A Post-Pyett Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What Is It Good For—Could It Be Absolutely Nothing or Really Something?

Michael Z Green
CHAPTER 12

A Post-Pyett Collective Bargaining Agreement to Arbitrate Statutory Discrimination Claims: What Is It Good For?—Could It Be Absolutely Nothing or Really Something?

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Introduction

The Supreme Court decided 14 Penn Plaza LLC v. Pyett in a five to four majority opinion on April 1, 2009. In a decision authored by Justice Clarence Thomas, the Court in Pyett held that a union may waive individual employees’ statutory rights to pursue age discrimination claims in court. Dissenting opinions were filed by Justice John Paul Stevens and by Justice David Souter. According to the Court, a clear and unmistakable waiver of employees’ court access to pursue statutory discrimination claims can be achieved by a union through agreeing explicitly to resolve those claims under the arbitration process covered within a collective bargaining agreement (CBA).

On December 31, 2011, the employer association and the union involved in the dispute that led to Pyett modified their CBA to include an agreed protocol for the handling of employment discrimination disputes in light of the parties’ differing views of the meaning of the Pyett decision. This agreed protocol, hereinafter referred to as the Post-Pyett Protocol, was initially agreed to by the employer and union involved in the dispute addressed by the Pyett case on February 17, 2010. The Post-Pyett Protocol highlights some of the uncertainties still present with respect to the intricacies involved in effectuating a clear and unmistakable waiver by a union of an employee’s right to pursue a statutory discrimination claims in court after the Supreme Court’s decision in Pyett.

Most recently I have asserted the significant advantages for unions, employers, and especially employees in having statutory employment discrimination claims resolved in labor arbitration. This paper further asserts those advantages while exploring the Post-Pyett Protocol and opining on its approach. In Section II, this paper describes the Pyett decision and its

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1 Professor of Law, Texas A&M University School of Law. I would like to thank Professor Samuel Estreicher for inviting me to participate in the New York University 65th Annual Conference on Labor and Employment Law as part of a panel on Collective Bargaining Responses to Pyett. I have published an article, Reading Ricci and Pyett to Deliver Racial Justice Through Union Arbitration, 87 Ind. L.J. 367 (2012), which frames most of my thoughts and research as expressed herein along with my prior work seeking to explore better opportunities for unions to provide racial justice through arbitration of statutory discrimination claims. I appreciate the financial support provided by the Texas Wesleyan University School of Law and the student research assistance from Kristen vanBolden, Keena Hilliard, Robyn Murrell, and Amy Herrera.


3 Id. at 251, 274.

4 Id. at 274 (Stevens, J., dissenting); id. at 277 (Souter, J., dissenting).

5 Id. at 260.


7 See id. (describing Post-Pyett Protocol, originally agreed to on Feb. 17, 2010, and incorporated into CBA agreement on December 31, 2011).

8 See id.

reasoning along with some of the relevant cases decided since Pyett. Section III describes in
detail the specific terms of the Post-Pyett Protocol. Section IV opines on the value of the Post-
Pyett Protocol along with the overall value of pursuing an agreement that would have a union
pursue statutory discrimination claims in arbitration. This paper concludes in Section V that there
are many win-win opportunities that add value to pursuing such an agreement. Although the
Post-Pyett Protocol is a decent first step, it leaves too many issues open to provide an effective
guide for others seeking to develop similar agreements after Pyett. Further, by not addressing
fully the concerns of employees who still want to vindicate their statutory discrimination claims
when the union chooses not to pursue those claims or the rationale for waiving their right to
pursue those claims in court, the Post-Pyett Protocol may offer some good things but not enough.

