did not mandate any layoffs.[34] In a dictum that appears to be contrary to the *Enterprise Wheel* dicta, the Court suggested that an arbitrator has authority under the contract doctrine of impossibility of performance to refuse to enforce a collective bargaining agreement provision that conflicts with external law.[35]

The sea change, in the Court's view, of the propriety of arbitral interpretation and application of public law governing the workplace occurred in *Gilmer v. Interstate/Johnson Lane Corp.*[36] *Gilmer* did not involve arbitration under a collective bargaining agreement. Rather, it involved the question of whether an individual employee's promise in a non-unionized environment to arbitrate public law claims arising out of the individual's employment was enforceable.[37] Prior to *Gilmer*, 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.[38] In *Gilmer*, 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.[39]

Gilmer did not expressly overrule *Gardner-Denver*. *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 collective bargaining agreement and did

33. 461 U.S. 757, 759, 113 L.R.R.M. (BNA) 2641 (1983).
34. *Id.* at 768–69.
35. *Id.* at 767, n.10.
36. 500 U.S. 20 (1991).
37. *Id.* at 23.
38. *See* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105 (5th Cir. 1990), *vacated,* 500 U.S. 930, 930 (1991); Utley v. Goldman Sachs & Co., 883 F.2d 184, 185–86 (1st Cir. 1989); Nicholson v. CPC Int'l, Inc., 877 F.2d 221, 224 (3d Cir. 1989); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304, 1305–06 (8th Cir. 1988); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1553 (10th Cir. 1988); Johnson v. Univ. of Wisconsin-Milwaukee, 783 F.2d 59, 62 (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, 196 (4th Cir. 1990), *aff'd*, 500 U.S. 20, 22 (1991).
39. *Gilmer*, 500 U.S. at 23–24.

not extend to resolving statutory claims.[40] 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.[41] This aspect of the Court's reasoning relied expressly on Meltzer's writings concerning the arbitrator's lack of institutional competence to adjudicate 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."[42]

Not surprisingly, encouraged by the affirmed ruling in *Gilmer*, the Fourth Circuit continued its pattern in arbitration cases and held that employees covered by collective bargaining agreements were required to pursue their statutory claims through the grievance and arbitration procedure.[43] The Fourth Circuit was again an outlier, as all other circuits that addressed the issue held that *Gardner-Denver* continued to control.[44] In *Wright v. Universal Maritime Service Corp.*,[45] the Supreme Court had the opportunity to reaffirm *Gardner-Denver*, and to hold that an arbitrator selected under a collective bargaining agreement's grievance scheme was not empowered to resolve public law claims. The Court failed to do so. It declined to resolve the issue of whether an employee can be compelled to arbitrate a statutory claim under the provisions of a collective bargaining agreement.[46] The Court held, however, that if such an agreement waiving the judicial forum is to be enforced, the agreement must be clear and unmistakable.[47] In so doing, the Court recognized the tension between *Gilmer* and *Gardner-Denver*, but declined to resolve it definitively.[48] However, the

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40. *Id.* at 34.

41. *Gardner-Denver Co.*, 415 U.S. at 56–58.

42. *Id.* at 34, n.5 (*quoting* Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 626–27 (1985)) (citations omitted).

43. *See* Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 878–79, 151 L.R.R.M. (BNA) 2673 (4th Cir. 1996).

44. *See* Penny v. United Parcel Serv., 128 F.3d 408, 411, 156 L.R.R.M. (BNA) 2618 (6th Cir. 1997); Pryner v. Tractor Supply Co., 109 F.3d 354, 365, 154 L.R.R.M. (BNA) 2806 (7th Cir. 1997); Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1452, 156 L.R.R.M. (BNA) 2033 (10th Cir. 1997); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 525, 155 L.R.R.M. (BNA) 2858 (11th Cir. 1997); Varner v. Nat'l Super Mkts., 94 F.3d 1209, 1214 (8th Cir. 1996); Tran v. Tran, 54 F.3d 115, 117–18, 149 L.R.R.M. (BNA) 2350 (2d Cir. 1995).

45. 525 U.S. 70, 159 L.R.R.M. (BNA) 2769 (1998).

46. *Id.* at 79.

47. *Id.* at 80.

48. *Id.* at 76–77.

Wright Court made clear that where a public law claim is arbitrated under a collective bargaining agreement, "the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires...."[49]

IV. Will Labor Arbitration Awards Based on External Public Law Be Enforced? The Confused State of the Case Law

Although the Supreme Court has abandoned its discomfort with arbitral interpretation and application of public law, the lower courts appear conflicted. This section highlights six decisions that reflect that conflict.

A. *Cases Hostile to Arbitral Interpretation of External Public Law*

In *Roadmaster Corp. v. Production and Maintenance Employees Local 504*, the contract between Roadmaster and United Employees Union No. One ran through February 28, 1986, and provided that it would automatically renew from year to year unless one party gave the other party at least sixty days' notice of intent to amend or terminate it.[50] During the term of the contract, the union went on strike over wage concessions demanded by the company, and, consequently, the company hired over 500 permanent replacements.[51] Simultaneously, the union's membership voted to merge with Local 771 of the Laborers International Union of North America (LIUNA).[52] Officers from both unions purported to accept Roadmaster's most recent offer, but the company refused to reinstate the replaced strikers.[53] Thereafter, the employees voted to form their own LIUNA local and Local 504 was chartered.[54] Roadmaster refused to recognize Local 504.[55]

On December 16, 1985, Roadmaster sent a letter notifying all three unions of its intent to terminate the contract effective February 28, 1986.[56] Roadmaster refused to bargain with any union.[57] Local 504 sued and a court compelled Roadmaster to arbitrate a number of issues, including whether the December 16 letter defeated the automatic renewal of the contract.[58] The arbitrator held that the letter was

49. *Id.* at 79.
50. Roadmaster Corp. v. Production and Maintenance Employees Local 504, 851 F.2d 886, 887, 129 L.R.R.M. (BNA) 2449 (7th Cir. 1988).
51. *Id.* It is not clear from the court's opinion how such a strike could come about mid-contract.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 888.
56. *Id.*
57. *Id.*
58. *Id.*

void because Roadmaster refused to offer to bargain, in violation of section 8(d)(2) of the NLRA.[59] Consequently, the arbitrator found that the contract automatically renewed for another year.[60]

The Seventh Circuit vacated the award. The court relied on the *Enterprise Wheel* dicta and *Gardner-Denver*, and held that the arbitrator exceeded his authority, which was limited to interpretation of the contract and did not extend to interpretation of the NLRA.[61] The court opined:

