OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CEASAR WRIGHT, Petitioner v. UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.

CASE NO: 97-889 C.2

PLACE: Washington, D.C.

DATE: Wednesday, October 7, 1998

PAGES: 1-51

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 CEASAR WRIGHT, :

4 Petitioner :

5 v. : No. 97-889

6 UNIVERSAL MARITIME SERVICE :

7 CORPORATION, ET AL. :

8 -X

9 Washington, D.C.

10 Wednesday, October 7, 1998

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 11:05 a.m.

14 APPEARANCES:

15 RAY P. McCLAIN, ESQ., Charleston, South Carolina; on

16 behalf of the Petitioner.

17 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the United States, as amicus curiae,

20 supporting the Petitioner.

21 CHARLES A. EDWARDS, ESQ., Raleigh, North Carolina; on

22 behalf of the Respondents.

23

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 RAY P. McCLAIN, ESQ.

4 On behalf of the Petitioner 3

5 ORAL ARGUMENT OF

6 BARBARA D. UNDERWOOD, ESQ.

7 On behalf of the United States, as amicus curiae,

8 supporting the Petitioner 19

9 ORAL ARGUMENT OF

10 CHARLES A. EDWARDS, ESQ.

11 On behalf of the Respondents 28

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 97-889, Ceasar Wright v. Universal Maritime

5 Service Corporation.

6 Mr. McClain.

7 ORAL ARGUMENT OF RAY P. McCLAIN

8 ON BEHALF OF THE PETITIONER

9 MR. McCLAIN: Excuse me. Mr. Chief Justice, and

10 may it please the Court:

11 Petitioner Ceasar Wright seeks a hearing on the

12 merits of his claim that the respondents violated his

13 rights under the Americans with Disabilities Act when they

14 refused to accept him for work when he was referred from

15 the union hiring hall.

16 As the district court found when Mr. Wright was

17 refused work, he took the matter to the union. The union

18 protested on his behalf, but when the employers would not

19 accede to the union's protest, the union decided, as the

20 district court found, that they would not pursue the

21 matter as a formal grievance, and recommended that Mr.

22 Wright should take the matter to private counsel to bring

23 the case under the Americans with Disabilities Act.

24 QUESTION: Do you think that the ADA claim could

25 have been resolved in a grievance procedure?

1 MR. McCLAIN: This grievance procedure I do not
2 believe was thought by the union to cover it.
3 QUESTION: I'm not asking you what the union
4 thought. I'm asking you whether -- if -- suppose the
5 union said, fine, we'll process it. Do you think under
6 this agreement that under the grievance procedure this
7 claim could have been resolved?
8 MR. McCLAIN: Not with finality. No, not
9 binding on the petitioner, if it was -- if it had been
10 addressed, no.
11 QUESTION: Why would it not have been binding on
12 the petitioner?
13 MR. McCLAIN: Because the grievance procedure
14 itself did not specifically provide for a statutory claim
15 to be pursued through that manner.
16 QUESTION: So then you're saying that the
17 collective bargaining agreement, because it didn't specify
18 statutory claims, didn't include this kind of a claim?
19 MR. McCLAIN: That's been the holding of this
20 Court for years, Your Honor.
21 QUESTION: In what cases?
22 MR. McCLAIN: Livadas v. -- the Livadas case is
23 the most recent one, in which it was indicated that the
24 waiver of an individual's right to proceed under a law
25 that was applicable to all workers would not be inferred.

1 QUESTION: Well, you said a holding of this
2 case, and now you say -- the case you cite for the
3 holding, you say it was indicated in the case. Was
4 Livadas a holding on this point?
5 MR. McCLAIN: I believe it actually was part of
6 the holding of that case, Your Honor. I'd have to read it
7 more carefully to be absolutely sure of that.
8 QUESTION: If there had been a nondiscrimination
9 clause in the collective bargaining agreement, would that
10 have changed the situation here? Would that have been
11 enough?
12 MR. McCLAIN: No, because as in Alexander the
13 petitioner had both remedies recognized by this Court's
14 decision.
15 QUESTION: Well, Alexander's been cut back in
16 later cases by our Court. Some of the reasoning of
17 Alexander has certainly been undercut as to arbitration
18 not being a satisfactory way of handling these cases.
19 MR. McCLAIN: That's correct, Your Honor, but
20 however, an essential part of the reasoning of Alexander
21 which this Court emphasized in the decision in the Gilmer
22 case is as applicable today as it was when Alexander was
23 decided, and that is that Mr. Wright had no legal
24 authority to compel a hearing on his claim. He was at the
25 mercy of the union's decision as to whether or not the

1 matter would be pursued.

2 QUESTION: Why is that worse for a statutory

3 claim than it is for -- is that only bad for Federal

4 statutory claims, or is it State statutory claims as well?

5 MR. McCLAIN: The same rule applies to the State

6 statutory --

7 QUESTION: To State statutory claims.

8 MR. McCLAIN: Which Livadas was an example of.

9 QUESTION: Why is a State statutory claim

10 against -- well, let's assume -- or a Federal, against

11 discrimination, why is that more important to the worker

12 than his common law right to get the money owed him for

13 work performed under a contract? I mean, you know, as

14 between one and the other, which one would you rather give

15 up?

16 MR. McCLAIN: I don't want to give up either

17 one, Justice Scalia.

18 QUESTION: Yes, me neither, but if I had to pick

19 I would think my right to agreed-upon contract

20 compensation might be the more important to me, to tell

21 you the truth.