I. 14 PENN PLAZA LLC v. PYETT

The plaintiffs were three employees, all over forty years of age, who worked as night
lobby watchmen and other positions for TEMCO Services Industries, Inc. (TEMCO), a
maintenance service contractor.10 These employees sued TEMCO for age discrimination after
being reassigned to less desirable and lower paying jobs when a new security company was hired
at their work location.11 TEMCO is part of an employer association of contractors and business
owners, the Realty Advisory Board (RAB), which negotiated a CBA with the union, Local 32BJ
of the Service Employees International Union (SEIU Local 32BJ).12 SEIU Local 32BJ pursued
the age discrimination claims on behalf of the employee up to arbitration. However, SEIU Local
32BJ withdrew its pursuit of the claims in arbitration because it concluded that it could not
pursue the grievance any further given that it had consented to the placement of the new security
firm at the employees' work location.13

The specific CBA in Pyett provided unusually clear language regarding discrimination
claims:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any
present or future employee by reason of race, creed, color, age, disability, national
origin, sex, union membership, or any other characteristic protected by law,
including, but not limited to, claims made pursuant to Title VII of the Civil Rights
Act, the Americans with Disabilities Act, the Age Discrimination in Employment
Act, the New York State Human Rights Law, the New York City Human Rights
Code, . . . . All such claims shall be subject to the grievance and arbitration
procedures (Articles V and VI) as the sole and exclusive remedy for violations.
Arbitrators shall apply appropriate law in rendering decisions based upon claims
of discrimination.14

In considering the enforcement of a union's agreement with an employer to resolve
employees’ statutory discrimination claims through labor arbitration, the Court in Pyett

10 Pyett, 556 U.S. at 252-54 & n.3.
11 Id..
12 Id. at 251-52.
13 Id. at 252-53.
14 Id. at 252. I consider this language as “unusually clear” because it literally refers to arbitration as the “sole and exclusive
remedy” which is unusual language in my view for a union and employer to agree to with respect to a nondiscrimination clause in
a collective bargaining agreement. Such unusual language supported the intent of the parties to waive court access to remedy
statutory claims. See id.
addressed complex issues that coalesce across various statutory regimes including the Federal Arbitration Act (FAA), the Age Discrimination Employment Act (ADEA), and the National Labor Relations Act (NLRA) along with prior Court interpretations of those statutes. In Pyett the Court rejected the United States Court of Appeals for the Second Circuit’s finding that a prior Court decision, Alexander v. Gardner-Denver, forbids enforcement of judicial forum waivers in a CBA.

The Court in Pyett reviewed the unusually specific CBA language authorizing resolution of statutory discrimination claims pursuant to the arbitration process. The Supreme Court had suggested in its 1998 decision, Wright v. Universal Maritime Servs. Corp., that a union waiver of employee rights to court access might be possible. Because the clear language in section 30 of the CBA stated that “[a]ll such [discrimination] claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy . . . [whereby] [a]rbitrators shall apply appropriate law and the Court’s prior decisions broadly endorsed the use of arbitration to resolve statutory claims as a strong policy under the FAA, the Court’s finding in Pyett that a clear and unmistakable waiver existed should not have presented much of a surprise.

Without relying on the Wright decision and its declaration that Gardner-Denver had created a “seemingly absolute prohibition of union waiver of employees’ federal forum rights,” the Pyett case dismissed the longstanding concerns from Gardner-Denver about balancing the majoritarian principles under labor law with individual principles embodied in statutory discrimination law as “dicta.” By framing the concerns expressed in Gardner-Denver as dicta, the Court could easily reject challenges in Pyett based upon any purported conflict of interest posed by a union’s focus on collective rights which may run counter to an individual employee’s rights in a particular matter. This conflict of interest becomes heightened when you recognize that a union has exclusive control over the manner and extent to which an individual grievance is submitted. According to the Court, this purported “conflict of interest” was not a limit to be read into the ADEA that would require the Court to reject the arbitration clause in Pyett based upon dicta from Gardner-Denver. Further, the Court found that Congress had provided for the handling of any conflict of interest through its recognition under the NLRA that the interests of the employees versus their unions could be addressed through the union’s duty of fair representation.