> The arbitrator cast no doubt upon what he was doing. And he was plainly wrong. He based his decision not on the parties' bargain, but rather upon his view of the requirements of enacted legislation. Thus, he has exceeded the scope of the submission and the award will not be enforced....Resolution of NLRA disputes must be left to [the National Labor Relations Board] the NLRB and not to an arbitrator.[62]

Roadmaster is problematic in a number of respects. The court acknowledged that the NLRB routinely defers unfair labor practice charges to arbitration.[63] It questioned the validity of the Board's deferral doctrine, noting that the Board's decision in *Collyer Insulated Wire* Co.[64] pre-dated *Gardner-Denver*.[65] Moreover, the court did not even mention the Supreme Court's observation in *W. R. Grace* that an arbitrator may refuse to enforce a provision of a collective bargaining agreement based on supervening illegality.[66] One is left wondering why, if arbitrators may refuse to enforce an illegal provision of a collective bargaining agreement, they may not refuse to give effect to illegal notices of intent to terminate a collective bargaining agreement. Indeed, *Roadmaster* appears to take the Court's *Enterprise Wheel* dicta out of context, as the Court in that case also recognized that arbitrators may look to the law to determine the sense of the agreement, and that where there is ambiguity as to whether the arbitrator looked to the law for guidance or based the award solely on the commands of statute, the ambiguity must be resolved in favor of enforcing the award.[67] Consequently, *Roadmaster* represents the height of judicial hostility to arbitral interpretation of external public law.

Roadmaster is now two decades old. It pre-dates *Gilmer* and *Wright*. It may be tempting to dismiss it as a relic of former times. The

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59. *Id.*
60. *Id.*
61. *Id.* at 889.
62. *Id.* (citations omitted).
63. *Id.*
64. Collyer Insulated Wire Co., 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1931 (1971).
65. *Roadmaster*, 851 F.2d at 889 n. 3.
66. *W.R. Grace & Co.*, 461 U.S. at 759.
67. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

same, however, cannot be said of *Sheriff of Suffolk County v. AFSCME Council 93*.[68]

In *Sheriff of Suffolk County*, the grievant, a corrections officer, had retired on full disability pension as a result of an on-duty injury.[69] A Massachusetts statute allowed employees who retired due to disability to return to their former positions or similar positions if they recovered sufficiently to perform the essential functions of their job.[70] The grievant returned to work under this statutory provision, but was placed in a position that he believed was lower than the position to which his seniority entitled him.[71] The union pursued his grievance to arbitration.[72] The arbitrator determined that the parties had not contemplated this type of situation and, hence, the contract did not control.[73] Relying on the statute, the arbitrator concluded that the grievant was entitled to a higher position by virtue of his seniority and required the employer to upgrade him.[74]

The Massachusetts Appeals Court concluded that, by relying on the statute, the arbitrator exceeded his authority.[75] Relying on standard boilerplate language that the arbitrator had no authority "to alter, amend, add to, or detract from the language of this Agreement,"[76] the court reasoned:

> The collective bargaining agreement's grievance procedure...gave the arbitrator no authority to construe statutory rights...Thus, the arbitrator only had authority to draw his award from the agreement's express provisions. As the arbitrator went outside the agreement to craft his award, he exceeded the authority granted to him by the parties.[77]

B. Cases Supportive of Arbitral Interpretation of External Public Law

In contrast to cases such as *Roadmaster* and *Sheriff of Suffolk County* are cases where courts enforced grievance arbitration awards that were based on external public law. In *Butler Manufacturing Co. v. United Steelworkers of America*, the employer discharged an employee pursuant to a negotiated attendance control plan embodied in a memorandum of understanding between the employer and the

68. 856 N.E.2d 194 (Mass. App. 2006).
69. *Id.* at 195.
70. *Id.* at 196.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 198.
76. *Id.*
77. *Id.*

union.[78] The arbitrator determined that three of the absences for which the grievant had been charged were FMLA-protected and ordered the grievant reinstated with half back pay.[79] The employer sued to vacate the award.[80]

The union argued that the award drew its essence from the contract and cited a provision of the agreement that stated, "Butler Manufacturing Company offers equal opportunity for employment, advancement in employment, and continuation of employment to all qualified individuals in accordance with the provisions of law and in accordance with the provisions of this Agreement for the represented employees covered by it."[81] The district court, however, determined the quoted language to be "nothing but boilerplate anti-discrimination commitments that did not necessarily pull the FMLA into the agreement" and held that the arbitrator exceeded her authority by relying on the FMLA.[82] The Seventh Circuit reversed. The court reasoned:

> If there was some kind of "clear statement" rule that applied to CBAs and to the match between a CBA and an arbitrator's authority, perhaps [the district court's analysis] would have been right. But there is no such rule. Instead...the standard asks only whether the arbitrator's interpretation can rationally be linked to the CBA. Here, a broader look...demonstrates that the arbitrator's award did draw its essence from the parties' agreement. Article 2, paragraph 13...does not say only that there will be "equal opportunity for employment...in accordance with the provisions of this Agreement..." [I]n the ellipsis between the word "employment" and the last phrase comes the phrase "in accordance with the provisions of law." We have no reason to think that this reference to external law is either surplusage or "mere boilerplate." [W]e find that Article 2, paragraph 13 conferred on the arbitrator the authority to consider the FMLA.[83]

The First Circuit has taken an even more expansive view of arbitral authority. In *Costal Oil of New England, Inc. v. Teamsters Local*,[84] the contract 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 workers' compensation statute.[85] The contract covered only one of the employer's three facilities.[86] The same union represented the employees at the other two facilities, but each facility had its own collective bargaining agreement.[87]

78. 336 F.3d 629, 632, 172 L.R.R.M. (BNA) 3129 (7th Cir. 2003).
79. *Id.*
80. *Id.* at 631.
81. *Id.* at 633.
82. *Id.*
83. *Id.* at 633-34 (citation omitted).
84. 134 F.3d 466, 467, 157 L.R.R.M. (BNA) 2294 (1st Cir. 1998).
85. *Id.* at 468.
86. *Id.*
87. *Id.*

An employee covered by the collective bargaining agreement was injured on the job.[88] Following his recovery, he sought reinstatement but was advised that there were no openings.[89] The union and employer agreed that the employee would be reinstated to the next available opening.[90] Subsequently, the employee learned of an opening at one of the other two facilities.[91] When the employer refused to award him that position, he grieved and the union took the claim to arbitration.[92]

