TRYING IT AGAIN FOR THE FIRST TIME: JUDICIAL TREATMENT OF ARBITRAL DECISIONS IN SUBSEQUENT TITLE VII CASES

I. INTRODUCTION

In *Alexander v. Gardner-Denver Co.*,[1] the United States Supreme Court held that the grievance and arbitration provisions of a collective bargaining agreement could not be used as a bar to judicial enforcement of a Title VII claim.[2] The Court, therefore, created an exception to the usually binding effects of arbitration. Even if the employer prevails in arbitration, the employee still may file suit under Title VII and be granted relief.[3] In the concluding sentence of *Gardner-Denver*, the Court addressed the impact of arbitration on the subsequent Title VII litigation, stating that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[4] Nevertheless, the Court desired to refrain from issuing standards for the evaluation of a district court's deference to the arbitrator's decision.[5]

Gardner-Denver created mass confusion among district courts. Unsure of the proper treatment of arbitral decisions, district courts have displayed no consistency.[6] Some courts, recognizing the efficiency inherent in the adoption of arbitral findings, have admitted the arbitrator's findings in the subsequent district court case.[7] Other courts have avoided the issue altogether by reading *Gardner-Denver* as permissive rather than mandatory, refusing to admit arbitral decisions in previously arbitrated Title VII cases.[8] Because of the ambiguity arising from the *Gardner-Denver* decision, courts remain in flux as to the proper deference or weight to accord arbitral findings in subsequent Title VII litigation.

This Comment presents the various positions that courts have taken

---

1. 415 U.S. 36 (1974).
2. *Gardner-Denver*, 415 U.S. at 59-60.
3. *Id.*
4. *Id.* at 60.
5. *Id.* at n.21 (stating that the Court would "adopt no standards as to the weight to be accorded an arbitral decision").
6. *See infra* Part IV.
7. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985); Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982).
8. *See, e.g.*, Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994).

with regard to the proper judicial treatment of arbitral decisions.[9] Although the Comment focuses primarily upon Title VII—the area most directly impacted by the *Gardner-Denver* decision—it remains equally applicable to other statutory actions that guarantee an individual the right to trial.[10]

II. *ALEXANDER V. GARDNER-DENVER CO.*

Harrell Alexander, Sr., a black male, was employed at the Gardner-Denver Company as a drill operator.[11] Gardner-Denver discharged Alexander, stating that his production of numerous defective parts was unacceptable.[12] After his discharge, Alexander filed a grievance under the collective bargaining agreement, claiming that his discharge was racially motivated.[13]

The collective bargaining agreement governing Alexander's employment stated that "[n]o employee [would] be discharged, suspended or given a written warning notice *except for just cause*."[14] At the arbitration hearing, the arbitrator examined the facts and issues presented and determined that Gardner-Denver's concern regarding proper product production constituted "just cause" for Alexander's termination.[15]

Alexander then instituted an action[16] under Title VII of the Civil Rights Act of 1964.[17] The United States District Court for the District of Colorado granted Gardner-Denver's motion for summary judgment, holding that the arbitral finding was binding and precluded Alexander from bringing suit under Title VII.[18] According to the district court, allowing Alexander to file suit under Title VII after the arbitrator had decided against him permitted Alexander to seek review of already-decided facts in a different forum.[19] The United States Court of Appeals for the Tenth Circuit affirmed the district court's opinion.[20]

---

9. This Comment addresses judicial treatment of arbitral decisions in subsequent Title VII cases. It does not consider judicial *review* of arbitral decisions or judicial *notice* of arbitral decisions in prior cases.

10. *See infra* Part V.

11. *Gardner-Denver*, 415 U.S. at 38.

12. *Id.*

13. *Id.* at 39.

14. *Id.* at 41 (citing Collective Bargaining Agreement, Article 23, Section 6(a)) (emphasis added).

15. *Id.* at 42.

16. *Id.* at 43. Alexander's district court action, like his grievance, claimed racial discrimination. *Gardner-Denver*, 415 U.S. at 43.

17. Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994 & Supp. IV 1998).

18. Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971). The district court also noted that Alexander's deposition revealed that the racial discrimination charge had been raised in arbitration. *Id.* at 1014.

19. *Id.* at 1015.

20. Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972).

The United States Supreme Court granted certiorari[21] and decided the case in February of 1974.[22] The Supreme Court approached the issue from a different perspective, reversing the Tenth Circuit and holding that Alexander should not have to choose between arbitration under the collective bargaining agreement and litigation under Title VII.[23] Examining the legislative history of Title VII, the Court concluded that "[t]he clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."[24] According to the Court, pursuing an action under Title VII is a "statutory right independent of the arbitration process."[25] Because of the special nature of Title VII, therefore, *Gardner-Denver* established an anomaly, allowing an action already considered in arbitration to be reheard in a Title VII case.[26]

Although the Court's holding in *Gardner-Denver* embraced a broad concept, the Court showed great restraint with regard to the manner in which the holding should be implemented. Specifically, the Court provided only a cursory glance at the impact its decision would have on district courts deciding post-arbitral Title VII cases.[27] The final sentence of the Court's *Gardner-Denver* opinion has thrust the treatment of arbitral decisions into a state of flux, asserting that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[28] Attempting to clarify the sweeping parameters of the statement, the Court included an explanatory footnote:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators . . . .[29]

---

21. Alexander v. Gardner-Denver Co., 410 U.S. 925 (1973).
22. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
23. *Gardner-Denver*, 415 U.S. at 52.
24. *Id.* at 48.
25. *Id.* at 54.
26. *Id.* at 47 (noting that "legislative enactments in [the area of civil rights] have long evinced a general intent to accord parallel or overlapping remedies against discrimination").
27. *Id.* at 60 n.21.
28. *Gardner-Denver*, 415 U.S. at 60.
29. *Id.* at n.21.

