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Is a USERRA Plaintiff in the Railroad or Airline Industry Required To Exhaust Remedies under the Collective Bargaining Agreement and the Railway Labor Act Before Suing the Employer for Violating USERRA?

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]

1.4—USERRA enforcement.

1.5—USERRA and arbitration.

1.8—Relationship between USERRA and other laws/policies.

Q: I am a Commander in the Navy Reserve Judge Advocate General's Corps (JAGC). I am an attorney in private practice, in a small firm,

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[1] I invite the reader's attention to [Law Center | ROA](). You will find more than 2,000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses' Protection Act (USFSPA), the title 38 chapters that provide for veterans' benefits administered by the Department of Veterans Affairs (VA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 80% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 50 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. §§ 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at samuel@maherlegalservices.com or by telephone at (708) 468-8155.

specializing in labor and employment law on the employee side. Because of my Navy Reserve service, I have taken a great deal of interest in the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have read and reread many of your "Law Review" articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. Your articles have been immensely helpful to me in advising and representing my clients and in recruiting new clients. I joined the Reserve Organization of America (ROA) as a life member because I want to promote and support this excellent service that you are providing for Reserve Component (RC) service members.

I have a current client whose USERRA rights were violated by his employer, an airline. I filed suit on behalf of this client against the airline in the United States District Court for the district where the airline's headquarters is located. The defendant's attorney has filed a motion to dismiss, contending that the court lacks jurisdiction and that, in accordance with the Railway Labor Act (RLA), my client's claim can only be adjudicated by the arbitrator appointed by the airline and the union for the airline employees. I need your advice and assistance in dealing with this motion to dismiss.

Q: First, how did we get here?

A: September 16, 2026 will mark the 86th anniversary of the Veterans' Reemployment Rights Act (VRRA).[3] Congress enacted the VRRA in 1940, as part of the Selective Training and Service Act (STSA),[4] the law that

[3] The VRRA had many formal names, but it was known colloquially as the VRRA until Congress enacted USERRA in 1994.

[4] Public Law 76-783, 54 Stat. 885.

led to the drafting of more than ten million young men (including my late father) for World War II.

Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were drafted. Senator Thomas offered an amendment to that effect during the STSA debate and convinced his colleagues to adopt it. He explained the rationale for his amendment as follows:

> [I]t is not unreasonable to require the employers of such men [those who were drafted and necessarily left their civilian jobs] to rehire them upon completion of their service, since the lives and property of employers, as well as the lives and property of everyone else in the United States, are defended by such service.[5]

As originally enacted in 1940, the VRRA only applied to those who were drafted, but just one year later Congress amended the VRRA as part of the Service Extension Act of 1941.[6] The 1941 amendment expanded the law to make it apply to those who voluntarily enlisted, as well as those who were drafted. Almost from the very beginning, the reemployment statute has applied to voluntary as well as involuntary service, but to this day some employers incorrectly relate the right to reemployment to the draft and assume that those who have volunteered do not have the right to reemployment.[7]

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[5] 96 Cong. Rec. 10573 (remarks of Sen. Thomas). This statement is quoted in *Leib v. Georgia Pacific Corp.,* 925 F.2d 240, 246 (8th Cir. 1991).

[6] Public Law 77-213, 55 Stat. 626.

[7] For more than two generations, all military service in our country has been voluntary. In 1973, Congress abolished the draft and established the All-Volunteer Military.

Since 1940, the VRRA has applied to the Federal Government and to private employers. In 1974, as part of the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA),[8] Congress amended the VRRA to make it apply to state and local governments as well. Today's reemployment statute applies to almost all employers in our country, including the Federal Government, state and local governments, and private employers, regardless of size.[9]

The Relationship Between the Railway Labor Act and the Federal Reemployment Statute.