The arbitrator, relying on the Massachusetts Workers' Compensation Law, ordered the employer to reinstate the grievant to the position at the other facility, which was covered by a different contract.[93] 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 agreement, fail to address whether the provisions of the Massachusetts Worker's Compensation Law incorporated into that agreement...have been met? 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.[94]

Courts also have rejected arguments that a grievance is not arbitrable because the arbitrator will have to interpret external public law to resolve the grievance, a matter beyond the arbitrator's bailiwick. For example, in *Knipp v. Lawrence County Board of Commissioners*,[95] the director of the Lawrence County Department of Job and Family Services informed Knipp, a social worker employed by the department, that her employment was terminated.[96] The director did not obtain approval for the termination from the county Board of Commissioners.[97] Knipp sued, alleging that the department failed to follow procedures mandated by Ohio statute for terminating an employee.[98] The Ohio Court of Appeals held, however, that Knipp was required to grieve and

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 469–70.
95. 2005 WL 1433182, 178 L.R.R.M. (BNA) 2589 (Ohio Ct. App. 2005).
96. *Id.* at *1.
97. *Id.*
98. *Id.*

arbitrate her claim that her purported termination contravened state statute.[99] The arbitrator hearing such grievance would be thrust into the role of interpreting and applying external public law rather than the parties' collective bargaining agreement.[100]

In *California Correctional Peace Officers Association v. State*,[101] the same union represented rank-and-file correctional officers and their supervisors.[102] The two groups negotiated separately, but pursuant to agreed-upon ground rules, each group was allowed to attend the other group's negotiations as observers.[103] When the state discontinued the practice, the union sought to enforce the negotiated ground rules in arbitration.[104] The state resisted arbitration, arguing that a state statute prohibited supervisors from participating in rank-and-file negotiations and vice versa.[105] In the state's view, the grievance was not arbitrable because it sought relief that was prohibited by statute.[106] The California Court of Appeals rejected the state's argument:

> [T]here is simply no authority to support the Department's position that courts alone can interpret statutes, to the exclusion of arbitrators. It is certainly true that courts will, in some instances, be the *final* interpreters of statutory law as a result of their appellate authority, but nothing in the statutes or the case law suggests that arbitrators cannot also interpret statutes. On the contrary, the body of case law governing arbitration has recognized repeatedly that arbitrators may be presented with issues of statutory interpretation and are entitled to resolve those issues—at least in the first instance.[107]

V. Developments in the Relationship Between Grievance Arbitration and External Public Law

Much has changed in the world of employment and the world of labor arbitration over the forty-plus years that have elapsed since Professor Meltzer's writings. This section discusses three developments that have thrust upon arbitrators the need to consider external public law. Two of these developments reflect the erosion of *Gardner-Denver*. First, a significant minority of courts are requiring employees to bring their public law claims through the collective bargaining agreement's grievance and arbitration procedure. Second, there is an even stronger trend to rely on a grievance arbitration outcome that is unfavorable to the employee as a basis for granting summary judgment against the

99. *Id.* at *3.
100. *Id.*
101. 47 Cal. Rptr. 3d 717, 180 L.R.R.M. (BNA) 2631 (Cal. Ct. App. 2006).
102. *Id.* at 718–19.
103. *Id.* at 719.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 726 (emphasis in original).

employee in subsequent public law claims litigation. The third development is the enactment of the FMLA, which is an external public law that labor arbitrators simply cannot avoid considering. Implications of these developments for arbitrators are discussed in *The Evolving Role of the Labor Arbitrator*.[108] Implications for judicial enforcement of grievance arbitration awards are considered below.

A. *Compelling Arbitration of Public Law Claims Under a Collective Bargaining Agreement*

Gardner-Denver offered three reasons for its holding that an employee may pursue a Title VII claim in court despite losing a grievance arbitration arising out of the same set of facts: (1) arbitration is inferior to adjudication for resolving public law claims; (2) grievance arbitration is intended to resolve claims of breach of the collective bargaining agreement, rather than claims arising under public law independent of the contract; and (3) the union, rather than the individual employee, controls the grievance arbitration process.[109]

The first rationale has been completely undermined by *Gilmer*.[110] The second rationale led the *Wright* Court to require a clear and unmistakable waiver of the judicial forum before compelling arbitration of a statutory claim pursuant to a collective bargaining agreement.[111] Whether the third concern should preclude waiver of the judicial forum in a collective bargaining agreement was the issue left open in *Wright*.[112]

Most courts considering defense requests to compel plaintiffs to arbitrate their statutory claims under their collective bargaining agreement have applied *Wright* and found no clear and unmistakable waiver of the right to litigate.[113] Although the Second Circuit has held definitively that a union may not waive an employee's right to sue on a statutory claim,[114] a significant minority of courts have found and enforced the requisite waivers.

Not surprisingly, the Fourth Circuit has led the way. In *Safrit v. Cone Mills Corp.*,[115] the collective bargaining agreement's non-discrimination

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108. Martin H. Malin & Jeanne Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISPUTE. RESOL. 199 (2005).

109. *See Gardner-Denver Co.*, 415 U.S. at 56–60.

110. *See Gilmer*, 525 U.S. at 78-79.

111. *See Wright*, 25 U.S. 70 (1998).

112. *Id.*

113. *See, e.g.*, Fayer v. Town of Middlebury, 258 F.3d 117 (2d Cir. 2001); E.E.O.C. v. Ind. Bell Tel. Co., 256 F.3d 516 (7th Cir. 2001); Rogers v. N.Y. Univ., 220 F.3d 73, 164 L.R.R.M. (BNA) 2854 (2d Cir. 2000); Kennedy v. Superior Printing Co., 215 F.3d 650, 164 L.R.R.M. (BNA) 2609 (6th Cir. 2000); Bratten v. S.S.I. Servs., Inc., 185 F.3d 625, 161 L.R.R.M. (BNA) 2985 (6th Cir. 1999); Quint v. A. E. Staley Mfg. Co., 172 F.3d 1 (1st Cir. 1999).

114. Pyett v. Pa. Bldg. Co., 498 F.3d 88, 182 L.R.R.M. (BNA) 2359 (2d Cir. 2007), *cert. granted sub nom.* Penn Plaza, LLC v. Pyett, 128 S.Ct. 1223 (2008).