Though purporting to refrain from issuing standards, the Court's list of relevant factors has prevailed as the applicable criteria for evaluating the influence arbitral decisions will have on a Title VII case.[30] Despite these broad criteria, however, lower courts remain divided on the proper treatment of arbitral decisions in subsequent Title VII cases.

On remand, the Colorado district court, relying considerably on facts established in the grievance arbitration, declared that Alexander "was discharged from his employment with the defendant company for a legitimate, nondiscriminatory reason."[31] Although the district court did not address the appropriate weight to grant the arbitral decision, it examined the arbitrator's findings and took the finding of "just cause" one step further to hold that Alexander's discharge did not involve discrimination.[32] The Court of Appeals for the Tenth Circuit affirmed.[33] The treatment of the arbitral decision on remand suggests that both the district court and the Tenth Circuit followed the criteria set forth in footnote 21 of the Supreme Court's *Gardner-Denver* opinion.[34] Because Alexander had raised his discrimination claim in arbitration, any subsequent judicial review could accord the arbitral decision "great weight."[35]

III. TREATMENT OF ARBITRAL DECISIONS PRIOR TO *GARDNER-DENVER*

Although *Alexander v. Gardner-Denver Co.* was the first Supreme Court treatment of district court deference to Title VII arbitral decisions, the Fifth Circuit had addressed the issue in 1972 in *Rios v. Reynolds Metals Co.*[36] Noting the normally binding effects of arbitration, the *Rios* court acknowledged an exception with regard to Title VII cases, allowing an employee to file suit in a district court in addition to pursuit of grievance arbitration.[37] Nevertheless, the *Rios* court expressed a concern

---

30. *See generally* Bromley v. Michigan Educ. Ass'n, 82 F.3d 686, 692-93 (6th Cir. 1996) (reviewing the *Gardner-Denver* factors and refusing to defer to the arbitral decision); Pollard v. Azcon Corp., No. 93C3474, 1995 U.S. Dist. LEXIS 10407, at *2-*5 (N.D. Ill. July 25, 1995); Washington v. Johns-Manville Prods Corp., No. S-74-48-WHO, 1978 U.S. Dist. LEXIS 19963, at *1-*2 (E.D. Cal. Jan. 24, 1978) (analyzing each element of the Supreme Court "guidelines" and, ultimately, finding for the employer); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (S.D. Ohio 1976) (noting the presence of the *Gardner-Denver* factors, but not applying them to the summary judgment scenario).

31. Alexander v. Gardner-Denver Co., No. C-2476, 1974 WL 298, *2 (D. Colo. Nov. 19, 1974).

32. *Id.*

33. Alexander v. Gardner-Denver Co., 519 F.2d 503, 507 (10th Cir. 1975).

34. *Gardner-Denver*, 415 U.S. at 60 n.21 ("Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.").

35. *Id.*

36. 467 F.2d 54 (5th Cir. 1972). *Rios v. Reynolds Metals Co.* has been described as "the first judicial attempt to set conditions under which deference to an arbitrator's award is permissible by a court adjudicating a Title VII claim." Paul E. Mirengoff, *Judicial Deference to Arbitrators' Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974).

37. *Rios*, 467 F.2d at 57. The Fifth Circuit "conclude[d] that the traditional approach to the

about what one court has called "a philosophy which gives the employee two strings to his bow when the employer has only one."[38] In other words, the Fifth Circuit was disturbed by the possibility that an employee could file a grievance, undergo arbitration, lose at arbitration, and file suit under the same facts in a district court.[39]

The *Rios* court, therefore, set forth a standard whereby a district court could defer to a previously decided arbitral finding under certain circumstances:[40]

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.[41]

Such a test saved the court from retrying issues already determined in

---

arbitration process is not warranted in [a Title VII] context." Rather, the court stated,

> [t]he remedy afforded by Title VII is supplemental. It exists apart from analogous remedies provided by contract or by federal or state law. Indeed, aggrieved employees may seek relief under Title VII without first invoking or exhausting available alternative legal or contractual remedies . . . even where an employee does pursue an alternative remedy in cases involving Title VII rights, the federal court is to be 'the final arbiter.'

Id. (quoting Hutchings v. United States Indus., Inc., 428 F.2d 303, 313 (5th Cir. 1970)).

38. Alexander v. *Gardner-Denver Co.*, 346 F. Supp. 1012, 1019 (D. Colo. 1971).

39. *Rios*, 467 F.2d at 57 (stating that "[i]t does not follow . . . that an employee who has submitted his claim to binding arbitration must always be given an opportunity to relitigate his claim in court. In some instances such a requirement would not comport with elementary notions of equity, for it would give the employee, but not the employer, a second chance to have the same issue resolved."). The Fifth Circuit further noted that trying the employee's grievance in both arbitral and judicial fora might discourage employer participation in arbitration. The result of such discouragement would be an increase in district court suits, cluttering the already overburdened judicial dockets. *Id.*

40. *Id.* at 58. The court developed its deferral standard from a similar test established by the National Labor Relations Board. For further explanation of the NLRB standard, see Lodge No. 12, Dist. No. 37, Int'l Ass'n of Machinists v. Cameron Iron Works, Inc., 257 F.2d 467, 473 (5th Cir. 1958); Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1090 (1955).