22 MR. McCLAIN: Well --

23 QUESTION: What's the reason for this rule? And

24 what if California codifies its law of contract so that

25 your right to get money for a day's work as agreed upon in

1 the contract becomes a statutory right? It then becomes,
2 what, nongrievable in the union contracts?
3 MR. McCLAIN: Your Honor, basically -- let me
4 back off just a minute and try to start with the questions
5 one at a time.
6 QUESTION: All right.
7 MR. McCLAIN: First, Congress has determined
8 that certain minimum standards should apply to all
9 workers, and they have determined that these minimum
10 standards are enforceable in court, and they've determined
11 that they're only -- as this Court held in Alexander, it
12 has been determined that there are only two jurisdictional
13 requirements for going to court.
14 QUESTION: But congressional law is
15 interstitial. I mean, Federal law, especially in these
16 areas of contract, is really not the dominant law. The
17 States have determined, I can say just as --
18 MR. McCLAIN: Well, I would --
19 QUESTION: -- just as ponderously the States have
20 determined that a man or woman should get a day's pay for
21 a day's work as agreed upon, and has determined that there
22 should be a lawsuit available for that.
23 MR. McCLAIN: But in the unionized contract --
24 context, it is in fact Federal law that governs because of
25 the statutory relationship between the union as the

1 exclusive bargaining agent for the workers in that unit,
2 and so the union has to be the party to enforce the
3 rights, and the rights that it can enforce are those which
4 it has negotiated with the employer.
5 That's the nature of that particular workplace.
6 It has been organized pursuant to Federal statute, as
7 construed and applied for decades by this Court.
8 QUESTION: I'm not sure what you're saying. Are
9 you saying that the rule you're arguing for is that only
10 Federal statutes cannot be made -- cannot be disposed of
11 in the collective bargaining arbitration process?
12 MR. McCLAIN: No, sir. What I was stating -- I
13 was trying to answer your question about whether this was
14 a matter of State law, the contract right, and the fact is
15 that the contract right under the collective bargaining
16 agreement is totally regulated by Federal law, and the
17 rights, the manner in which those contract rights are
18 created, and the manner in which those contract rights are
19 enforced are thoroughly regulated by --
20 QUESTION: You're talking about 301.
21 MR. McCLAIN: That's correct.
22 QUESTION: And Lincoln Mills, and that --
23 MR. McCLAIN: Yes, ma'am.
24 QUESTION: And that under that whole regime you
25 have a right to go to court but you have to use the

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1 grievance arbitration procedure --

2 MR. McCLAIN: First, under 301 --

3 QUESTION: So that works for the whole

4 collective bargaining regime.

5 MR. McCLAIN: That's correct.

6 QUESTION: And was your distinction of Gilmer

7 primarily that the -- it is not the worker that has a

8 claim in the grievance procedure, it is the union that is

9 in control and that's --

10 MR. McCLAIN: That's --

11 QUESTION: That's how you differ it from Gilmer?

12 MR. McCLAIN: That's absolutely right. That's

13 why the union is not capable of making the same promise

14 that Mr. Gilmer made, because the union cannot say, under

15 the labor grievance mechanism, that Mr. Wright will have

16 the power to enforce this contract.

17 QUESTION: Well, but that simply states the

18 conclusion.

19 What if this case had come up under the Federal

20 Arbitration Act, that these people were not longshoreman,

21 but the Federal Arbitration Act would apply to their

22 contracts? There we would probably hold that this was

23 arbitrable, don't you think?

24 MR. McCLAIN: Well, Your Honor, of course this

25 Court has not decided the question of whether or not the

1 Federal Arbitration Act applies to any contract of
2 employment.
3 QUESTION: No, but let's assume we did decide
4 that point in favor of arbitration.
5 MR. McCLAIN: And then -- well, no -- the
6 critical distinction between Mr. Gilmer's situation as an
7 individual and Mr. Wright's situation as a member of an
8 organized bargaining unit is absolutely critical. Both
9 Mr. Wright has not in fact --
10 QUESTION: Are you answering my question, or --
11 MR. McCLAIN: I'm trying to.
12 QUESTION: Okay.
13 MR. McCLAIN: Sorry.
14 QUESTION: Keep trying.
15 MR. McCLAIN: The answer is no under the FAA,
16 because the promise -- the union just can't make the same
17 promise.
18 QUESTION: Well, but the union certainly is
19 capable of enforcing the contract rights, and it may have
20 to give away some of Mr. Wright's claims there, and you're
21 saying that there's some magic difference between
22 statutory rights and contract rights?
23 MR. McCLAIN: That is the case because the whole
24 labor grievance arbitration process for enforcing the
25 contract rights is an integral part of the bargain.

1 QUESTION: Well, if you made the arbitration
2 clause broader, supposing it said specifically that we
3 include statutories, then you could say that was an
4 integral part of the thing, too. That just states the
5 conclusion. To say it's an integral part --
6 MR. McCLAIN: No, sir, I'm sorry, I didn't make
7 myself clear.
8 When I say it's an integral part of the bargain
9 I mean that the decision -- in other words, the way in
10 which disputes under the contract are to be resolved is in
11 the contract --
12 QUESTION: Well --
13 MR. McCLAIN: -- and there is -- it doesn't have
14 any source in external law, in public law.
15 QUESTION: Well, but why does that make a
16 difference?
17 MR. McCLAIN: As between the FAA and --
18 QUESTION: Well, either between the FAA and the
19 present situation or between statutory rights. I mean, if
20 arbitration is favored, I mean, why don't we encourage the
21 inclusion of arbitration clauses in Federal labor
22 contracts, allow for the arbitration and statutory rights?
23 MR. McCLAIN: Because that would threaten the
24 union's role as the exclusive bargaining agent.
25 QUESTION: How would it do that?