115. 248 F.3d 306, 167 L.R.R.M. (BNA) 2070 (4th Cir. 2001).

provision recited that the parties agreed to "abide by all the requirements of Title VII" of the Civil Rights Act of 1964.[116] The same provision declared, "[U]nresolved grievances arising under this Section are the proper subjects for arbitration."[117] Under the collective bargaining agreement, the employee could not proceed at any stage of the grievance procedure without the union.[118]

After twelve years of employment with Cone Mills, Safrit became a fixer trainee and was the only female trainee in her class.[119] She alleged that her employer failed to train her properly and denied her job opportunities that were available to other trainees.[120] The union grieved, and at the fourth step of the grievance procedure, the employer agreed to correct the deficiencies.[121] The plaintiff alleged, however, that the employer breached the agreement and continued to discriminate against her.[122] The union declined to file a new grievance and advised the plaintiff to seek redress outside of the collective bargaining agreement.[123] Hence, plaintiff filed a charge with the EEOC and ultimately filed suit.[124]

The district court granted summary judgment against the plaintiff, holding that the collective bargaining agreement waived her right to sue.[125] The Fourth Circuit affirmed.[126] The court reasoned, "[I]t is hard to imagine a waiver that would be more definite or absolute. The parties agreed that they would 'abide by all the requirements of Title VII' and that 'unresolved grievance arising under this Section are the proper subjects for arbitration.'"[127]

The court rejected the plaintiff's argument that her good faith compliance with the grievance procedure coupled with her inability to control processing of the grievance should have relieved her of any duty to arbitrate.[128] Consequently, plaintiff found herself out of court and also out of the grievance and arbitration scheme.[129] The Fourth Circuit has since extended its holding to compel an employee with limited English

116. *Id.* at 308.
117. *Id.*
118. *Id.*
119. *Id.* at 307.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 308.
127. *Id.*
128. *Id.*
129. The harshness of the court's decision is apparent when it is compared to the approach of the NLRB. The NLRB often defers unfair labor practice complaints to arbitration where the incident giving rise to the alleged unfair labor practice also may give rise to a grievance. However, the NLRB conditions such deferral on the employer's agreement to waive any procedural defects that might otherwise preclude arbitration. *See* Collyer Insulated Wire, 192 N.L.R.B. 837, 77 L.R.R.M. (BNA) 1931 (1971).

skills to arbitrate her statutory claims under a collective bargaining agreement even though the contract was available only in English.[130]

Other courts have found clear and unmistakable waivers and compelled arbitration of employee public law claims. Although many of these cases are within the Fourth Circuit,[131] the phenomenon is not limited to that arbitration-happy jurisdiction. For example, the Appellate Division of the New York Supreme Court has compelled arbitration of statutory discrimination claims where the collective bargaining agreements' grievance and arbitration provisions expressly covered claims arising under the statutes.[132]

In contrast, in *Pyett v. Pennsylvania Building Corp.*,[133] the Second Circuit, facing the same CBA provision that the New York Appellate Division had enforced, held definitively that even a clear and unmistakeable waiver of the right to a judicial forum in a CBA is not enforceable. The Supreme Court has granted certiorari in *Pyett* and presumably will resolve the issue that if found unnecessary to resolve in *Wright*.

Regardless of how the Court rules in *Pyett*, labor arbitrators will continue to face claims arising under external public law. For example, courts are compelling arbitration under collective bargaining agreements in cases where the public law claim is intertwined with, rather than independent of, the collective bargaining agreement. In *Ruiz v. Sysco Food Services*, Sysco fired Ruiz for allegedly threatening his supervisor with a knife.[134] Ruiz grieved and an arbitrator found that the investigation leading to Ruiz's discharge did not comply with the contract's requirements.[135] Following his reinstatement, Ruiz sued for, *inter alia*, defamation and intentional and negligent infliction of emotional distress, all arising out of the investigation and its aftermath.[136] The California Court of Appeal held that Ruiz was required to arbitrate his tort claims under the collective bargaining agreement.[137] The court reasoned that determining whether Ruiz could establish "actual malice," required for the defamation claim, and "conduct beyond that which a civilized society would tolerate," required for the emotional

130. Aleman v. Chugach Support Servs., Inc., 485 F.3d 206, 208, 181 L.R.R.M. (BNA) 3034 (4th Cir. 2007).

131. *See* Wikle v. CNA Holdings, Inc., 2001 WL 474692 (4th Cir. 2001); Singletary v. Enersys, Inc., 2003 WL 264703 (4th Cir. 2003); Pine Ridge Coal Co. v. Loftis, 271 F. Supp. 2d 905, 173 L.R.R.M. (BNA) 2053 (S.D. W. Va. 2003); Saunders v. Int'l Longshoremen's Ass'n, 265 F. Supp. 2d 624, 172 L.R.R.M. (BNA) 2922 (E.D. Va. 2003).

132. *See* Garcia v. Bellmarc Property Mgmt., 745 N.Y.S.2d 13, 173 L.R.R.M. (BNA) 2286 (N.Y. App. Div. 2002); Torres v. Four Seasons Hotel, 715 N.Y.S.2d 28, 166 L.R.R.M. (BNA) 2192 (N.Y. App. Div. 2000).

133. Pyett v. Pa. Bldg. Co., 498 F.3d 88, 182 L.R.R.M. (BNA) 2359 (2d Cir. 2007), *cert. granted sub nom.* Penn Plaza, LLC v. Pyett, 128 S.Ct. 1223 (2008).

134. 18 Cal. Rptr. 3d 700, 702, 176 L.R.R.M. (BNA) 2173 (Cal. Ct. App. 2004).

135. *Id.*

136. *Id.*

137. *Id.* at 704.

distress claims, required interpretation of the contract.[138] It further opined that "[t]he CBA language is broad enough to cover the subject matter of [Ruiz's] complaint."[139] Thus, an arbitrator hearing Ruiz's tort claims would have to interpret the contract and then interpret and apply California tort law to determine whether Ruiz had a claim and what relief was appropriate.[140]

Courts are also compelling arbitration of public law claims in cases where the union's control over the arbitration proceeding is not at issue. Particularly significant is that the Second Circuit, which has held flatly that a union lacks authority to waive an employee's right to a judicial forum, has compelled an employer to arbitrate its statutory claims. In *Interstate Brands Corp. v. Baker Drivers & Bakery Goods Vending Machines*, Interstate Brands sued the union under Section 303 of the Labor Management Relations Act for damages resulting from an alleged secondary boycott.[141] The contract'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."[142]

Relying on *Wright*, Interstate Brands argued that the strong presumption of arbitrability should not apply because it was pursuing a claim under a federal statute.[143] Interstate Brands maintained that any waiver of its right to bring its claim in federal court had to be clear and unmistakable.[144]

The Second Circuit rejected the argument.[145] According to the court, *Wright*'s requirement of a clear and unmistakable waiver resulted from

138. *Id.* at 707.