Congress enacted the Railway Labor Act (RLA) in 1926.[10] Congress enacted the RLA 14 years before it enacted the VRRA in 1940 and 68 years before it enacted USERRA in 1994. The RLA is administered by the National Mediation Board (NMB), a small federal executive agency. On its website, the NMB states:

> Under the Railway Labor Act, employee grievances **arising under the terms of collective bargaining agreements** (i.e., minor disputes) are subject to compulsory arbitration. Effective arbitration processes are therefore necessary to resolve such disputes.
> The NMB administers the processes available to the parties for resolving railroad grievances. They include:
> - Public Law Boards

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[8] Public Law 93-508, 89 Stat. 1593.

[9] You only need one employee to be an employer for purposes of the reemployment statute. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

[10] Act of May 20, 1926, 44 Stat. 577. The RLA is codified at 45 U.S.C. §§ 151 et seq. As enacted in 1926, the RLA applied only to railroads. In 1936, Congress expanded the law to include airlines as well.

- Special Boards of Adjustment
- National Railroad Adjustment Board

The NMB certifies appointments of arbitrators to serve as neutrals on these labor/management boards in the railroad industry. To be admitted to NMB's roster of arbitrators, an applicant must be eligible under the "Uniform Guidelines for Placement on NMB's Roster of Arbitrators". The "Guidelines" and relevant Application Form are available in this web site. Each applicant is notified in writing as to whether or not admittance is approved.

The NMB is also frequently asked to furnish panels of arbitrators from which the airline parties select a neutral for airline System Boards of Adjustment.[11]

The mandatory arbitration of employee grievances administered by the NMB applies to "employee grievances arising under the terms of collective bargaining agreements." This arbitration scheme does not apply to disputes arising under other federal statutes like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, or USERRA.

If there is an irreconcilable contradiction between the RLA and the reemployment statute, the reemployment statute must prevail, as the more recently enacted statute, but the law does not favor repeal by implication. The Supreme Court has held:

> The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely,

[11] https://nmb.gov/NMB_Application/index.php/arbitration-overview/ (emphasis supplied).

that there be an irreconcilable conflict between the two federal statutes at issue.[12]

Accordingly, it is necessary to *harmonize* the reemployment statute with the RLA, and vice versa. In an important 1958 case, the Supreme Court harmonized the apparent inconsistency between the RLA (enacted in 1926) and the reemployment statute (enacted in 1940).

A “Co-Pilot” search on this question brought the following result:

How Federal Courts Harmonize New Statutes with Older Ones

When a new federal statute appears to conflict with an older one, federal courts generally aim to **harmonize** the two rather than assume the new law automatically invalidates the old. This means finding an interpretation that allows both to coexist without contradiction, based on Congress’s presumed intent to create a consistent legal system.

1. **Legislative history as the primary tool**

   Courts often start by examining the **legislative history** of the new statute — committee reports, floor debates, and prior versions — to see how Congress intended the law to interact with existing statutes. This can reveal whether the new law was meant to replace, supplement, or coexist with the older provision.

[12] *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.,* 534 U.S. 124, 142 (2001).

2. **Specificity vs. generality**

   A key canon of statutory construction is that **a specific provision governs a general one**. If the new statute addresses a particular situation in detail, courts may interpret it as an exception to a broader, older rule. Conversely, if the older statute is more specific, it may take precedence.

3. **Referring to other statutes and subsequent enactments**

Courts may look to **provisions of other statutes** and later laws to clarify ambiguous terms or resolve contradictions. This ensures the new law fits within the broader legal framework and avoids undermining existing legislation.

4. **Avoiding implied repeal**

   Unless the new statute explicitly repeals or modifies the old one, courts generally **do not assume implied repeal**. Instead, they try to reconcile the two.

5. **Judicial canons and doctrines**

   Courts apply established canons, such as the **specificity rule** and the **absurdity doctrine**, to avoid results that are logically inconsistent or morally unacceptable. If a conflict leads to an absurd outcome, courts may depart from the literal text to prevent that result.