18 Pyett, 556 U.S. at 255-60, 266-69.
20 Pyett, 556 U.S. at 255.
21 Id. at 252, 264 (identifying the specific arbitration language in the CBA regarding discrimination claims and finding this “arbitration provision expressly covers both statutory and contractual discrimination claims”).
22 525 U.S. 70 (1998) (“[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.”).
23 Id at 77 (1998) (“[W]e find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.”).
24 Pyett, 556 U.S. at 252.
25 Id. at 265-270.
26 See Wright, 525 U.S. at 80.
27 Pyett, 556 U.S. at 256 n.5.
28 Id. at 269-70 (referring to and rejecting the “conflict of interest concern identified in the Gardner-Denver dicta”).
29 Id. at 270.
30 Id. at 270-72.
I have asserted that Pyett’s “failure to focus on Wright and its similar reasoning about Gardner-Denver as requiring a clear and unmistakable waiver” was part and parcel of a plan to circumvent thirty-five years of precedent\(^3\) without expressly overruling Gardner-Denver:

_Wright_ . . . neither endorsed Gardner-Denver’s broad language nor suggested a particular result in this case. . . . Because today’s decision does not contradict the holding of Gardner-Denver, we need not resolve the _stare decisis_ concerns raised by the dissenting opinions. . . . But given the development of this Court's arbitration jurisprudence in the intervening years, . . . Gardner-Denver would appear to be a strong candidate for overruling if the dissents' broad view of its holding . . . were correct.\(^3\)

While the Court in Pyett focused on rejecting longstanding precedent without explicitly overruling Gardner-Denver, it failed to confront the concern that a union could waive an individual employee’s right to court access in pursuit of a claim while also deciding not to pursue that same claim in arbitration within the limits of the NLRA's duty of fair representation analysis.

Accordingly, in a post-Pyett world, we are left with several unanswered questions. But the Court’s failure to identify the consequences when a union's decision to not pursue a claim through arbitration and whether a waiver prevents an individual employee's statutory claim from being effectively vindicated represents a key concern after Pyett. The Court called it “speculation" to resolve this issue because of factual disputes that had not been fully briefed or covered in earlier proceedings.\(^3\) In his dissent, Justice David Souter asserted the Pyett decision may have no impact due to its failure to address this issue: “On one level, 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….“\(^3\) Given the development of the Post-Pyett Protocol and the need for lower courts to flesh out many of the questions left unanswered in Pyett, Justice Souter is likely correct in asserting that Pyett may ultimately have little effect other than establishing that a union may agree to a clear and unmistakable waiver.

Important policy considerations warrant against enforcement of an arbitration agreement when the agreement in practice precludes an employee from effectively vindicating his or her statutory discrimination claims in labor arbitration because the agreement to arbitrate subsumes the substantive statutory right to relief.\(^3\) After the Pyett decision, a few cases filed in the federal

\(^3\) _See_ Green, _supra_ note 9, at 392-93.\(^3\) _Pyett_, 556 U.S. at 273-274 (“Respondents also argue that the CBA operates as a substantive waiver of their [statutory] rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. . . . [W]e are not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from ‘effectively vindicating’ their ‘federal statutory rights in the arbitral forum,. . . [a]s’ [r]esolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.’”) (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000)).\(^3\) _Id._ at 285 (Souter, J., dissenting) (internal citation omitted) (quoting McDonald v. City of West Branch, 466 U.S. 284, 291 (1984)).\(^3\) _See_ Brady v. Williams Capital Grp., L.P., 928 N.E.2d 383, 387 (N.Y. 2010) (referring to a “strong state policy favoring arbitration agreements and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum”). The court _in Brady_ recognized that the strong state policy of invalidating agreements to arbitrate that precludes an employee from vindicating statutory rights is derived from the Supreme Court’s analysis in _Gilmer_ requiring that “a prospective litigant [must be able to] effectively . . . vindicate [his
district court in New York suggest that if the union controls the right to present the claim and does not pursue the claim in arbitration, the employee may still be able to pursue the claim in court. For example, in *Morris v. TEMCO Serv. Indus., Inc.*, a case involving the same union, SEIU Local 32BJ, the same service employer, TEMCO Industries, and the same agreement language as in *Pyett*, the union did not pursue the employee’s discrimination claim. The court decided not to compel Morris to arbitrate her discrimination claim because SEIU Local 32BJ prevented her from arbitrating the claim by not pursuing it. The court found under those circumstances the arbitration provision need not be enforced and Morris was free to pursue her discrimination claim in federal court.