139. *Id.*

140. *Id.* The result in *Ruiz* contrasts with *Tice v. Am. Airlines, Inc.* (288 F.3d 313, 169 L.R.R.M. (BNA) 3148 (7th Cir. 2002)). Tice and fellow plaintiffs were pilots who, by Federal Aviation Administration regulation, were disqualified from captain and first officer positions upon attaining age 60. They sought to down bid into flight officer positions and were denied. They sued, alleging that American Airlines' refusal to allow them to down bid was due to their age in violation of the Age Discrimination in Employment Act (ADEA). American Airlines claimed that under the contract, no one disqualified from a captain or first officer position was allowed to down bid regardless of whether the disqualification was the result of reaching age 60 or some other non-age-related reason. The plaintiffs disputed that position. The court held that the plaintiffs' claims depended on interpretation of the contract and required the district court to stay the lawsuit while plaintiffs pursued their claims under the contract in arbitration. The court indicated, however, that if plaintiffs obtained a favorable contract interpretation from the arbitrator, they could return to court to pursue their ADEA cause of action.

141. 167 F.3d 764, 766, 160 L.R.R.M. (BNA) 2404 (2d Cir. 1999).

142. *Id.* at 765.

143. *Id.* at 767.

144. *Id.*

145. *Id.*

concerns with the union waiving the individual employee's right to sue.[146] The court reasoned that the *Wright* requirement did not apply to an employer's right in a collective bargaining agreement to arbitrate its statutory claims.[147] Accordingly, the court held that Interstate Brands was required to arbitrate its Section 303 claim against the union.[148]

In *Barnica v. Kenai Peninsula Borough School District*, 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 collective bargaining agreement's grievance and arbitration procedure.[149] The contract contained a non-discrimination clause,[150] and a clause defining a grievance as "a claim by a grievant that there has been an alleged violation...of the Agreement."[151] The court's dispositional opinion distinguished *Wright*, noting, *inter alia*, that grievance arbitration in public employment collective bargaining agreements was mandated by Alaska statute[152] 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.[153]

Some courts are also compelling arbitrators to consider defenses to grievances that are grounded in public law, and vacating awards when they fail to do so. In *Racine County v. International Association of Machinists and Aerospace Workers District 10 AFL-CIO*,[154] the Wisconsin Supreme Court vacated an arbitration award, in part because the arbitrator failed to consider whether the relief sought by the union conflicted with a Wisconsin statute. The union represented a bargaining unit of county employees that included social worker-case managers who worked in family court. Two union members, who were told that their positions were being eliminated, elected to retire, and a third member, who was told that her position was being reduced to part-time, elected layoff.[155] Subsequently, the Director of Family Court Counseling Services rehired the two retired social workers, in addition to another social worker retiree, as independent contractors.[156]

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146. *Id.*
147. *Id.*
148. *Id.* at 767–68.
149. 46 P.3d 974, 169 L.R.R.M. (BNA) 3270 (Alaska 2002).
150. *Id.* at 977 n.9.
151. *Id.* at 977 n.11.
152. *Id.* at 977.
153. *Id.* at 980 n.48. By 3-2 vote, the Alaska Supreme Court has backed away from *Barnica*. *See* Hammond v. State, Dept. of Transp., 107 P.3d 871, 176 L.R.R.M. (BNA) 2922 (Alaska 2005). 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 collective bargaining agreement has not been lost on other courts. *See, e.g.*, Serafin v. State, Dept. of Mental Health, 2005 U.S. Dist. LEXIS 3603 (D. Conn. Mar. 9, 2005).
154. 751 N.W.2d 312, 184 L.R.R.M. (BNA) 2676 (Wis. 2008).
155. *Id.* at 314.
156. *Id.* at 314-15.

The union grieved, contending that the county violated the collective bargaining agreement's recognition clause which stated that the union was "the sole and exclusive bargaining representative for all regular full time and regular part time...Social Workers/Case Managers who work in Family Court."[157] The arbitrator sustained the grievance and ordered the county to cease and desist employing independent contractors to perform social worker-case manager duties.[158]

The court held that the award conflicted with a Wisconsin statute that gave the director the authority to contract "with a person or public or private entity to perform mediation and to perform any legal custody and physical placement study services."[159] The court further held that the arbitrator had a duty to consider the relevant statute and exceeded her authority when she failed to do so.[160] The court reasoned that "the arbitrator exhibited a manifest disregard for the law by making no attempt to apply or interpret the relevant statutory law."[161]

Thus, although most reported decisions refuse to compel arbitration of public law claims under a collective bargaining agreement, courts are ordering such arbitration in a significant minority of cases. Moreover, with increasing frequency, parties are arbitrating grievances that implicate public law, and arbitrators are looking to public law in adjudicating grievances without court compulsion. In such cases, after the arbitrator renders an award, an employee may seek to litigate the public law claim. Such action inevitably raises the question of the effect of the arbitration award on subsequent litigation.

B. Litigating a Public Law Claim Following an Arbitration Award

In *Gardner-Denver*, Alexander had grieved his discharge and the arbitrator denied his grievance.[162] The precise issue before the Court was whether the unfavorable arbitration award precluded Alexander from litigating his Title VII claim alleging that his discharge was racially motivated.[163] The Court held squarely that it did not; rather, Alexander was entitled to a de novo review on his statutory claim, with the arbitration award serving as, at most, evidence in litigation.[164] Subsequent lower-court decisions, however, have substantially eroded *Gardner-Denver*'s holding that an employee who loses the grievance is entitled to de novo review on the statutory claim.

157. *Id.* at 315.
158. *Id.* at 316.
159. *Id.* at 320 (quoting Wis. STAT. § 767.405(2)(b)).
160. *Id.* at 324.
161. *Id.* at 323.
162. *Garden-Denver Co.*, 415 U.S. at 42.
163. *Id.* at 45.
164. *Id.* at 60 n. 21.

In *Collins v. New York City Transit Authority*, the plaintiff was fired after he allegedly assaulted his supervisor.[165] He grieved, and a tri-partite arbitration board upheld his termination.[166] Plaintiff sued, alleging that his discharge was the result of his race and his prior EEOC complaints of violations of Title VII.[167] The district court granted the defendant's motion for summary judgment and the Second Circuit affirmed.[168] The Second Circuit placed particular weight on the arbitration award upholding the plaintiff's discharge.[169] 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 somehow compromised.[170]

In *Clarke v. UFI, Inc.*, the New York Eastern District Court found that the arbitration award was not entitled to res judicata effect.[171] Nevertheless, the court opined that where an arbitration decision finds all facts against a plaintiff, the award will essentially guarantee a grant of summary judgment against the plaintiff's Title VII sexual harassment claim.[172] The court explained, "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."[173]

Similarly, in *Darden v. Illinois Bell Telephone Co.*, the Seventh Circuit affirmed a district court's grant of summary judgment against a Title VII plaintiff, which relied heavily on a grievance arbitration

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165. 305 F.3d 113, 116-17 (2d Cir. 2002).