6. Role of Congress and later amendments

If Congress later amends or enacts a new law that overrides a prior interpretation, courts must apply the updated statutory text. However, as research shows, even after such overrides, courts may continue to cite the old precedent for years due to citation practices and information gaps.

In practice:

A court might find that the new statute's specific provisions apply only in certain circumstances, while the older statute governs the rest. Or, it might interpret the new law's language to align with the older statute's purpose, ensuring legislative harmony.

Bottom line:

Harmonization is the default approach — courts seek to give both statutes effect by interpreting them in a way that preserves consistency, using legislative history, statutory specificity, and related laws to resolve conflicts.[13]

USERRA's legislative history

13 https://www.bing.com/search?q=how+does+a+federal+court+harmonize+a+new+federal+statute+with+an+existing+statute+enacted+decades+ago%3F&form=ANSPH1&refig=6a72464f30cd4a2e9c6ee7d419d47ca3&pc=U531&pqlth=0&assgl=102&sgcn=how+does+a+federal+court+harmonize+a+new+federal+statute+with+an+existing+statute+enacted+decades+ago%3F&qs=HS&sgtpv=HS&smvpcn=0&swbcn=10&sctcn=0&sc=10-0&sp=1&ghc=0&cvid=6a72464f30cd4a2e9c6ee7d419d47ca3&clckatsg=1&hsmssg=0.

USERRA's legislative history addresses the relationship between USERRA, collective bargaining agreements, and the RLA as follows:

> Section 4302(b) [of USERRA] would reaffirm a general preemption as to State and local laws and ordinances, as well as employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 [USERRA] or put additional conditions on those rights. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Department of the City of New York,* 675 F. Supp. 847 (S.D.N.Y. 1987) and *Fishgold, supra,* 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit, or eliminate any right under chapter 43.
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> *Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 270 (1958); *Beckley v. Lipe Rollway Corp.,* 448 F Supp. 563, 567 (N.D.N.Y. 1978).
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> It is the Committee's [House Committee on Veterans Affairs] intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. *See Kidder v. Eastern Airlines, Inc.,* 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).[14]

[14] House Committee Report, April 28, 1993, H.R. Rep. 103-65 (Part 1) (emphasis supplied). This report is reprinted in full in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found on pages 713-14 of the 2025 edition of the *Manual.*

In four cases decided after Congress enacted USERRA in 1994, courts have rejected the argument that a person claiming USERRA rights is required to exhaust administrative remedies as a condition precedent to initiating a USERRA lawsuit.[15]

How the Supreme Court has addressed this issue.

In its first case concerning the 1940 reemployment statute, the Supreme Court held: "No practice of employers *or agreements between employers and unions* can cut down the service adjustment benefits that Congress has secured the veteran under the Act."[16] In its fifth case applying the reemployment statute, the Supreme Court firmly rejected the contention that a veteran claiming rights under the reemployment statute was required to exhaust arbitral remedies under the RLA before initiating a lawsuit in federal court against the railroad employer. The Court held:

> The rights petitioner asserts are rights created by federal statute *even though their determination may necessarily involve interpretation of a collective bargaining agreement*. Although the statute does not itself create a seniority system, but accepts that set forth in the collective bargaining agreement, it requires the application of the principles of that system in a manner that will not deprive the veteran of the benefits, in terms of restoration to

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[15] *See Huhmann v. Federal Express Corp.,* 874 F.3d 1102 (9th Cir. 2017); *Hance v. Norfolk Southern Railway Co.,* 571 F.3d 511 (6th Cir. 2009); *Veronko v. County of Suffolk,* 2018 WL 11697437 (E.D.N.Y. 2018); and *Duffer v. United Continental Holdings, Inc.,* 173 F. Supp. 3d 689 (N.D. Ill. 2016). Two of those cases, *Huhmann* and *Hance,* involve employers that are subject to the RLA.

[16] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946) (emphasis supplied).

position and advancement in status, for which Congress has provided.