A similar result occurred in *Kravar v. Triangle Services, Inc*. The employer’s motion to compel arbitration was dismissed because the union (SEIU Local 32BJ) refused to arbitrate the claim, and the CBA expressed that only the union could file a grievance and pursue arbitration of that grievance. As the rulings in both *Morris* and *Kravar* establish, when a union agrees to a *Pyett* waiver, but chooses to not pursue an employee’s statutory discrimination claim through arbitration, the employee may still pursue these claims in court.

## II. THE POST-PYETT PROTOCOL

On February 17, 2010, the union and the employer association involved in the dispute that led to *Pyett*, SEIU Local 32BJ and the RAB, entered into an agreement and protocol with respect to the handling of statutory discrimination claims, the Post-*Pyett* Protocol. On December 31, 2011, the parties agreed to incorporate the Post-*Pyett* Protocol into Article XIX, Section 24, No Discrimination, of their CBA.

As part of the Post-*Pyett* Protocol, the parties take the approach of agreeing to disagree about the consequences when SEIU Local 32BJ chooses not to pursue a statutory claim in arbitration. The RAB takes the position in the Post-*Pyett* Protocol that all claims, including those statutory claims not pursued by SEIU Local 32BJ, are subject to final resolution through the arbitration procedures provided in the CBA. SEIU Local 32BJ disagrees by asserting that the CBA does not offer provisions for the arbitration of disputes that SEIU Local 32BJ does not pursue and in those situations, including disputes involving statutory claims, employees may pursue a court resolution. The Post-*Pyett* Protocol also provides that either party can seek a resolution of a disputed issue by taking the question to arbitration and giving the other party 30 days of notice while also agreeing that neither party can seek a court resolution of this

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36 2010 U.S. Dist. LEXIS 84885, at *13 (S.D.N.Y. Aug. 12, 2010). Similar to the *Pyett* case, SEIU Local 32BJ was not an actual party as the case in *Morris* involved a discrimination suit brought by an employee against their employer. But the collective bargaining agreement language in *Morris* is from the same agreement analyzed in *Pyett*.

37 *Id.* at *15.

38 *Id.*

39 2009 U.S. Dist. LEXIS 42944, at *7-9* (S.D.N.Y. May 19, 2009). Other cases involving the same or similar contract language as in *Pyett* also indicate that if the union does not pursue the claim, the employee may take the statutory discrimination claim into court. See, e.g., *Borrero v. Ruppert Hous. Co.*, No. 08-CV-5869, 2009 U.S.Dist. LEXIS 52174, at *9-10* (S.D.N.Y. June 19, 2009) ("Should [plaintiff’s] attempts to arbitrate his claims be thwarted by the Union, the CBA will have operated as a ‘substantive waiver’ of his statutorily created rights and he will have the right to re-file his claims in federal court.").


41 *See* Post-*Pyett* Protocol, *supra* note 6.

42 *Id.* at 8.

43 *Id.*
The Post-Pyett Protocol goes further to establish a broad dispute resolution program in lieu of arbitrating their disagreement about the effect of claims that SEIU Local 32BJ chooses not to pursue in arbitration. Under this dispute resolution program, SEIU Local 32BJ and RAB have "elicited from the American Arbitration Association a list of arbitrators who (1) are attorneys, and (2) qualified to decide employment discrimination cases" to handle disputes the union declines to pursue in arbitration. If an employee and an RAB member employer seek arbitration of an employment discrimination claim, the list of arbitrators will be provided to the individual employee and the employer member of RAB. The process for selecting the arbitrator and paying the arbitrator's costs shall be decided between the employee and the RAB employer. Any arbitration conducted shall proceed according to the American Arbitration Association's National Rules for Employment Disputes.