166. *Id.* at 117.

167. *Id.* at 117-18.

168. *Id.* at 118.

169. *Id.*

170. *Id.*; *see also* Martinez v. Amalgamated Transit Union Local 1056, 2005 U.S. Dist. LEXIS 12252 (S.D.N.Y. June 23, 2005) (applying *Collins*); Norris v. N.Y. City Housing Auth., 2004 U.S. Dist. LEXIS 8619 (S.D.N.Y. May 14, 2004) (applying *Collins*).

171. 98 F. Supp. 2d 320, 164 L.R.R.M. (BNA) 2388 (E.D.N.Y. 2000) (quoting *Gardner-Denver Co.*, 415 U.S. at 58).

172. *Id.* at 329.

173. *Id.* (emphasis added); *see also* Pender v. AFSCME Dist. Council 37 of Am. Fed'n of State, County & Mun. Employees, 223 F. Supp. 2d 534 (S.D.N.Y. 2002).

award that had upheld the plaintiff's discharge.[174] The arbitrator addressed the discrimination claims in the award.[175] The court opined:

> The "great weight" standard was appropriate here, since the arbitrator clearly construed the collective bargaining agreement in accord with Title VII to proscribe racially discriminatory and retaliatory discharges, and thus fully considered Darden's Title VII claim. Reviewing the arbitrator's finding that Illinois Bell had not discharged Darden for either of these illicit reasons, along with the totality of the evidence...the District Court did not err when it held that Darden had failed to create a genuine dispute as to the real reason for his discharge.[176]

Even where an arbitrator refuses to consider the discrimination or other public law issues in resolving a grievance, the award may preclude the employee from subsequently litigating. In *Umpierre v. SUNY Brockport*, plaintiff challenged her dismissal as a professor and one-time chair of the foreign language department at SUNY Brockport under a collective bargaining agreement.[177] At the arbitration hearing, plaintiff, represented by union counsel, charged the university with retaliating against her activities opposing discrimination, and discriminating against her because of her gender, national origin, and sexual orientation.[178] The arbitrator expressly disclaimed addressing the discrimination and retaliation claims but found that the university proved all charges against plaintiff, except one, and thus approved the university's termination of the plaintiff's employment.[179]

Plaintiff subsequently sued for violations of Title VII and the Americans with Disabilities Act (the ADA).[180] The court relied on the arbitration award in granting the university's motion for summary judgment.[181] The court considered the arbitrator's failure to address the discrimination issues immaterial and granted summary judgment because it concluded that "no rational trier of fact could conclude that SUNY Brockport fired her for any reason other than because the arbitrator found her guilty of misconduct."[182]

Although the weight of authority in total is against giving grievance arbitration awards res judicata or collateral estoppel effect in subsequent public law litigation, the bar against such preclusive effect is not absolute. A number of state courts have afforded grievance arbitration awards res judicata or collateral estoppel effect in subsequent common

174. 797 F.2d 497, 503–04 (7th Cir. 1986).
175. *Id.* at 504.
176. *Id.*
177. 1997 WL 599314, at *1 (N.D.N.Y. Sept. 26, 1007).
178. *Id.* at *2.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at *5.

law tort actions.[183] Particular circumstances may lead to a court affording a grievance arbitration award res judicata or collateral estoppel effect on subsequent statutory litigation. For example, in *Serafin v. State*, the plaintiff sued for violation of the FMLA.[184] The plaintiff had previously grieved her termination pursuant to her collective bargaining agreement, and the arbitrator upheld her discharge.[185] Unlike the typical collective bargaining agreement, the agreement that covered the plaintiff allowed her to arbitrate personally, without the approval or participation of the union.[186] Plaintiff did so, was represented at the arbitration by her personal attorney, and, by agreement, paid half of the arbitrator's fee.[187] The court distinguished cases that refused to give preclusive effect to awards from union-controlled arbitration procedures and held that the arbitration award precluded plaintiff from litigating her FMLA claim in court.[188]

Consequently, the erosion of *Gardner-Denver* is thrusting upon arbitrators the need to consider external public law when resolving grievances under a collective bargaining agreement. In some cases, courts are requiring employees and employers to grieve and arbitrate their public law claims. In other cases, the parties have voluntarily arbitrated the very action that is the subject of a public law claim, and because of the erosion of *Gardner-Denver*'s holding, that the employee is entitled to a trial under de novo review, the arbitral forum, as a practical matter, becomes the only forum in which the public law claim will truly be heard.[189]

C. *The Impact of the FMLA*

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.[190] The Act applies to employees who

183. *See, e.g.*, Kelly v. Vons Cos., Inc., 79 Cal. Rptr. 2d 763 (Cal. Ct. App. 1998); Bulger v. Lieberman, 667 A.2d 561 (Conn. App. Ct. 1995); Taylor v. People's Gas Light & Coke Co., 656 N.E.2d 1341 (Ill. App. 1995); *but see* Taylor v. Lockheed Martin Corp., 6 Cal. Rptr. 3d 358 (Cal. Ct. App. 2003) (refusing to give arbitration award preclusive effect with respect to statutory claims); Camargo v. Cal. Portland Cement Co., 103 Cal. Rptr. 2d 841, 166 L.R.R.M. (BNA) 2421 (Cal. Ct. App. 2001) (same).

184. 2005 U.S. Dist. LEXIS 3603 (D. Conn. Mar. 9, 2005).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Of course, before *Gardner-Denver*, this was the case for NLRA unfair labor practices under the NLRB's deferral policies. Indeed, this led Judge Mikva to argue that the Board lacked authority to *Collyer*-ize section 8(a)(3) cases. Hammontree v. NLRB, 925 F.2d 1486, 1516–17, 136 L.R.R.M. (BNA) 2478 (D.C. Cir. 1991) (Mikva, J., dissenting).