41. *Rios*, 467 F.2d at 58. The court explained its test as a valid reassessment of the deference standard; it is more restrictive than a court's power to review whether the arbitrator should have decided certain issues and more restrictive than the doctrine of res judicata. *Id.*

arbitration. The test, however, failed under Supreme Court analysis.[42] In *Gardner-Denver*, the Court reiterated the importance of guaranteed rights under Title VII, asserting its position that "a standard [such as *Rios*] that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. . . . It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights."[43] *Gardner-Denver*'s assessment of the weight accorded arbitral findings, therefore, is a direct response to the Fifth Circuit's *Rios* deference test.[44] Viewing *Rios* as a deference standard with ramifications on the composition of the arbitral forum, the *Gardner-Denver* Court pulled in the reins, eliminating deference to arbitral decisions and establishing vague criteria for district courts to apply in assessing the proper weight to grant an arbitral finding.[45]

IV. TREATMENT OF ARBITRAL DECISIONS IN TITLE VII CASES IN LIGHT OF *GARNDER-DENVER*

In *Gardner-Denver*, the Supreme Court recognized the problems created with the *Rios* deference standard.[46] However, the Court outlined its solution to such problems in terms sufficiently ambiguous to confuse numerous district and circuit courts.[47] The *Gardner-Denver* opinion examines the weight to be granted an arbitral finding only briefly, in the opinion's final footnote which reads, "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[48] Yet, in the first line of the footnote, the Court notes that it "adopt[s] no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case."[49] Without issuing standards, the Supreme Court left lower courts in the murky waters of ambiguity, unable to discern the proper treatment of an arbitral decision in a Title VII case. Certainly, the Court did offer "[r]elevant factors"[50] for lower courts to consider, but the factors remain ever-qualified by the "[w]e adopt no standards" language immediately preceding them and the

42. *Gardner-Denver*, 415 U.S. at 58-59. The Court called the *Rios* test a "demanding deferral standard," and rejected its broader implications. *Id.* at 58.

43. *Id.*

44. For further discussion of the *Rios* opinion, see Mirengoff, *supra* note 36. Note, however, that the Mirengoff article was pre-*Gardner-Denver*.

45. *Gardner-Denver*, 415 U.S. at 60 n.21.

46. *Id.* at 58-59.

47. *See, e.g., id.* at 60 n.21.

48. *Id.* at 60.

49. *Id.* at n.21.

50. *Gardner-Denver*, 415 U.S. at 60 n.21.

Court's reiteration of the importance of the judicial forum immediately following them.[51] *Gardner-Denver*, therefore, began to spin a complex web of confusion among the lower courts.

A. Validity of the Gardner-Denver *Opinion*

Before delving into the confusion created by *Gardner-Denver*'s famous footnote twenty-one, the validity of the *Gardner-Denver* opinion must be established. Some debate exists regarding the remaining legitimacy of *Gardner-Denver*. The Fourth Circuit, in *Austin v. Owens-Brockway Glass Container Inc.*,[52] asserted that the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[53] effectively overruled *Gardner-Denver*.[54] After the Fourth Circuit affirmed the *Austin* decision in *Wright v. Universal Maritime Service Corp.*,[55] the Supreme Court granted certiorari,[56] subsequently vacating and remanding the Fourth Circuit's decision.[57] *Gilmer* involved a registered securities representative who filed a district court suit against his employer, Interstate/Johnson Lane, alleging wrongful discharge[58] in violation of the Age Discrimination in Employment Act of 1967 ("ADEA").[59] Pursuant to his New York Stock Exchange registration application, Gilmer was required to arbitrate claims arising from his employment.[60] Interstate/Johnson filed a motion to compel arbitration,[61] but the district court denied the motion on the basis of *Gardner-Denver*.[62] The Fourth Circuit reversed, determining that the ADEA did not preclude compulsory arbitration.[63] The Supreme Court affirmed,[64] carefully wording its opinion to avoid overruling *Gardner-Denver*.[65]

---

51. *Id.* After listing the relevant factors, the Court reminds lower courts that they "should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims[,]" thereby significantly decreasing a court's ability to grant great weight to an arbitral decision. *Id.*

52. 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 890 (1996).

53. 500 U.S. 20 (1991).

54. *Austin*, 78 F.3d at 885.

55. 121 F.3d 702 (4th Cir. 1997).

56. 522 U.S. 1146 (1997).

57. Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 82 (1998).

58. *Gilmer*, 500 U.S. at 23-24.

59. 29 U.S.C. §§ 621-634 (1994).

60. *Gilmer*, 500 U.S. at 23. When Gilmer registered as a securities representative with the New York Stock Exchange ("NYSE"), the application required arbitration for certain claims. *Id.* Among those claims requiring arbitration was "[a]ny controversy between a registered [securities] representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* at 23 (citing NYSE Rule 347).

61. *Id.* at 24.

62. *Id.*

63. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 196 (4th Cir. 1990).

64. *Gilmer*, 500 U.S. at 35.