1 MR. McCLAIN: Well, the control, as this Court
2 has emphasized in decisions such as Vaca v. Sipes, the
3 control of the grievance process in the hands of the union
4 subject to only an extremely limited review is essential
5 to the union's role as -- in enforcing the contract, in
6 continuing to maintain labor peace by not only making an
7 agreement with the employer in the first place but by then
8 resolving disputes that arise under the agreement with
9 that employer.
10 And if the union does not have the authority to
11 make these decisions with a very limited scope of review,
12 then it will not be able to have the same give-and-take
13 that this Court has approved --
14 QUESTION: Well, maybe it does have authority to
15 make these decisions with limited scope of review.
16 MR. McCLAIN: That's correct, and then that --
17 that deprives the individual of his right under the
18 Federal statute.
19 QUESTION: Well, but if his right to -- if his
20 right to contract for wages is subject to that, why
21 shouldn't his statutory rights be subject to that?
22 MR. McCLAIN: In part because this Court
23 concluded in Alexander that --
24 QUESTION: Well --
25 MR. McCLAIN: -- that was not the case, and it

1 has been reaffirmed in numerous cases since that time,
2 because of the absence of the ability of the individual to
3 control the prosecution of his claim, and Congress has
4 approved that arrangement, and --
5 QUESTION: How did Congress approve it?
6 MR. McCLAIN: In the same way that Congress
7 approved this Court's decision in the Meritor case, as was
8 discussed in the Faragher and Ellers decisions at the end
9 of last term, that the -- in the 1991 Civil Rights Act
10 Congress specifically addressed and modified some eight
11 decisions of this Court. It did not address Meritor.
12 QUESTION: So by not addressing a case Congress
13 confirms it?
14 MR. McCLAIN: Well, in -- that's -- I'm simply
15 citing the decisions of this Court.
16 QUESTION: You must not be familiar with the
17 legislative process.
18 QUESTION: Mr. McClain, I thought your argument
19 at least in part is somewhat different from what you have
20 been saying to the Chief Justice, and let me just put
21 forward what I thought was at least one strand of your
22 argument, and you tell me whether it is or it isn't.
23 I thought at least one strand of your argument
24 was that the line represented in Alexander, for example,
25 or drawn in Alexander still applied here, was that it was

1 the only way to respect what Congress has in fact done.

2 And Congress has in fact given a crucial

3 bargaining role to unions in contract formation, and

4 therefore there's nothing really inconsistent with that

5 with saying, okay, we're also going to give the union an

6 equally significant role in determining how we negotiate

7 enforcement of this contract, if you will.

8 But Congress has not given the union any role in

9 the formation of the right under title -- rights under

10 title VII or the ADA, and that's why we are simply

11 respecting the will of Congress in saying, you can't let

12 the union bargain away what the union has had no role in

13 giving, whereas when you have given the union a role in

14 contract formation it is consistent with congressional

15 intent to let the union have a role in enforcing it. I

16 thought that was the guts of your argument.

17 MR. McCLAIN: I think -- I certainly agree with

18 your -- the case as stated, or the propositions as stated,

19 Justice Souter. I don't disagree with that at all. I was

20 trying to articulate that earlier and failed to do so as

21 well as you have.

22 QUESTION: May I ask if the end result, then, is

23 what you're saying is, in any employment covered by a

24 collective bargaining contract you simply cannot have a

25 Gilmer-type deal because the employer, under the NLRA the

1 employer cannot contract with the employee, but only with
2 the union?
3 MR. McCLAIN: Well, that is the case unless the
4 union authorizes the employer to make a separate agreement
5 with the individuals.
6 QUESTION: Can the union do that? I didn't know
7 that.
8 MR. McCLAIN: If the union and the individual
9 agree to do so we believe that they can. They cannot do
10 it directly.
11 QUESTION: Do you know of any instances where
12 they -- you see, one of the things that affects me about
13 this case is, if I were an employer, I would have a
14 severe -- and with the multiplication of Federal laws
15 affecting the employment relationship, the ADA and a
16 number of others, I would be very disinclined to have a
17 unionized shop if it means that neither the union can
18 agree to have all of these common disputes arbitrated, nor
19 can the individual employee.
20 MR. McCLAIN: I think I'm trying to state that
21 our position is that if the union and the individual
22 employee concur, each individual employee as to his
23 claims, then it can be done.
24 QUESTION: But --
25 MR. McCLAIN: It cannot be done --

1 QUESTION: I thought the rule was the individual
2 employee cannot negotiate -- in a unionized situation the
3 negotiation between the employer must be through the
4 union. It cannot be with the individual.
5 So you cannot get each individual employee to
6 agree, we'll go to arbitration on all these title VII
7 claims, these ADA claims. You can't go to the individual
8 employees.
9 Whereas the employer who doesn't have a union,
10 when he hires people as part of the employment contract,
11 any disputes about title VII, about the ADA, will go to
12 arbitration. That would be lawful in that situation,
13 wouldn't it?
14 MR. McCLAIN: Not if it's a condition of
15 employment, Your Honor. I don't believe that's Congress'
16 intent.
17 QUESTION: Not if it's a condition of
18 employment?
19 MR. McCLAIN: Not if it's a unilaterally imposed
20 condition of employment. There's no voluntary right --
21 QUESTION: Maybe what you're saying is that the
22 JI case law is for the benefit of the union, that you
23 can't -- the employer can't make individual contracts.
24 If the union wants to waive that benefit, and
25 say -- and agree that the individual can contract directly

1 with the employer, that would be the only person who could
2 complain.
3 MR. McCLAIN: That's correct, Your Honor, and --
4 or the union could negotiate a framework and allow
5 individual members of the union -- the bargaining unit to
6 opt into that framework.
7 QUESTION: In that hypothetical could the
8 employer make it a condition of employment?
9 MR. McCLAIN: Could the -- well, the employer --
10 QUESTION: Could the employer say, we've agreed
11 on this framework and you're going to let me go to
12 individual employees, but if they don't sign this they
13 can't work for me?
14 MR. McCLAIN: I don't -- well, he has to bargain
15 with the union, and if the union doesn't -- certainly if
16 the union does not agree to make it a condition of
17 employment the employer could not impose it unilaterally
18 without the union's consent.
19 QUESTION: The union is in the driver's seat on
20 all of this, so what you said is, the union if it wants to
21 can say, we're going to give up the control rein that we
22 hold over the grievance procedure and we're going to let
23 this person make this deal with the employer, but the
24 union stands at the gate, and unless the union says yes,
25 the employer cannot make a deal with the individual

1 employee, right?