190. 29 U.S.C. § 2611(4) (2000). 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. Metro. Educ. Enter., Inc., 519 U.S. 202 (1997).

have worked for an employer 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.[191] 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 child or disabled child who has a serious health condition.[192]

The primary impetus for enactment of the FMLA was the need to enable employees to take time off from work following the birth or adoption of a child without worrying about job security or health insurance. In practice, however, leave following birth or adoption of a child accounts for a small minority of FMLA leaves. The Department of Labor's 2000 surveys, the most recent data available, reflect the following:

Reasons for Taking Leave Across All Leaves Taken in Previous 18 Months: 2000 Survey

Reason for Leave	Percent of Leave Takers
Own health	52.4%
Maternity-disability	7.9%
Care for a newborn, newly adopted, or newly placed foster child	18.5%
Care for ill child	11.5%
Care for ill spouse	6.4%
Care for ill parent	13.0%[193]

Thus, the majority of leave takers took leave for their own health conditions. Fewer than 20 percent took leave to care for a newborn, newly adopted, or newly placed foster child.[194]

Not surprisingly, most litigation under the FMLA has concerned leaves taken or sought for serious health conditions because most leaves are taken for that reason.[195] Moreover, determining whether an employee qualifies for leave for a serious health condition is more complex than determining whether an employee qualifies for leave following the birth or adoption of a child. In the latter case, one simply determines

191. 29 U.S.C. § 2611(2)(A)–(B) (2000).

192. *Id.* at § 2612(A).

193. DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS, 2000 UPDATE § 2.1.2, tbl. 2.3 (2000), http://www.dol.gov/esa/whd/fmla/fmla/toc.pdf.

194. The table totals exceed 100 percent because of overlap and, presumably, the maternity-disability leave takers overlap with leave takers to care for a newborn child.

195. *See* CANTOR, *supra* note 193.

whether the employee has worked the requisite period of time in a covered facility and whether the employee has had or adopted a child within the past twelve months. On the other hand, the term "serious health condition" is ambiguous. It clearly covers open-heart surgery and clearly does not cover a skinned knee. However, whether it covers illnesses where the severity is between skinned knees and open-heart surgery is open to debate. For example, under some circumstances, an ear infection or the flu may be a serious health condition,[196] while under other circumstances they may not be considered sufficiently serious.[197] One court has held that a case of eczema was not a serious health condition,[198] while another held that an ulcer was.[199] It is not surprising that a survey of appellate court FMLA decisions issued between December 1994 and October 1999 found that 25 percent of the cases concerned the seriousness of an employee's illness and 6 percent concerned the seriousness of an employee's family member's illness.[200]

The FMLA also gives greater rights to employees taking serious health condition leave than to those taking childbirth or adoption leave. For example, whereas an employee may take leave intermittently or on a reduced schedule following childbirth or adoption only with the consent of the employer, an employee has a right to intermittent or reduced leave for his or her own or a close family member's serious health condition whenever medically necessary.[201]

Absenteeism presents one of the most frequent discipline problems encountered by employers.[202] 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 imposed at increasingly severe levels upon accumulation of specified point totals. However, Department of Labor regulations expressly provide: "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions...nor can FMLA leave be counted under 'no fault' attendance policies."[203]

Discipline and discharge for attendance infractions constitute a significant portion of labor arbitrators' dockets.[204] In hearing these

196. *See, e.g.*, Miller v. AT & T Corp., 250 F.3d 820 (4th Cir. 2001) (flu); Caldwell v. Holland of Tex., Inc., 208 F.3d 671 (8th Cir. 2000) (ear infection).

197. *See, e.g.*, Henderson v. Central Progressive Bank, 2002 WL 31086086 (E.D. La. 2002) (flu); Seidle v. Provident Mut. Life Ins. Co., 871 F. Supp. 238 (E.D. Pa. 1994) (ear infection).

198. Beal v. Rubbermaid Commercial Prods., Inc., 972 F. Supp. 1216 (S.D. Iowa 1997).

199. Victorelli v. Shadyside Hosp., 128 F.3d 184 (3d Cir. 1997).

200. STEVEN K. WISENSALE, FAMILY LEAVE POLICY: THE POLITICAL ECONOMY OF WORK AND FAMILY IN AMERICA 172, tbl. 7.8 (M.E. Sharpe 2001).

201. 29 U.S.C. § 2612(b) (2000).

202. *See* Barbara Zausner Tener & Ann Gosline, *Absenteeism and Tardiness*, *in* LABOR AND EMPLOYMENT ARBITRATION § 17.01[1] (Tim Bornstein et al., eds., 2d ed. 2007).

203. 29 C.F.R. § 825.220(c) (2007).

204. *See* Tener & Gosline, *supra* note 202, at § 17.01[1].

cases, arbitrators inevitably run head long into the FMLA. The simple fact in these cases is that an employer cannot operate its attendance plan without taking into account the FMLA, and, therefore, it does not make sense to operate a disciplinary system as if this elephant were not standing in the middle of the room. The FMLA is clearly implicated into every contract's just-cause provision and arbitrators simply cannot ignore it. It is not surprising that the most recent edition of *Elkouri & Elkouri* 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."[205]

VI. It Is Time for Courts to Declare Howlett the Winner

In *Enterprise Wheel*, the Court distinguished between an arbitrator looking to external public law to interpret a collective bargaining agreement, which it deemed proper, and relying solely on public law, which it deemed improper.[206] Although the Court backed off this distinction when it suggested in *W. R. Grace* that an arbitrator may accept a defense of illegality to a grievance, lower courts continue to try to draw a line between the two uses of external public law alluded to in *Enterprise Wheel* when faced with awards that are clearly driven by the mandates of public law. It is time to recognize that the *Enterprise Wheel* dicta has been overtaken by subsequent developments and rulings and that it no longer makes sense to grasp for a line that is artificial and merely elevates form over substance. Regardless of whether or not Howlett was correct in 1964, he surely is correct today that the law is impliedly incorporated into every collective bargaining agreement.

Consider for example *Coastal Oil of New England, Inc. v. Teamsters Local*.[207] There the contract expressly provided that the employer would comply with the Massachusetts workers' compensation statute.[208] This enabled the court to enforce the arbitrator's award, which relied on the statute in reinstating the grievant to a position in another unit covered by a different collective bargaining agreement.[209] Yet the notion that the arbitrator was simply interpreting and applying the collective bargaining agreement is surely a fiction. The decision was driven by the Massachusetts statute, not the contract.

What if the contract had not expressly stated that the employer would comply with the state workers' compensation statute? Would that justify a belief that the parties, in negotiating the contract, did

205. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 520 (Alan Myles Rubin ed. 6th ed. 2003).

206. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

207. 134 F.3d 466, 157 L.R.R.M. (BNA) 2294 (1st Cir. 1998).

208. *Id.* at 468.