65. *Id.* at 34-35. Justice White, writing for the Court, stated that Gilmer's reliance on *Gardner-Denver* was "misplaced." *Id.* at 33. Justice White cautiously distinguished *Gardner-Denver*,

After *Gilmer*, an aggrieved employee still may file suit under Title VII in the district court if the grievance arose under a collective bargaining agreement.[66] *Gilmer* involved an employment contract, not a collective bargaining agreement, and the Supreme Court allowed the provisions of *Gardner-Denver* applying to collective bargaining agreements to stand.[67] As one scholar has argued,

> [b]ecause *Gilmer* did not overrule *Alexander*, the employees most affected by *Gilmer* and its progeny are those who are the weakest in their bargaining power, i.e., those whom a collective bargaining agreement does not cover, and who do not benefit from the strength of the group in their dealings with employers.[68]

Currently, therefore, employees covered by a collective bargaining agreement remain within the *Gardner-Denver* construction, whereby they are not bound by an unfavorable arbitral decision.[69] Despite employer success in arbitration, an employee covered by a collective bargaining agreement may file a Title VII suit under the same facts.[70] Judicial treatment of the arbitral findings, however, is mixed.

B. Admissibility of the Arbitral Decision

Since 1974, courts have struggled to establish the proper treatment of arbitral findings. *Gardner-Denver* remains good law (despite the *Gilmer* opinion), but the Court's meager treatment of judicial consideration of arbitral decisions has spawned a plethora of judicial disagreement. *Gardner-Denver* stated that an "arbitral decision *may* be admitted as evidence"[71] in a subsequent Title VII case. Seizing upon the Court's permissive language, courts in other cases have asserted their right *not to admit* arbitral decisions. The Seventh Circuit, upholding a district court's decision not to admit an arbitrator's findings, maintained that a "trial court has the discretion to admit an arbitration decision into evidence and to accord it such weight as is deemed appropriate, but there is no requirement that the court must allow an arbitration decision to be

---

never specifically overruling it. He merely highlights "several important distinctions between the *Gardner-Denver* line of cases" and *Gilmer*. *Id.* at 35.

66. *Id.* at 34-35; *see also* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189 (9th Cir. 1998) (stating that the *Gilmer* Court "distinguished *Gardner-Denver* on the ground that it involved a collective bargaining agreement rather than an individual agreement to arbitrate").

67. *Gilmer*, 500 U.S. at 34-35; *see also* Boyd A. Byers, *Mandatory Arbitration of Employment Disputes: The Whats, Whys and Hows*, 67 J. KAN. B. ASS'N 18, 23-24 (1998).

68. Pierre Levy, Comment, Gilmer *Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455, 455 n.1 (1996).

69. *Gardner-Denver*, 415 U.S. at 60.

70. *Id.*

71. *Id.* (emphasis added).

admitted at all."[72] Similarly, an Illinois district court noted that "[t]he court has complete discretion to admit or exclude a decision of an impartial arbitrator . . . . There is simply no rule requiring a district court to allow the admission of an arbitration decision."[73] By refusing to admit an arbitral decision, a district court avoids the *Gardner-Denver* problem. Deeming the arbitral findings inadmissible, a district court circumvents *Gardner-Denver*'s footnote twenty-one altogether.[74] Nevertheless, other courts have dared to address the unsettled issue presented by *Gardner-Denver*'s famous final footnote.

C. Weight Accorded Arbitral Findings

When a court elects to admit an arbitrator's findings as evidence in a Title VII case, it does not defer automatically to the arbitral decision. Because Title VII affords plaintiffs statutory rights that are distinct from the contractual rights asserted in arbitration,[75] the admission of an arbitral decision "cannot preclude the exercise of rights independent of the collective bargaining process."[76] The court, therefore, must ascertain the appropriate weight to grant an arbitral decision that has been admitted as evidence.[77]

Gardner-Denver, in footnote twenty-one, established relevant criteria for the district court to consider in the post-arbitral Title VII case, including: (1) the existence of provisions in the collective bargaining agreement that conform with Title VII; (2) the degree of procedural fairness in the arbitral forum; (3) the adequacy of the record with respect to the issue of discrimination; and (4) the special competence of particular arbitrators.[78] Additionally, the *Gardner-Denver* opinion cites specific instances in which the court should grant deference to the arbitral finding:

> Where an arbitral determination gives full consideration to an

---

72. Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994); *see also* Kramer-Navarro v. Bolger, 586 F. Supp. 677, 682 n.25 (refusing admission of arbitral decision and specifically stating that "[t]he arbitration proceeding, its findings, and determinations, play no part in the Court's judgment").

73. Pollard v. Azcon Corp., No. 93C3474, 1995 U.S. Dist. LEXIS 10407 (N.D. Ill. July 25, 1995).

74. *Gardner-Denver*, 415 U.S. at 60 n.21.

75. *See id.* at 49-50. The Court noted the difference between contractual and statutory rights, asserting that "[t]he distinctly separate nature of these contractual [collective bargaining agreement] and statutory [Title VII] rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." *Id.* at 50.

76. Wilmington v. J.I. Case Co., 793 F.2d 909, 916 (8th Cir. 1986); *see also* McDonald v. City of West Branch, 466 U.S. 284, 292 & n.13 (1984).

77. *Gardner-Denver*, 415 U.S. at 60 n.21.