2 MR. McCLAIN: That's the nature of the union's

3 role --

4 QUESTION: Yes.

5 MR. McCLAIN: -- as exclusive bargaining agent.

6 QUESTION: So it is the case that in a

7 collective bargaining situation the employer will not be

8 able to make a Gilmer deal, because he can't deal, get

9 past the union.

10 MR. McCLAIN: Well, but even if he made an

11 agreement with the union and -- that's correct, but even

12 if he made an agreement with the union it would not be a

13 Gilmer deal because individual employees have not --

14 QUESTION: Yes.

15 MR. McCLAIN: Don't have the power to enforce

16 it.

17 QUESTION: What I mean is he can't get -- he

18 can't get -- he can't go directly to the individual

19 employee. He can go only if the union says okay, which

20 seems unlikely that the union's going to give up control

21 over the grievance procedure.

22 MR. McCLAIN: Well, that may be, and then it's a

23 question for bargaining between the employer and the

24 union.

25 QUESTION: Thank you, Mr. McClain.

1 Ms. Underwood, we'll hear from you.

2 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

3 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE PETITIONER

5 MS. UNDERWOOD: Mr. Chief Justice, and may it

6 please the Court:

7 A worker's right to a judicial hearing on a

8 claim of employment discrimination is an individual right

9 that can't be waived by a collective bargaining agreement

10 between the union and an employer. This Court said so in

11 Alexander in 1974 and has reaffirmed that principle many

12 times since then.

13 It's a matter of statutory interpretation, as

14 Justice Souter said earlier, and the Court said so

15 recognizing a fundamental tension between individual

16 statutory rights conferred by Congress and collective

17 representation.

18 The Court said that unions are properly

19 concerned with the collective interests of their members,

20 and that it would be inconsistent with the individual

21 focus of at least the antidiscrimination laws to let a

22 union decide whether and how to enforce claims under those

23 laws.

24 QUESTION: I know we said that, but I --

25 MS. UNDERWOOD: Well, I'd like to say that

1 not --

2 QUESTION: I'm still not sure I understand why

3 it's so. It might seem --

4 QUESTION: And Alexander was different.

5 QUESTION: -- like my individual right to money

6 is no less individual than my individual right not to be

7 discriminated against.

8 MS. UNDERWOOD: Well, but your right to money,

9 your wages and -- except for the minimum wage requirements

10 established by the Federal -- by the Fair Labor Standards

11 Act are precisely what the union was set up and authorized

12 by Congress to negotiate.

13 This, as I said, is a question of interpreting

14 statutory regimes, and this Court concluded correctly that

15 there were two regimes here, one in which Congress

16 conferred the power to invoke and waive both rights and

17 procedures ancillary to those rights on individuals, and

18 the other on unions, and there's an additional reason for

19 adhering to that regime now, because --

20 QUESTION: Both of these laws apply to the

21 employment relationship equally. My right to get paid for

22 the work I do is a right that relates to the employment --

23 my right not to be discriminated against by the employer,

24 not to be fired for reasons that would violate the ADA,

25 they relate to the employment relationship just as well.

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1 I don't know how you can --

2 MS. UNDERWOOD: That's true. The question is,

3 who did Congress intend to confer the power of enforcing

4 those rights upon in a unionized workplace?

5 QUESTION: But wait, Alexander, I take it a

6 different case. In Alexander there was a question of a

7 contractual claim, and the Court said that delegating to

8 the union the power to settle the contractual claim did

9 not delegate to the union the power to settle a statutory

10 claim, which was a different claim, and so what you seem

11 to be arguing is a different thing, which I would like to

12 know the answer to.

13 If I say to you, I like you, you're my friend, I

14 would like you to settle my lawsuit against somebody else,

15 I can do that, no matter whether it comes under a statute

16 or not, so why couldn't I say, the union is my friend. I

17 delegate to the union the power to settle my statutory

18 claim against the employer in this area?

19 Now, I think there's a question of whether this

20 has done that, but suppose it were absolutely clear. The

21 worker says, I delegate to my friend the union the power

22 to meet with my employer and settle my statutory

23 discrimination claim. Is there something in the statute

24 books that would prohibit that from happening?

25 MS. UNDERWOOD: Well, I think there's a question

1 about whether Congress intended to permit unions to settle
2 in advance, which is what this is, not to --
3 QUESTION: I mean in my case. I have a piece of
4 paper --
5 MS. UNDERWOOD: Oh, to settle the existing
6 claim?
7 QUESTION: No. They say, now, we settle the
8 existing claim. Fine. What I do is, I say, it may be
9 this employer, whom I don't trust all that much, will one
10 day discriminate against me, and I hereby give to you, the
11 union, the power to settle any future discrimination claim
12 against me by this employer. Is there something in the
13 law that prohibits that?
14 MS. UNDERWOOD: Yes. I would read the --
15 QUESTION: What? Yes.
16 MS. UNDERWOOD: -- antidiscrimination laws as
17 prohibiting that for several reasons. One, the structural
18 analysis that I believe the Court undertook in Alexander,
19 because the Court said not only the contract did not give
20 the union the power to settle the statutory -- to waive
21 the judicial forum for the statutory claim, but that it
22 could not.
23 But beyond that, I think it's implausible to
24 think that Congress gave unions the power to assert or
25 waive their members' rights.