209. *Id.*

not assume that the employer would comply with the statute? Surely not. It is well-established that arbitrators may properly consider, for example, established past practices that, although not expressly incorporated into the contract's language, nevertheless reflect assumptions that the parties likely made when negotiating the contract.[210] In today's workplace where regulation by public law is pervasive and evolving law has effectively deprived the arbitrator of Professor Meltzer's option to apply the collective bargaining agreement and ignore the law, just as courts enforce awards based on established past practice because parties assume continuation of such practices when negotiating the contract, courts should enforce awards based on external public law because the parties assume compliance with public law when negotiating the contract.

Failure to enforce awards that courts deem to be based on public law undermines a key justification for labor arbitration—the efficient resolution of workplace disputes. Because the line between arbitral examination of external public law to interpret a collective bargaining agreement and arbitral reliance on external public law as the basis for an award is far from obvious, maintenance of that elusive line undermines finality by encouraging post-award litigation. It also can place arbitrators in potentially untenable positions and undermine their role in resolving workplace disputes.

Consider, for example, the arbitrator in *Roadmaster*.[211] It is clear from the court's opinion that the arbitrator realized that, in light of the NLRB's deferral policies, if he did not resolve the unfair labor practice issue, no other body would.[212] Similarly, in light of the erosion of *Gardner-Denver*'s holding that employees are entitled to a trial de novo on their public law claims, arbitrators resolving grievances alleging violations of the public law must realize that they may be providing the employee's only forum for the claims. Yet, like the arbitrator in *Roadmaster*, the arbitrator who realizes that the arbitral forum may be the only forum for an employee to be heard runs the risk that reliance on public law will subject the award to collateral attack. Of course, the arbitrator may bulletproof the award by expressly disclaiming reliance on public law as anything other than a guide to contract interpretation, and many arbitrators have done so.[213] Yet, it makes no sense to

210. The last holdout against this view, the Sixth Circuit, recently fell in line with the clear weight of authority. *See* Mich. Family Res., Inc. v. Serv. Employees Int'l Union Local 517M, 475 F.3d 746, 181 L.R.R.M. (BNA) 2257 (6th Cir. 2007), *overruling* Cement Div., Nat'l Gypsum Co. v. United Steelworkers of Am. Local, A.F.L.-C.I.O., 793 F.2d 759, 123 L.R.R.M. (BNA) 2015 (6th Cir. 1986).

211. Roadmaster Corp., v. Production and Maintenance Employees Local 504, 851 F.2d 886, 128 L.R.R.M. (BNA) 2953 (7th Cir. 1988).

212. *Id.*

213. *See, e.g.*, Chicago Tribune Co., 2003 WL 23531156, 119 Lab. Arb. (BNA) 1007, 1013 n.15 (2003) (Nathan, Arb.).

mandate that enforcement turn on whether the arbitrator thought to disclaim the public law as the basis for the award. It merely perpetuates a fiction that no longer retains any real substance.

The fiction that the arbitrator who relies on public law is merely interpreting the contract produces another negative side effect. It enables courts to avoid determining the issue of the proper standard of judicial review of arbitral interpretations of public law. Judge Harry Edwards has articulated this avoidance most eloquently:

> When construction of the contract implicitly or directly requires an application of "external law," *i.e.*, statutory or decisional 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 to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator...The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.[214]

If courts recognize that what the arbitrator is really doing is resolving the dispute in accordance with external public law, courts will be forced to confront the issue of whether they should bring the privately appointed and privately accountable arbitrator into the public justice system by reviewing the correctness of the arbitrator's interpretation. It has been argued that courts should continue to give wide deference to arbitral findings of fact and to arbitral contract interpretation but should review arbitral interpretations of public law de novo.[215] Others have disagreed.[216] The purpose here is not to revisit that debate. Rather, the point is that perpetuating the fiction that labor arbitration awards driven by external public law are merely interpreting the contract enables courts to duck the issue rather than confront the debate.

Arbitration, of course, remains a process created by contract and the scope of the arbitrator's authority is controlled by the contract. However, much of the law of labor arbitration consists of judicial creation of default rules backed by heavy presumptions in favor of arbitrability, enforceability, and minimal judicial oversight. The parties remain free to contract around these default rules, but the weight of

214. American Postal Workers Union, AFL-CIO. v. U.S. Postal Serv., 789 F.2d 1, 6, 122 L.R.R.M. (BNA) 2094 (D.C. Cir. 1986).

215. *See* Martin H. Malin, *Privatizing Justice—But by How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187 (1993).

216. *See, e.g.*, Robert Covington, *Employment Arbitration after* Gilmer*: Have Labor Courts Come to the United States?* 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Michael Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005).

the presumptions backing these default rules mandates that to contract around them, the parties must be particularly explicit.[217] Recognizing that parties may be presumed to have assumed compliance with external public law when they negotiated their contract brings the default rules concerning arbitral reliance on external public law when resolving a grievance in line with the general default rules in labor arbitration. Parties that wish to contract around the default rules may do so, but they must be explicit and definite.

It might be argued that the approach advocated here is inconsistent with the Court's decision in *Wright*. After all, in *Wright*, the Court reasoned that the principal rationale justifying the heavy presumption of arbitrability rests on recognition that arbitrators are better suited than courts to interpret the contract. The Court further reasoned that this rationale did not apply to the interpretation of statutes and concluded that the presumption of arbitrability did not mandate a requirement that employees bring their statutory claims through the contractual grievance procedure unless the waiver of the judicial forum was clear and unmistakable. The issue the Court faced in *Wright*, however, was whether an employee may bypass the contractual grievance procedure and litigate his or her statutory claims. That situation is qualitatively different from the case where an employee voluntarily resorts to the grievance procedure. In such cases, the law has developed to the point where the arbitral forum may well be the only forum for an employee's claims. Under these circumstances, it makes sense to recognize that the parties negotiate their contract assuming compliance with external public law and to presume that they intend to empower arbitrators to resolve disputes brought under and based on external public law.

Returning to the hypothetical that began this article, it makes no sense to mandate that enforcement of the award sustaining Worker's grievance turn on whether the arbitrator clothed the award in a strained interpretation of the "needs of the Company" language or simply to sustain the grievance because the FMLA gave Worker a right to substitute vacation for unpaid FMLA leave. In either instance, the award is based on the FMLA and the parties should be presumed to have assumed FMLA compliance when they negotiated their contract. In either case, the court should enforce the award.

217. *See* Michael C. Harper, *Limiting Section 301 Preemption: Three Cheers for* The Trilogy, *Only One for* Lingle *and* Lueck, 66 CHI.-KENT L. REV. 685, 690–700 (1990).