Petitioner sues not simply as an employee under a collective bargaining agreement, but as a veteran asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the armed forces. For the effective protection of these distinctively federal rights, Congress provided in § 9(d) of the act that if any employer fails to comply with the provisions of the statute, the District Court, upon the filing of a petition by a person entitled to the benefits of the act, has jurisdiction to compel compliance and to compensate for loss of wages.

The court is enjoined to order speedy hearing in any such case and to advance it on the calendar, and the U.S. attorney must appear and act for the veteran in the prosecution of his claim if reasonably satisfied that he is entitled to the benefits of the act. Nowhere is it suggested that before a veteran can obtain the benefit of this expeditious procedure and the remedies available to him in the District Court, he must exhaust other avenues of relief possibly open under a collective bargaining agreement or before a tribunal such as the National Railway Adjustment Board.

On the contrary, the statutory scheme contemplates the speedy vindication of the veteran's rights by a suit brought immediately in the District Court, advanced on the calendar before other litigation, and prosecuted with the assistance of the U.S. attorney. Only thus, it evidently was thought, would adequate protection

> be assured the veteran, since delay in the vindication of re-employment rights might often result in hardship to the veteran and the defeat, for all practical purposes, of the rights Congress sought to give him.
>
> To insist that the veteran first exhaust other possibly lengthy and doubtful procedures on the ground that his claim is not different from any claim that an employee might file under a bargaining agreement would ignore the actual character of the rights asserted and defeat the liberal procedural policy clearly manifested in the statute for the vindication of those rights.[17]

Q: *Fishgold* and *McKinney* were decided decades before Congress enacted USERRA in 1994. Why are those cases even relevant?

A: On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA)[18] as a long-overdue rewrite of the VRRA. The 1994 law made some significant improvements, but do not think of this law as 32 years old, think of it as 86 years old. USERRA's legislative history includes the following important statement:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits have been

[17] *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265, 269-270 (1958) (emphasis supplied).

[18] Public Law 103-353, 108 Stat. 3149. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335 (38 U.S.C. §§ 4301-35).

> eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis,* 431 U.S. 581, 584 (1977).[19]

It should also be noted that, as I have stated above, USERRA's legislative history specifically mentions both *Fishgold* and *McKinney* with approval. The legislative history shows that Congress intended that the new law (USERRA) be interpreted consistently with the existing law (the VRRA) in most respects, including the specific respect of precluding binding arbitration of USERRA disputes by arbitrators appointed under the RLA.

The Supreme Court has repeatedly held that an arbitrator appointed by the union and the employer, under the terms of a collective bargaining agreement, has no authority to adjudicate the *statutory* rights of employees.

In a 1974 decision, the Supreme Court unanimously held that an employee who had been fired and who claimed that the firing amounted to discrimination against him on the basis of his race, was

[19] House Committee Report, April 28, 1993; HR Rep. 103-65 (Part 1). The entire text of this report is reprinted in Appendix D-1 of *The USERRA Manual,* by Kathryn Piscitelli and Edward Still. The quoted paragraph can be found on page 712 of the 2025 edition of the *Manual.*

not precluded from suing the employer in federal court under Title VII of the Civil Rights Act of 1964. The Court held:

> In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII. 42 U. S. C. § 2000e-5 (f)(1) (1970 ed., Supp. II). In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices. *Hutchings* v. *United States Industries*, 428 F.2d 303, 310 (CA5 1970); *Bowe* v. *Colgate-Palmolive Co*., 416 F.2d 711, 715 (CA7 1969); *Jenkins* v. *United Gas Corp*., 400 F.2d 28, 33 (CA5 1968). See also *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968).
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> Pursuant to this statutory scheme, petitioner initiated the present action for judicial consideration of his rights under Title VII. The District Court and the Court of Appeals held, however, that petitioner was bound by the prior arbitral decision and had no right to sue under Title VII. Both courts evidently thought that this result was dictated by notions of election of remedies and waiver and by the federal policy favoring arbitration of labor disputes, as enunciated by this Court in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), and the *Steelworkers* trilogy. See also *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *Gateway Coal*

Co. v. *United Mine Workers of America*, 414 U.S. 368 (1974). We disagree.