1 QUESTION: It wouldn't be a power given to the
2 union. The question would be, normally I take it you are
3 my lawyer. I could say to you, lawyer, if Mr. Smith ever
4 does anything bad to me in a certain area, I hereby
5 delegate to you the power to settle it.
6 Now, that's the normal background rule of law,
7 and it doesn't limit it only to lawyers, so I suppose
8 you'd have to find something that would suggest in this
9 statute that although I could delegate this power to my
10 lawyer, I couldn't delegate it to the union.
11 MS. UNDERWOOD: Well, one of the things --
12 QUESTION: And if so, what is that?
13 MS. UNDERWOOD: One of the things I'd point to
14 is the fact that in the antidiscrimination laws, in title
15 VII in the ADA and the ADEA, the unions are identified as
16 potential defendants, and it seems implausible that
17 Congress would, in the same statute that it -- and there's
18 a historical reason why that's so. That is, the unions
19 had been and perhaps still are sometimes participants in
20 the discrimination.
21 QUESTION: Why is that different from the
22 Securities Act cases, where we've said you can agree to an
23 arbitration, and the -- you know, the obviously the
24 arbitration is going to be against your employer, very
25 often, or perhaps your broker, and you have a board of

1 arbitrators in which the broker has a large part of saying
2 who's going to be appointed.
3 MS. UNDERWOOD: Well, we're not challenging the
4 Gilmer propositions that you can agree to arbitration of
5 these antidiscrimination claims as well.
6 The point is that you can't -- that Congress
7 didn't intend that the union, who will frequently be, or
8 sometimes be allied with the discriminator, couldn't --
9 could make the agreement on your behalf, that the union
10 doesn't have the same undivided duty of loyalty in
11 relationship to employees, particularly with regard to
12 these discrimination issues, as does your lawyer, whose
13 obligation is entirely of direct loyalty to --
14 QUESTION: What if -- I'm sorry. What if the
15 employee knows all of that? He says, look, I realize that
16 our positions are not exactly right, but I don't want to
17 have to go through this myself and hire a lawyer. I'm
18 willing to take my chances with you. I make a specific
19 agreement with you, the union, which says you can
20 arbitrate and otherwise deal with my rights in any way you
21 see fit.
22 Why, if the agreement is the kind of knowing
23 agreement that I've just described, should that not be
24 allowed, because the -- I mean, the point of the ADA is to
25 protect the person who is making this knowing and willing

1 agreement, and if he wants to agree, why is there a
2 congressional purpose to disallow it?
3 MS. UNDERWOOD: Well, I think the statutes, the
4 antidiscrimination statutes are fairly read as reserving
5 to the individual the right to assert or waive both the
6 statutory right itself and the judicial forum for it, but
7 it would --
8 QUESTION: Well, why should that be, because
9 there is such a danger that the union is going to be a
10 coparticipant in the kind of discrimination? Is that why
11 you think Congress intended as a matter of law to disallow
12 the kind of agreement that Justice Breyer has and, if not,
13 what would the reason be?
14 MS. UNDERWOOD: Well, I think that's one of the
15 reasons.
16 I think it's not just, however, being a
17 coparticipant in the discrimination. It is the nature of
18 the union's obligation that it has a broad discretion,
19 consistent with the duty of fair representation, to decide
20 which claims to enforce, how vigorously to enforce them,
21 that it may make a judgment, for example, that it would be
22 more productive in the area of sexual harassment to
23 negotiate policy changes with the employer and leave the
24 pressing of individual claims alone for the time being
25 while these general policy negotiations are going on.

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1 QUESTION: Do I understand --

2 QUESTION: Am I missing -- am I missing the boat

3 here, or is it really not Justice Breyer's question that

4 we have before us here?

5 As I understood his question, it was the

6 individual employee who would agree to waive it, and

7 that's not the situation here. It was a collective

8 bargaining agreement that this individual employee had no

9 control over, right?

10 MS. UNDERWOOD: This individual employee -- this

11 compuls -- this arbitration clause was a) agreed to by the

12 union and not by the employee and 2) constructed an

13 arbitration process that was controlled by the union and

14 not by the individual.

15 So yes, it does not present the question, could

16 such a contract exist, although I think that there's a

17 serious question about whether it could.

18 I do want to address a question that was raised

19 earlier about whether the union workplace would

20 necessarily be a Gilmer-free world, that is to say,

21 whether it would be possible to negotiate such contracts

22 in the union workplace.

23 And I think -- and the point was made, but I'd

24 just like to emphasize it, that the union could, under

25 Case, authorize such contracts. It might in some

1 workplaces be unlikely that it would do so.

2 In workplaces where individuals have a great

3 deal of power themselves, union contracts often do reserve

4 the possibility of individual contracts about all manner

5 of things, to baseball players and people in the

6 entertainment industry, perhaps not so often to

7 longshoremen.

8 QUESTION: Fickle workers, eh?

9 (Laughter.)

10 MS. UNDERWOOD: Yes. Yes.

11 But to return to Justice Souter's question, it

12 would be possible -- I believe the statutes prohibit the

13 employee from delegating to the union the power to make

14 these agreements, but another --

15 QUESTION: Because the risk is just too great,

16 right?