78. *Id.*

> 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.[79]

Later cases have applied the *Gardner-Denver* criteria directly to determine the proper treatment of an arbitral decision. After finding that an arbitrator's decision met all of the footnote twenty-one criteria, one judge of a Title VII case announced "I'm not deferring to the Arbitrator's decision. It's just that I did give it considerable weight, which, when put together with the testimony given here, led me to the conclusion."[80] The district judge continued that the defendant "did not engage in an unlawful employment practice, under Title VII of the Civil Rights Act of 1964, as amended . . . in its discharge of the plaintiff."[81] Nevertheless, the degree of deference a court grants to an arbitral decision remains a matter of judicial discretion.[82] Although courts often rely heavily on arbitral findings in Title VII cases, individual jurisdictions and judges vary the amount of deference they grant individual arbitral decisions. Therefore, courts prescribe the admissibility and weight accorded an arbitral decision on a case-by-case basis.[83]

D. Judicial Concerns Regarding Admissibility and Weight of Arbitral Decisions

Though courts generally admit arbitral decisions and accord them some degree of weight, some courts have expressed specific concerns regarding the proper treatment of arbitral decisions. For example, judges must consider carefully the value of the arbitral decision and the prejudicial impact it might have on a jury. Plaintiffs objecting to the admission of arbitral findings, therefore, cite Rule 403 of the Federal Rules of Evidence.[84] In Title VII actions, where jury trials are a recent development,[85] judicial concerns more often pertain to the nature of the arbitral

---

79. *Id.*

80. Washington v. Johns-Manville Prods. Co., No. S-74-48-WHO, 1978 U.S. Dist. LEXIS 19963, at *5-*6 (E.D. Cal. Jan. 24, 1978).

81. *Id.* Because of the permissive nature of *Gardner-Denver*'s footnote twenty-one, the presence or absence of any of the "[r]elevant factors" is not dispositive of the weight granted to an arbitral decision in a Title VII case. *Gardner-Denver*, 415 U.S. at 60 n.21.

82. *See Gardner-Denver*, 415 U.S. at 60 n.21 (stating that the weight given to an arbitral decision "must be determined in the court's discretion with regard to the facts and circumstances of each case").

83. *Id.*

84. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

85. The provision allowing jury trials was added to Title VII when the Civil Rights Act was

proceeding itself and the differences between arbitration and litigation. The primary concerns that district courts have expressed are set forth below.

1. Judicial Power Over Title VII

Beginning with *Gardner-Denver* and continuing into the present, courts have expressed a concern that deference to an arbitral decision would defeat the congressional intent fueling Title VII. As the Supreme Court asserted in *Gardner-Denver*, "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."[86] A Connecticut district court expressed similar concerns, noting that arbitration under a collective bargaining agreement could "pose a threat to the protection of individual statutory rights."[87] The perceived threat emanates from a now-dwindling judicial mistrust of arbitral capabilities in the area of statutory interpretation.[88]

As one court observed, the traditional function of arbitration is "interpreting and applying private contracts, not federal statutes."[89] Courts, therefore, willingly defer to arbitral findings regarding contractual matters. In *Gardner-Denver*, for instance, the Court stated that the arbitrator's authority to assess contractual rights "remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."[90] Construing federal statutes, however, remains in the capable hands of the judiciary.

Despite prior judicial apprehension regarding the abilities of arbitrators, recent opinions have noted that "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."[91] In fact, recent trends indicate that the arbitral forum looks remarkably similar to the judicial one.[92] With

---

amended in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102(c), 105 Stat. 1071, 1072-73 (1991).

86. *Gardner-Denver*, 415 U.S. at 56.

87. Claps v. Moliterno Stone Sales, Inc., 819 F. Supp. 141, 146-47 (D. Conn. 1993).

88. *See* Pryner v. Tractor Supply Co., Inc., 927 F. Supp. 1140, 1145 (S.D. Ind. 1996) ("It is uncontroverted that the decision in *Gardner-Denver* reflected the Court's then-current view that arbitration was inferior to judicial process for the resolution of statutory claims.").

89. *Claps*, 819 F. Supp. at 146.

90. *Gardner-Denver*, 415 U.S. at 54; *see also* Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982) ("The court should defer to the arbitrator's construction of the contract.").

91. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-27 (1985); *see also Pryner*, 927 F. Supp. at 1140.

92. Byers, *supra* note 67, at 19. Byers notes the similarities between an arbitral setting and the setting of civil litigation:

such similarity between the two fora, it would certainly benefit the judiciary to grant "great weight"[93] to arbitral decisions involving substantially similar facts. Many assert that arbitrators may even be better equipped to decide certain issues than judges. For example, arguing in favor of arbitration for claims arising under the Americans with Disabilities Act ("ADA"), one commentator noted that "[a]rbitrators have experience in crafting suitable remedies for disputes in the workplace and are more likely to understand the nuances of the employer/union relationship than would a judge."[94] Such comments reflect a greater societal acceptance of arbitral capabilities, and lend favor to the possibility of judicial acceptance of certain arbitral findings.

2. *Fairness of Union Representation*

Courts express additional concern about the adequacy of union representation at arbitration. Although union representation is a factor in determining the fairness of the arbitral proceeding, the court remains mindful that the union essentially becomes a slave to two masters: the individual employee bringing the claim and the collective union (bargaining unit) itself.[95] These two interests have the potential for a jolting collision. As the Supreme Court recognized in *Gilmer*, "in collective-bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.'"[96]

The dual role of union representation, however, is easily remedied in the district court. If the employee's union representation is inadequate, courts are unlikely to accord weight to the arbitral findings.[97] In *Lynch v. Pathmark Supermarkets*,[98] for instance, the plaintiff alleged that his un-

---

> The arbitrator, who presides over the arbitration, decides both issues of fact and issues of law, much like a judge in a non-jury trial. The parties, commonly called "claimant" and "respondent," usually are represented by legal counsel. As in civil litigation, the parties initially present their positions through pleadings. The claimant submits a "demand" or "statement of claim." The respondent then files a "response" or "answer." The parties may engage in limited discovery, including depositions, interrogatories, and document requests, subject to the underlying arbitration agreement.