The individual employee hearings, held pursuant to this dispute resolution program, may be held at the Office of Contract Arbitration used for disputes under the CBA. However, it is understood that use of the Office of Contract Arbitration under this Post-Pyett Protocol is not a forum provided by the CBA. Also, pursuant to the Post-Pyett Protocol, SEIU Local 32BJ will not be a party to any arbitration pursued under this program and "the arbitrator shall not have authority to award relief that would require amendment of the CBA or other agreements(s) between the Union and the RAB or conflict with any provision of any CBAs or other such agreement." Finally, the Post-Pyett Protocol concludes by stating that "[a]ny mediation and/or arbitration outcome shall have no precedential value with respect to the interpretation of the CBAs or other agreement(s) between the Union and the RAB."

III. THE POST-PYETT PROTOCOL: WHAT IS IT GOOD FOR?

As I am admittedly already on the record as supporting the benefits of an agreement to have a union pursue statutory discrimination claims on behalf of employees in a labor arbitration process, it should be no surprise that I am supportive of the Post-Pyett Protocol that the parties from the Pyett case have implemented. As SEIU Local 32BJ asserted in its brief in the Pyett case, the value of providing diverse arbitrators and fair dispute resolution processes for women and people of color represents a significant motivation for pursuing the union's right to pursue statutory claims on behalf of employees through labor arbitration. This result appears to be quite favorable for bargaining unit employees especially given the difficulties individual employees face in resolving their discrimination claims in the courts:

This agreement was based on our joint commitment to diversify the panel of arbitrators to better reflect the Union's membership, to develop procedures appropriate for such cases, and to evaluate our experience in connection with

44 Id.
45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Id.
52  Green, supra note 9, at 403-04 & n.198.
these claims at the conclusion of this agreement and in light of any subsequent court decisions.\textsuperscript{53}

However, the issue is whether arbitration of statutory claims without the union’s involvement represents an effective vindication of statutory rights. Although the Post-\textit{Pyett} Protocol establishes that SEIU Local 32BJ will not be a party to these arbitrations, the arbitrator may not award relief that would require amendment of the CBA. Also, any award made pursuant to this Protocol would not have any precedential value under the CBA.\textsuperscript{54} There is still some question as to what was the motivation of SEIU Local 32BJ in agreeing to these terms of the Protocol. At a minimum, the Post-\textit{Pyett} Protocol suggests that this agreement was entered into as a means to limit any uncertain resolution of these matters through the court system.

While SEIU Local 32BJ takes great care in making sure that it is on record as stating that employees may still go to court if SEIU Local 32BJ does not pursue a claim in arbitration, the one concern I do have about the Post-\textit{Pyett} Protocol is that it makes the argument stronger for the employer to assert that an individual employee should have to arbitrate any claims SEIU Local 32BJ does not pursue. This argument arises from the fact that the Post-\textit{Pyett} Protocol provides a specific process for individual employees to use arbitration when SEIU Local 32BJ chooses to not process a claim through labor arbitration and SEIU Local 32BJ has signed off on this process as part of agreeing to the Protocol and placing its terms in the CBA.

\begin{quote}
It is not clear what Local 32BJ’s motivation was for agreeing to development of the individual employee arbitration process rather than just staying with the status quo after the \textit{Pyett} decision by continuing to pursue statutory claims in arbitration when it desired and asserting that employees can go into court when SEIU Local 32BJ declined to process the claim. SEIU Local 32BJ states as part of the Protocol that its only involvement in an arbitration dispute that it has decided not to pursue was in the process of picking the statutory arbitrator panel that is available to handle the individual employee’s statutory claim in arbitration.
\end{quote}

Accordingly, it would have been helpful to have SEIU Local 32BJ’s rationale identified in the Post-\textit{Pyett} Protocol regarding the creation of the statutory arbitrators and the process for individual employee arbitration when SEIU Local 32BJ does not pursue the matter in arbitration. So where I and the SEIU may diverge in agreement depends upon what the SEIU’s motivation was and is for agreeing to the individual employee arbitration program in the Post-\textit{Pyett} Protocol rather than just maintaining the status quo. Given that a number of the court decisions after \textit{Pyett} had found that employees could still go to court if the union declined to process the claim, was the Post-\textit{Pyett} Protocol a recognition by both sides that continued litigation would only cause more confusion? Did SEIU Local 32BJ obtain additional benefits for its membership through