17 MS. UNDERWOOD: Yes. But an alternative would

18 be to indulge -- to establish a strong presumption against

19 such a delegation so that when the contract is being

20 interpreted -- and perhaps that was what informed

21 Alexander. After all, this Court said that if the

22 Alexander did not in fact cover statutory rights --

23 QUESTION: Thank you, Ms. Underwood.

24 MS. UNDERWOOD: -- because it could not.

25 QUESTION: Mr. Edwards, we'll hear from you.

1 ORAL ARGUMENT OF CHARLES A. EDWARDS
2 ON BEHALF OF THE RESPONDENTS
3 MR. EDWARDS: Mr. Chief Justice, and may it
4 please the Court:
5 We believe it's clearly a question presented to
6 the Court to hear as to whether there should be two rules
7 of law, one applicable to nonunion employees, and I mean
8 that in the broader sense -- that is, employees not
9 covered by a collective bargaining agreement, rather than
10 just simply union members, and one for those who actually
11 are bargaining unit members. The --
12 QUESTION: Either way we're going to have that,
13 is that not true, unless we overrule Alexander, because
14 Alexander says it comes in after the grievance and
15 arbitration procedure has been used, and then the Court
16 says, but title VII is something different, so there's
17 already a separate regime.
18 QUESTION: Well, Justice Ginsburg, in the Gilmer
19 decision this Court brought up three issues which were not
20 before the Court in Gilmer, and said that those three
21 issues represented grounds upon which Alexander had
22 continuing vitality.
23 Two of those grounds, I would respectfully
24 submit, are distinctions without a difference, one being
25 the presumption in favor of arbitration under the Federal

1 Arbitration Act, which in my careful reading of this
2 Court's decisions seems to be totally the same as the
3 presumption in favor of labor arbitration.
4 The second was the question of, in Alexander and
5 in Barrentine and in McDonald, the three cases that were
6 characterized by this Court as Alexander and its progeny,
7 the question was, what is the binding effect in terms of
8 res judicata, collateral estoppel, issue preclusion, fact
9 preclusion, whatever you want to call them, of an already
10 completed arbitration award, or arbitration decision which
11 you cannot tell from the record of the case considered the
12 discrimination question whatsoever, and so it is certainly
13 possible to continue to distinguish Alexander on those two
14 bases or on the basis -- on the second ground, and never
15 get to a need to overrule. The question, however,
16 though --
17 QUESTION: I don't understand, because it seems
18 to me that if -- unless there's going to be very limited
19 review of the arbitration, then all this is is a
20 protraction thing. It says, yeah, you've got your good
21 old title VII right in court with a jury trial, but you
22 have to wait and go to arbitration, and then whatever the
23 result is, if you don't like it, come to court.
24 MR. EDWARDS: Well, the question of scope of
25 review was, of course, addressed in a sense in Alexander

1 by saying there can be no estoppel effect whatsoever, so
2 there is nothing to review, but the question of the scope
3 of review of an arbitration award involving statutory
4 claims is, of course, not properly presented in this case.
5 It is -- that's one which has been litigated in
6 great detail in other cases which I certainly presume are
7 going to find their way in this direction sooner or later,
8 and I think that one of the most instructive decisions in
9 that regard is Judge Edwards' decision in the Cole case in
10 the D.C. Circuit, in which he advocates a heightened
11 scrutiny standard.
12 Because after all, rather than deferring to the
13 arbitrator's contract interpretation in a statutory claim
14 arbitration the arbitrator is, at least in some sense,
15 resolving either questions of law or mixed questions of
16 law and fact which go beyond the terms of the contract per
17 se and, therefore, a court would be empowered to determine
18 whether, in fact, the procedures employed in the
19 arbitration, the remedies available to the grievant in the
20 arbitration comported with title VII, the ADEA, and the
21 Americans with Disabilities Act.
22 QUESTION: Well, instead of talking about Judge
23 Edwards' decision, could you tell me how you think, if you
24 prevail in this case, what happens when the employee says,
25 I don't like what the union got for me, I'm bringing my

1 own title VII case? Can he do that?

2 MR. EDWARDS: Certainly I can, Your Honor. In

3 that particular situation, if we're talking about a

4 hypothetical employee rather than about the petitioner in

5 this case, a hypothetical employee dissatisfied with the

6 union's conduct of the arbitration would actually have, or

7 the union's willingness to go forward with the arbitration

8 would have several remedies available to them.

9 QUESTION: I'm not asking about several. I'm

10 asking about, does he have a title VII remedy? I'm not

11 asking anything about bad faith, duty of fair

12 representation.

13 He -- is this just a question of primary

14 jurisdiction, as it seemed to be in Alexander? Then you

15 come to title VII. The employee files his title VII

16 claim. He doesn't like the result of the arbitration, as

17 the employee didn't in Alexander. He comes to court, and

18 then what?

19 MR. EDWARDS: When he is in court he -- the --

20 a -- the problem then is determining what standard of

21 review, if any, applies to the prior arbitration

22 proceeding, because he'd have to show --

23 QUESTION: Well, let me ask you --

24 MR. EDWARDS: Yes.

25 QUESTION: -- a very particular question, then.

1 MR. EDWARDS: Yes.

2 QUESTION: Title VII nowadays gives a plaintiff

3 a jury trial. In my case, yes or no, would my person who

4 goes to title -- who goes to court on his title VII after

5 the grievance procedure and he doesn't like the result,

6 does he get a jury trial?