Id.

93. *Gardner-Denver*, 415 U.S. at 60 n.21.

94. Amanda G. Dealy, Note, *Compulsory Arbitration in the Unionized Workplace: Reconciling* Gilmer, Gardner-Denver, *and the Americans with Disabilities Act*, 37 B.C. L. REV. 479, 507 (1996) (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 747-48 (1981)).

95. *Gardner-Denver*, 415 U.S. at 58 n.19; *see also* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) (noting that, in cases involving racial discrimination, union and employee views may not be compatible).

96. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 (1991) (citing *Gardner-Denver*, 415 U.S. at 58 n.19).

97. *See generally Gardner-Denver*, 415 U.S. at 60 n.21.

98. 987 F. Supp. 236 (S.D.N.Y. 1997).

ion attorney's arbitral representation was insufficient; according to the plaintiff, the attorney failed to raise key issues and did not call witnesses at arbitration.[99] In the subsequent Title VII case, the court stated, "[w]hether or not this charge [of insufficient representation] is true, the possibility that it is counsels against giving the arbitral findings preclusive effect."[100] When arbitral representation is unchallenged, however, the arbitral decision remains valid and may be granted "great weight"[101] in the district court.

3. *Arbitral Fact-Finding and Judicial Fact-Finding*

Courts also voice concern about the different methods implemented in arbitral and judicial fact-finding. In *McDonald v. City of West Branch*,[102] a post-arbitration section 1983 case, the Supreme Court declared that "arbitral factfinding is generally not equivalent to judicial factfinding."[103] The Court had made a similar statement ten years earlier in *Gardner-Denver*, distinguishing arbitral and judicial fact-finding procedures: "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[104] Because of the perceived lax and incomplete fact-finding methods implemented in arbitration, some courts are reluctant to accept the arbitrator's findings of fact without further judicial intervention. A court's acceptance of arbitral findings, however, is predicated upon the facts and circumstances surrounding each case.[105]

Nevertheless, *Gardner-Denver*'s pervasive footnote twenty-one devotes special attention to factual issues. The Court articulated that:

> 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.[106]

Factual determinations made in arbitration, while neither binding on the court nor preclusive of issues, generally act persuasively in the court's

---

99. *Lynch*, 987 F. Supp. at 236.
100. *Id.* at 242.
101. *Gardner-Denver*, 415 U.S. at 60 n.21.
102. 466 U.S. 284 (1984).
103. *City of West Branch*, 466 U.S. at 291.
104. *Gardner-Denver*, 415 U.S. at 57-58.
105. *See id.* at 60 n.21.
106. *Id.*

assessment of the case. The persuasive authority of the arbitral decision, however, technically does not reach the level of collateral estoppel.[107]

4. "Just Cause" and Evidence of Discrimination

Some courts in Title VII cases have expressed concern about according great weight to an arbitral finding of "just cause." These courts present the view that reliance on an arbitrator's finding of "just cause" precludes the court from adequately assessing the employee's Title VII claim. The Sixth Circuit, in particular, expressed its disfavor for granting deference to arbitral decisions in *Becton v. Detroit Terminal of Consolidated Freightways*,[108] declaring that:

> There is no realistic way to sever the discharge from the claim of discrimination because, according to the plaintiff, the discharge *is* the discrimination. An analysis of one must include consideration of the other because both involve the same operative facts. They cannot be considered in isolation from one another.[109]

According to the Sixth Circuit, therefore, deference to the arbitrator's decision prevents the employee from establishing all evidence of discrimination.[110]

The *Becton* court clearly articulated its concerns and elaborated on the weight that should be given to an arbitral decision:

> We do not hold that the arbitration decision is without significance. Certainly the court may consider the arbitration decision as persuasive evidence that the grounds found by the arbitrator to be just cause for discharge under the collective bargaining agreement are sufficient to amount to just cause. The court should defer to the arbitrator's construction of the contract. Moreover, an arbitration decision in favor of the employer is sufficient to carry the employer's burden of *articulating* "some legitimate, nondiscriminatory reason for the employee's rejection." However, to allow that decision to answer *conclusively* questions raised in the final step of the *McDonnell Douglas* [prima facie discrimination] analysis unnecessarily limits the plaintiff's opportunity to vindicate his statutory and constitutional rights.[111]

---

107. *See infra* Part IV.E.

108. 687 F.2d 140 (6th Cir. 1982).

109. *Becton*, 687 F.2d at 142 (emphasis in original).

110. *See id.*

111. *Id.* (citations and quotations omitted); *see also* Wilmington v. J.I. Case Co., 793 F.2d 909, 919 (8th Cir. 1986).