III

Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U. S. C. §§ 2000e-5 (b), (e), and (f). See *McDonnell Douglas Corp*. v. *Green, supra*, at 798. There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction.

In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. § 2000a *et seq*., Congress indicated that it considered the policy against discrimination to be of the "highest priority." *Newman* v. *Piggie Park Enterprises, supra*, at 402. Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums. See 42 U. S. C. § 2000e-5 (b) (1970 ed., Supp. II) (EEOC); 42 U. S. C. § 2000e-5 (c) (1970 ed., Supp. II) (state and local agencies); 42 U. S. C. § 2000e-5 (f) (1970 ed., Supp. II) (federal courts). And, in general, submission of a claim to one forum does not preclude a later submission to another.

Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement.

In reaching the opposite conclusion, the District Court relied in part on the doctrine of election of remedies. That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent, has no application in the present context. In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey* v. *Westinghouse Corp*., 375 U.S. 261 (1964).Cf. *Smith* v. *Evening News Assn*., 371 U.S. 195 (1962). There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each. Thus, the rationale behind the election-of-remedies doctrine cannot support the decision below.

We are also unable to accept the proposition that petitioner waived his cause of action under Title VII. To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. *Mastro Plastics Corp*. v. *NLRB*, 350 U.S. 270 (1956); *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver. See *Wilko* v. *Swan*, 346 U.S. 427 (1953).

The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. *J. I. Case Co*. v. *NLRB*, 321 U.S. 332, 338-339 (1944).

Moreover, a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee.

This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government. As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties:

"An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission," and the award will not be enforced. *Ibid*. Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.

The District Court and the Court of Appeals reasoned that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer, but not the employee, was bound by the arbitral award. In the District Court's words, it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." 346 F. Supp., at 1019.

This argument mistakes the effect of Title VII. Under the *Steelworkers* trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.

An employer does not have "two strings to his bow" with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices. *Oubichon* v. *North American Rockwell Corp*., 482 F.2d 569, 573 (CA9 1973).

The District Court and the Court of Appeals also thought that to permit a later resort to the judicial forum would undermine substantially the employer's incentive to arbitrate and would "sound the death knell for arbitration clauses in labor contracts." 346 F. Supp., at 1019. Again, we disagree. The primary incentive for an employer to enter into an arbitration agreement is the union's reciprocal promise not to strike.

As the Court stated in *Boys Markets* v. *Retail Clerks Union*, 398 U.S., at 248, "a no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration." It is not unreasonable to assume that most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII. Indeed, the severe consequences of a strike may make an arbitration clause almost essential from both the employees' and the employer's perspective.

Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee.

An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Respondent contends that even if a preclusion rule is not adopted, federal courts should defer to arbitral decisions on discrimination claims where: (i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged in the suit under Title VII; and (iii) the arbitrator has authority to rule on the claim and to fashion a remedy. Under respondent's proposed rule, a court would grant summary judgment and dismiss the employee's action if the above conditions were met. The rule's obvious consequence in the present case would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court.

At the outset, it is apparent that a deferral rule would be subject to many of the objections applicable to a preclusion rule. The 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. Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 359-360 (1971) (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co*., 363 U.S. 574, 581-583 (1960).

Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. 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. See *Bernhardt* v. *Polygraphic Co*., 350 U.S. 198, 203 (1956); *Wilko* v. *Swan*, 346 U.S., at 435-437. And as this Court has recognized, "arbitrators have no obligation to the court to give their reasons for an award." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp*., 363 U.S., at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

It is evident that respondent's proposed rule would not allay these concerns. Nor are we convinced that the solution lies in applying a more demanding deferral standard, such as that adopted by the Fifth Circuit in *Rio* v. *Reynolds Metals Co*., 467 F.2d 54 (1972). As respondent points out, a standard that adequately ensures effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. And judicial enforcement of such a standard would almost require courts to make *de novo* determinations of the employees' claims. It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights.