7 MR. EDWARDS: I don't believe so, Your Honor,

8 because the same statute that afforded the title VII

9 plaintiff a right to a jury trial, the Civil Rights Act of

10 1991 gave on the one hand, took away on the other by

11 encouraging alternative dispute resolution through a

12 section of that statute, a section of the -- and an,

13 virtually identically worded section of the Americans With

14 Disabilities Act.

15 QUESTION: Well, now you're going on to another

16 point about the -- what was the ADR thing in the 1991 act,

17 and I think Judge Posner takes a view of that quite

18 different from the one that you --

19 MR. EDWARDS: He certainly does, and

20 QUESTION: But anyway, let's -- so you're saying

21 that in essence you are asking us to overturn Alexander,

22 because you've given me the answer that if you prevail

23 here you come to court and you get some kind of standard

24 of review that's less than de novo, and you don't get a

25 jury trial.

1 MR. EDWARDS: The plaintiff in Gilmer didn't get
2 a jury trial, either, so --
3 QUESTION: You're not asking us to agree with
4 you on the second one.
5 MR. EDWARDS: No.
6 QUESTION: You're just saying that that's what
7 you think will happen, but we could agree with you as to
8 what should happen to this case and disagree with you as
9 to what happens when whatever the result of the
10 arbitration is is brought before a court.
11 MR. EDWARDS: Certainly.
12 QUESTION: I don't have to agree with both just
13 because I agree with one.
14 MR. EDWARDS: You do not have to agree with
15 both.
16 QUESTION: Now if -- may I ask, Mr. Edwards --
17 MR. EDWARDS: For that matter, you don't have to
18 agree with either.
19 (Laughter.)
20 QUESTION: Mr. Edwards -- Mr. Edwards.
21 MR. EDWARDS: Yes.
22 QUESTION: Hello. May I ask --
23 MR. EDWARDS: Pardon me, Justice O'Connor.
24 QUESTION: May I ask a question of you? Would
25 this person, this employee have been entitled to go to

1 grievance on this claim, this ADA claim?

2 MR. EDWARDS: Independent of any action by the

3 union?

4 QUESTION: When the -- the union says no, we're

5 not going to do it. Now --

6 MR. EDWARDS: If that were the case, if the

7 union had flatly refused, which is not established in the

8 record, if the union had flatly refused, there is, as I

9 read section 9(a) of the National Labor Relations Act, an

10 opportunity for the individual to attempt to present a

11 grievance on his own with the proviso that the union has

12 to be given notice of his intent to do so, and I think he

13 could have prosecuted it.

14 I will confess to Your Honor that I have no

15 basis under this particular collective bargaining

16 agreement for that --

17 QUESTION: For saying that.

18 MR. EDWARDS: For saying that.

19 QUESTION: No.

20 MR. EDWARDS: But this is the only employment

21 discrimination claim that has ever arisen in this context.

22 QUESTION: And could the grievance procedure

23 deal with the ADA issue, do you think?

24 MR. EDWARDS: The grievance procedure could deal

25 with the ADA issue presented in this case because, and

1 only because -- I'm not making a position here that under
2 the general language of the collective bargaining
3 agreement in question all discrimination claims can be
4 arbitrated. There is no discri -- no clause prohibiting
5 discrimination per se in the agreement.
6 QUESTION: But nothing that specifically
7 includes statutory claims.
8 MR. EDWARDS: Nothing that specifically includes
9 statutory claims except that section 17 of the collective
10 bargaining agreement requires that the agreement not be
11 construed so as to violate any State or Federal laws,
12 which would mean that, in Ceasar Wright's case, in order
13 for an arbitrator to determine whether he was "qualified"
14 to return to work from his medical leave of absence he
15 would have -- the arbitrator would have had to determine
16 whether the plaintiff was "otherwise qualified" under the
17 terms of the ADA.
18 And therefore this is one of those instances in
19 which the issue to be arbitrated is specific to a
20 statutory claim, unlike the generalized kinds of
21 discrimination claims that are more fairly presented in
22 cases such as Austin, Pryner, Brisentine, and various
23 other cases.
24 QUESTION: Why are they less specific? I mean,
25 give me an example of why they're less specific.

1 MR. EDWARDS: Well, the agreements in many of
2 those cases, not in Brisentine but in Austin and Pryner,
3 specifically refer to statutory claims, say that statutory
4 claims are dealt with by this agreement, that the
5 affirmative obligations of Federal law with respect to
6 discrimination specifically apply.
7 If Mr. Wright's claim had involved something
8 less integral to contract language than the question of
9 qualifications, then it is quite conceivable that this
10 issue would not have been argued by us to be one committed
11 to the grievance and arbitration process.
12 QUESTION: Mr. Edwards, may I ask you a question
13 about the Civil Rights Act in 1991 to which you
14 referred --
15 MR. EDWARDS: Certainly, Your Honor.
16 QUESTION: -- and which you quote on your brief?
17 Would you assume for a moment that legislative
18 history is relevant, and just take that premise.
19 Are you familiar with the passage in the House
20 report that states that this provision was intended to
21 supplement rather than to supplant the rights and remedies
22 provided by statute, and that the minority had proposed a
23 bill that would have made it clear that one was a
24 substitute for the other, and they rejected that proposal?
25 MR. EDWARDS: I'm quite familiar with that. The

1 same language appears in the conference report of the 1990
2 Civil Rights Act, and I believe also in the conference
3 report with respect to the Americans With Disabilities
4 Act.
5 That conference report goes on at one point to
6 say that Alexander is the way the law ought to be applied.
7 However, by the time the Civil Rights Act of 1991 was
8 enacted, Gilmer was the law of the land with respect to
9 arbitration and much of that language in the legislative
10 history becomes rather meaningless, and --
11 QUESTION: Why is it meaningless if it expresses
12 an intent to adopt the earlier view? There's nothing in
13 the report suggests they favor the Gilmer view.
14 MR. EDWARDS: There's no floor debate on any of
15 this.
16 QUESTION: And it is clear, is it not, that
17 the -- a bill was proposed and rejected that would have
18 clearly adopted your view?
19 MR. EDWARDS: And it's also true, Your Honor,
20 that there have been bills proposed since Gilmer was
21 decided to overrule Gilmer, and those haven't been
22 enacted.
23 QUESTION: Right.
24 MR. EDWARDS: So --
25 QUESTION: We're talking about the history of

1 the statute on which you rely, the 1991 act.