The Sixth Circuit makes a careful distinction between *deference* to an arbitral decision and according that decision great weight. The distinction is a valid one, but many courts use the terms interchangeably, according deference to the arbitral decision, but not deferring to it.[112]

5. *Treatment of Arbitral Decisions in Motions for Summary Judgment*

Judges are especially hesitant to grant deference to arbitral decisions when the employer moves for summary judgment. In *Kornbluh v. Stearns & Foster Co.*,[113] for example, the court determined that "all of the relevant [*Gardner-Denver* footnote twenty-one] factors except one were and are satisfied by the arbitration proceeding."[114] Rather than according the arbitral decision great weight, however, the court found that "[e]ven if that [one missing] factor were present, we are not satisfied that the footnote [twenty-one] means or dictates that an arbitration award made under the factor satisfying circumstances would be of sufficient 'weight' on which to base a summary judgment."[115] The Eighth Circuit agreed, reversing a district court opinion that "explicitly gave 'great weight' to the arbitrator's conclusion"[116] when granting the employer's motion for summary judgment.[117] The appellate court reversed the district court's decision, determining that deference to an arbitral decision precluded the court from properly viewing the plaintiff employee's evidence "in a light most favorable to her."[118] Noting that the arbitral decision would be admissible at trial, the court distinguished trial scenarios and motions for summary judgment because "in summary judgment proceedings, neither the district court nor we may place the parties' competing evidence in a balance scale when deciding whether to grant summary judgment."[119]

Gardner-Denver, therefore, has little impact on summary judgment proceedings; the admission of arbitral decisions violates the plaintiff's right to have evidence viewed in a light most favorable to her.[120] The special considerations necessary for summary judgment, however, do

---

112. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974).
113. 73 F.R.D. 307 (S.D. Ohio 1976).
114. *Kornbluh*, 73 F.R.D. at 312.
115. *Id.*
116. Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999) (quoting *Gardner-Denver*, 415 U.S. at 60 n.21).
117. *Bell*, 186 F.3d at 1101.
118. *Id.* at 1102.
119. *Id.*
120. *See id.* In post-arbitral Title VII cases, the arbitral decision almost always favors the employer. If the employee had prevailed in arbitration, the Title VII case would not have been necessary. Deference to an arbitral decision in a summary judgment motion, therefore, favors the employer and prevents the court from viewing evidence in favor of the non-moving party.

not apply to district court proceedings more generally. Absent such considerations, the court should grant "great weight"[121] to the decision of the arbitrator, insofar as the issues overlap.[122]

E. Res Judicata and Collateral Estoppel in Subsequent Title VII Cases

Although the trend towards acceptance of arbitral capability in the statutory arena is developing, some courts remain "hesitant to grant preclusive effect to arbitral decisions in Title VII actions brought in federal court."[123] In *Gardner-Denver*, the Court rejected the possibility of a res judicata argument, asserting that the claims presented in the arbitral and judicial forums must be considered independently; the contractual claim under the collective bargaining agreement remains in the power of the arbitrator, while the statutory claim requires separate consideration by the judiciary.[124] Analyzing the differences between contractual and statutory claims, the Court gave only a summary treatment to cases like Alexander's, in which the employee places *both* the contractual and the statutory claims before the arbitrator.[125] Not until the opinion's final footnote did the Court address the situation involved in Alexander's grievance itself, namely, "[w]here an arbitral determination gives full consideration to an employee's Title VII rights."[126] In those cases, the Court noted, district courts "may properly accord [the arbitral finding] great weight."[127]

Nevertheless, the Court implicitly retained its position that district courts handling post-arbitration Title VII claims should not *defer* to the arbitral agreement.[128] Insisting on de novo review of the claim, the Court implied a prohibition on the use of res judicata in subsequent Title VII cases.[129] The Ninth Circuit more expressly asserted the *Gardner-Denver* implication against res judicata, stating that "[t]he maintenance of the Title VII action after judicial review of the arbitration decision therefore does not involve splitting a cause of action so as to render the second action barred by res judicata."[130]

Despite *Gardner-Denver*'s rejection of res judicata, the Court did

---

121. *Gardner-Denver*, 415 U.S. at 60 n.21.

122. *Id.*

123. Taylor v. New York City Transit Auth., No. 96 Civ. 4322(55), 1997 WL 620843, at *4 (S.D.N.Y. Oct. 7, 1997).

124. *Gardner-Denver*, 415 U.S. at 49-50.

125. *Id.* The Court offered a broad statement of policy, analogizing to the National Labor Relations Board, stating that "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each." *Id.* at 50-51.

126. *Id.* at 60 n.21.

127. *Id.*

128. *Gardner-Denver*, 415 U.S. at 60.

129. *Id.*

130. Aleem v. General Felt Indus., Inc., 661 F.2d 135, 137 (9th Cir. 1981).

not expressly deny the possibility of collateral estoppel in post-arbitration Title VII cases. Courts after *Gardner-Denver*, however, continually have rejected a collateral estoppel argument when the prior issue determination occurred in arbitration.[131] Because the Federal Rules of Evidence generally do not apply to arbitral proceedings, the facts established during arbitration cannot have a binding effect on the subsequent Title VII litigation. Nonetheless, the facts "specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record"[132] should be accorded great weight. Any direct arbitral consideration of factual issues impacting the Title VII claim, therefore, should weigh heavily with the court.[133]

Certain issues have a collateral estoppel effect in the subsequent Title VII case, however. An arbitrator's findings regarding the collective bargaining agreement are binding on the district court, as they constitute contractual interpretation, an arbitral specialty.[134] Courts often defer to arbitrators' interpretations of contractual agreements.[135] Furthermore, an arbitral decision in favor of the employer will satisfy the company's Title VII burden of stating a legitimate, non-discriminatory reason for the employee's discharge.[136] The arbitral decision, though, will not collaterally estop the employee from presenting facts and issues already heard in arbitration.