A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.[20]

Q: I have read that *Alexander v. Gardner-Denver Co.* has been overruled by *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). Is *Alexander* still good law?

[20] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45-60 (1974). *See also McDonald v. West Branch,* 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981).

A: It is not correct to state that *Gilmer* overruled *Alexander. Gilmer* did not overrule *Alexander.* Rather, *Gilmer* distinguished *Alexander*—the facts are different, so the result is different. *Gilmer* reaffirmed *Alexander* in the context of arbitration under a collective bargaining agreement, not arbitration under an individual contract in which an employee agreed to submit future employment-related disputes to binding arbitration, rather than a lawsuit in a federal or state court. The majority decision in *Gilmer* includes the following instructive and relevant paragraphs:

> In addition to the arguments discussed above, Gilmer vigorously asserts that our decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), and its progeny – *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981), and *McDonal* v. *West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) -- preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.
>
> In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights:

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U.S. at 49-50.

We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.*, at 53-54. The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.*, at 53. By contrast, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.*, at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.*, at 58, n.19.

Barrentine and *McDonald* similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.

There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions.

Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi*, 473 U.S. at 625. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. Accordingly, the judgment of the Court of Appeals is *Affirmed*.[21]

[21] *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 33-35 (1991).

Robert D. Gilmer was hired by Interstate as a “manager of financial services” in May 1981. As required by his employment, he registered with several stock exchanges. He was required to utilize the “Uniform Application Form,” and that form required him to agree to arbitrate any “dispute, claim, or controversy” that might arise between him and Interstate. Gilmer was 62 years old when Interstate terminated his employment in 1987.

Gilmer sued Interstate, asserting that firing him violated the Age Discrimination in Employment Act (ADEA). Interstate sought to compel Gilmer to submit his ADEA claim to arbitration, rather than litigation in court. The District Court held that, under the Federal Arbitration Act (FAA), Gilmer’s agreement to arbitrate was valid and enforceable. The Court of Appeals and the Supreme Court agreed.

Congress enacted the FAA in 1925.[22] The pertinent FAA section is as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon

[22] 43 Stat. 883.

> such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.[23]

Harrell Alexander, Sr., a black man, was fired by the Gardner-Denver Company on 9/29/1969. He filed a grievance with his union, and the matter was referred to the arbitrator under the collective bargaining agreement. The arbitrator held that Alexander had been fired for just cause.

Alexander then filed a complaint with the United States Equal Employment Opportunity Commission (EEOC), alleging that he had been fired because of his race, in violation of Title VII of the Civil Rights Act of 1964. The Court of Appeals held that the arbitrator's finding of "just cause" precluded his Title VII lawsuit.

Q: In Law Review 22048 (August 2022), you (Captain Wright) wrote that the 5th Circuit, the 6th Circuit, and the 9th Circuit have held that section 4302(b) of USERRA does not override or supersede an agreement that an individual signed, usually as a condition of being hired, that agreed that future employment disputes, including USERRA disputes, must be submitted to binding arbitration rather than lawsuits in court. In that article, you urged Congress to enact legislation to overrule those appellate court cases. What gives?

A: I adhere to what I wrote in Law Review 22048, *but that article deals with an entirely separate issue and is not relevant to this discussion.*

[23] 9 U.S.C. § 2.

In Law Review 22048, I addressed arbitration that an individual employee agreed to in a contract that he or she signed when hired or at some later date. In this article, I am referring to arbitration and other administrative remedies that are provided by a collective bargaining agreement between the employer and the union representing the employees.[24]

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

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[24] *See Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

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