\textsuperscript{53} See Brief of the Serv. Empls. Int'l Union, Local 32BJ as Amici Curiae in Support of Respondents in 14 Penn Plaza v. Pyette, at 4A app. B (quoting Letter from Michael P. Fishman, SEIU Local 32BJ, to James Berg, Realty Advisory Board (April 19, 2000)); see also Larry Engelstein & Andrew Strom, Now That the Court Has Spoken, What's Next?, 5 N.Y.U. LAB. & EMP. L. News Fall 2009, at 5, 5-6 (offering comments from SEIU Local 32BJ representatives asserting that its agreement with the Realty Advisory Board in \textit{Pyett} does not act as a clear and unmistakable waiver, that court decisions since \textit{Pyett} show that employees may still go to court if the union does not pursue the case in arbitration, and identifying one benefit of pursuing discrimination claims in labor arbitration is that "low-wage workers often have trouble finding employment discrimination specialists who are willing to take their cases to court").

agreeing to the Post-Pyett Protocol? On its face, it is not clear what those benefits may be.

For example, one of the key problems for individual employees in pursuing discrimination claims in the courts is finding representation.\(^{55}\) It is not clear that the mediation or arbitration process offered by the Post-Pyett Protocol provides employees with assistance in obtaining legal representation to process these claims since SEIU Local 32BJ will not be involved? At the conference where this paper was presented, I learned from the attorneys for SEIU Local 32BJ and the RAB that the parties’ motivations have been to provide the fairest dispute resolution process for employees covered by their collective bargaining agreement. And the attorneys highlighted how much the mediation process employed by the Post-Pyett Protocol had further enhanced the opportunities for employees to fairly resolve their disputes with their employers without even getting to the arbitration stage. At the time, they did not have any experience with a claim brought by an individual after SEIU Local 32BJ declined to pursue it in arbitration.

Conclusion

An agreement that allows unions to pursue statutory discrimination claims on behalf of employees in the labor arbitration process provides a win-win for all stakeholders including employers, employees, and unions. Employers have the efficiency of having all disputes resolved in a familiar, fair and single forum rather than facing resolution in multiple forums. Unions have an opportunity to embrace fair and thoughtful processes to help support the goals of an increasingly diverse membership. And employees who face tremendous difficulties in pursuing their discrimination claims through the courts, especially due to lack of representation, can find an effective forum to have their voices heard through the support of their union. Accordingly, any agreement (including the Post-Pyett Protocol) that continues to allow unions to pursue statutory discrimination claims on behalf of employees as a process to value the increasingly diverse workforce has merit and should be applauded. Furthermore, it is laudatory that the parties have found that invoking mediation as a requirement has led to satisfactory results from all those involved.

On the other hand, the Post-Pyett Protocol appears to agree to something that was not clearly required after Pyett and may even end up in supporting an argument that SEIU Local 32BJ has agreed to waive an individual employee’s right to pursue statutory claims in court when the Union has declined to pursue the claim. Clearly, SEIU Local 32BJ has continued to assert that the employees can go to court and the terms of the CBA, including the inclusion of the Post-Pyett Protocol, do not waive the employees’ right to go to court if SEIU Local 32BJ declines to pursue the claim in arbitration. However, SEIU Local 32BJ could have asserted that position without endorsing the Post-Pyett Protocol’s individual employment arbitration option. So it is important to identify the rationale for SEIU Local 32BJ’s agreement to the Post-Pyett Protocol. If there are additional benefits that SEIU Local 32BJ obtained for its members in agreeing to the Post-Pyett Protocol, then those benefits should be identified and examined. Those benefits will demonstrate that the true value from the Post-Pyett Protocol is really something instead of absolutely nothing.