V. TREATMENT OF ARBITRAL FINDINGS IN NON-TITLE VII LITIGATION

Courts addressing post-arbitration non-Title VII actions also implement the *Gardner-Denver* factors. In several types of statutorily-based employment actions, including actions involving the Age Discrimination in Employment Act ("ADEA," explained below), section 1981,[137] sec-

131. *See* Kindle v. Mid-Central/Sysco Food Servs., Inc., No. 95-2123-JWL, 1996 U.S. Dist. LEXIS 2662, at *20 (D. Kan. Feb. 2, 1996) (holding that collateral estoppel does not prevent an ADA plaintiff from relitigating arbitral claims in a district court); *Aleem*, 661 F.2d at 137 ("Congress in enacting Title VII made it clear that prior administrative adjudications were not to prevent de novo review of Title VII claims in federal court.").

132. *Gardner-Denver*, 415 U.S. at 60 n.21.

133. *See* Dealy, *supra* note 94, at 509 ("Where the employee elects to pursue a claim in court following the arbitration, all involved benefit from the arbitral findings of fact and interpretation of collective bargaining agreement provisions.").

134. *See* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987); Garvey v. Roberts, 203 F.3d 580 (9th Cir. 2000); Becton v. Detroit Terminal of Consol. Freightways, 687 F.2d 140, 142 (6th Cir. 1982).

135. *Becton*, 687 F.2d at 142.

136. *Id; see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing necessary elements of a prima facie case of discrimination); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (refining the *McDonnell Douglas* allocation of burden of proof).

137. *See* Wilmington v. J.I. Case Co., 793 F.2d 909, 919 (8th Cir. 1986) (refusing to admit an arbitration decision in a subsequent section 1981 case).

tion 1983,[138] retaliatory discharge worker's compensation,[139] and the Fair Labor Standards Act ("FLSA"),[140] courts consistently have found that arbitral decisions should not have a res judicata or collateral estoppel effect on the subsequent action. Examining an ADEA case, the United States District Court for the Northern District of New York stated:

> [C]ourts have interpreted the *Gardner-Denver* decision as precluding the application of either res judicata or collateral estoppel in a situation where the prior arbitration was held pursuant to a labor agreement. This Court finds such precedent to be persuasive and holds that in the present case, the arbitrator's decision should not be given preclusive effect, but rather should be a factor to assist the Court in reaching its own decision.[141]

Though courts in all actions provide discretionary deference to an arbitrator's decision, they do not allow the arbitral findings to have either a res judicata or collateral estoppel effect on the subsequent statutory action. Relying upon the authority of *Gardner-Denver*, courts are reluctant to defer to arbitral decisions.

VI. CONCLUSION

The final footnote of the Supreme Court's opinion in *Alexander v. Gardner-Denver Co.* has generated inconsistency and incompatibility among district courts.[142] The Court's non-binding factors and permissive language left district courts with little guidance regarding the treatment of arbitral decisions in Title VII litigation. District courts, relying on varying interpretations of *Gardner-Denver*, remain bewildered as to the proper treatment of facts and issues already presented and decided in an arbitral forum. Although the Supreme Court has eliminated an employer's res judicata argument on the basis of policy considerations, collateral estoppel remains a viable, though not often successful, alterna-

---

138. *See* McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (holding that "in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement").

139. *See* Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994) (affirming a district court's decision to exclude from evidence an arbitrator's decision in a retaliatory discharge worker's compensation claim).

140. *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (stating that "[b]ecause Congress intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioner's claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures").

141. Todeschini v. Niagra Mohawk Power Corp., No. 96-CV-1137, 1997 WL 769470, at *4, (N.D.N.Y. Dec. 5, 1997) (citations omitted).

142. *See Gardner-Denver*, 415 U.S. at 60 n.21.

tive.

If courts implement the factors set forth in *Gardner-Denver*'s footnote twenty-one, the "great weight"[143] accorded to certain arbitral findings will promote judicial efficiency. Further, gleaning facts from the arbitral decision will place employer and employee on more equal footing. Without adoption or consideration of arbitral facts, an employee may, in essence, relitigate her claim in two different fora, while the employer is provided only a small degree of success from its arbitral efforts. Without some element of collateral estoppel, employer incentive to arbitrate dwindles into oblivion, thereby frustrating the ever-growing movement in favor of alternative dispute resolution.

The answer, perhaps, lies in a compromise between the specific standards set forth in *Rios v. Reynolds Metals Company*[144] and the more manageable, yet entirely permissive, "weight to be accorded" standard established in *Alexander v. Gardner-Denver Company*.[145] Striking a middle ground between these diametrically opposed standards could provide employees with adequate consideration of their claims and employers with an incentive to arbitrate. Such a scenario would encourage the use of employment arbitration and prevent district courts from essentially relitigating issues that have already been addressed in arbitration. Nevertheless, *Gardner-Denver* remains the current standard. Until the right case comes along to challenge the *Gardner-Denver* construction in a collective bargaining setting, district courts must settle with that standard, trying Title VII cases again for the first time.

Lynlee Wells Palmer

143. *Id.*
144. *Rios*, 467 F.2d at 58.
145. *Gardner-Denver*, 415 U.S. at 60 n.21.