2 MR. EDWARDS: That's correct, and in the -- a

3 statement by Senator Dole immediately prior to passage in

4 the Senate, Senator Dole said that this provision on

5 encouraging ADR is designed to further the goals expressed

6 in Gilmer, so apparently there are legislators of

7 different views which --

8 MR. EDWARDS: Of course, Senator Dole was

9 speaking for the minority, and he had supported the bill

10 that was rejected.

11 MR. EDWARDS: But he was speaking in favor of

12 the bill that was signed by both Houses, and therefore --

13 I'm --

14 QUESTION: It's really hard to tell, isn't it?

15 (Laughter.)

16 MR. EDWARDS: It's extremely hard to tell.

17 That's why I quoted --

18 QUESTION: Spent a lot of time on it, though.

19 QUESTION: Can I --

20 MR. EDWARDS: I would hate to do that. I think

21 this is one of those --

22 QUESTION: If you would like -- not like to

23 spend more time on it, could I ask you the --

24 MR. EDWARDS: Certainly, Justice Breyer --

25 QUESTION: -- sort of the second half of the

1 question I asked Ms. Underwood. You heard her response.
2 I don't know if you remember it.
3 But I was thinking of the individual employee,
4 and he simply delegates expressly to the union the power
5 to settle a discrimination claim under a statute, and she
6 was taken a little aback, and she mentioned the history,
7 and I take it the history shows that unions, too, are very
8 much involved in discrimination, and that was one of the
9 reasons why these acts were passed.
10 All right. My question is, given that history,
11 and given what Justice Scalia said, that we're not dealing
12 with an individual here, we're dealing with a group of
13 people who may or may not be focusing on what's in this
14 particular collective bargaining agreement, and given
15 ambiguous language in that agreement, why should there not
16 be a presumption that there is no delegation of authority
17 in the union to settle such claims, which are not like
18 typical CBA claims.
19 The typical collective bargaining agreement,
20 after all, sends to arbitration disputes arising under the
21 agreement, not normally statutes, unless they're directly
22 related to certain labor areas.
23 So given all that, why wouldn't we say under 301
24 in the discrimination area there is a presumption that the
25 claim is not delegated to the union to settle unless it

1 pretty clearly -- you know, like a first options type of
2 language, unless it pretty clearly says that it is, and
3 that would solve the problem, perhaps not the way you
4 would like it solved, but what is the objection, legally,
5 to doing that?
6 MR. EDWARDS: The critical problem there it
7 seems to me is that then what would really be being said
8 is that except under the most exceptional circumstances an
9 employer which has a collective bargaining relationship
10 with a union cannot have statutory discrimination claims
11 for employees covered by that relationship --
12 QUESTION: It does not say that.
13 MR. EDWARDS: -- with the arbitrator.
14 QUESTION: It says that it would have to be --
15 it would have to be stated pretty explicitly, and now, if
16 there is such a situation, if there does turn out to be a
17 collective bargaining agreement where the union really
18 goes to the employees and says, do you want us to settle
19 these claims, and they write it right into there, and the
20 employer signs it, that's the time to deal with the
21 question that I asked Ms. Underwood.
22 But not here, where in fact it doesn't say
23 anything like that. It's very general. It's vague. It's
24 like all other collective bargaining agreements but for
25 the fact that it doesn't say, explicitly limited to

1 arising under.

2 MR. EDWARDS: I think the hypothetical assumes

3 certain facts which are highly unlikely to occur in

4 today's labor management workplace, but certainly if a

5 union were to agree that individual employees could

6 consent to arbitration, prospectively, of future disputes,

7 then that would present a clearer case. I do not

8 necessarily think that it follows --

9 QUESTION: No, no. But Justice Breyer's

10 question is, what's wrong with a decision -- you would

11 lose in this case, but from the standpoint of logic and

12 rationality, what's wrong with our saying, look, these

13 grievance procedures, grievance committees are not set up

14 as adjudicative bodies. They're set up to negotiate under

15 the collective bargaining agreement having to do with

16 longshore work. These people don't know anything about

17 adjudicating a claim under this act.

18 So what's wrong with saying that it simply

19 doesn't cover such claims unless it specifically says so?

20 MR. EDWARDS: I believe your question presumes,

21 Your Honor, that labor arbitrators are less competent than

22 other arbitrators to resolve statutory claims. I think

23 that --

24 QUESTION: Well, that is part of my question.

25 After all, this is a grievance committee consisting mostly

1 of employees and representatives of employers. They're
2 not an adjudicative body in the normal course, and why
3 isn't -- what's wrong with Justice Breyer's suggestion
4 that we simply presume that claims of this type are not to
5 be submitted to that kind of agent, absent specific
6 language?
7 MR. EDWARDS: Well, if all there were, Your
8 Honor, were a grievance committee, I would agree with you.
9 However, we've got the further step of arbitration here by
10 a neutral selected by the parties.
11 QUESTION: Well, let me ask you on that precise
12 point --
13 MR. EDWARDS: Yes.
14 QUESTION: -- I take it that this agreement
15 isn't governed by the Federal Arbitration Act.
16 MR. EDWARDS: I think that even under the
17 broadest interpretation of the Federal Arbitration Act I
18 would be hard-pressed to contend that the FAA covered --
19 QUESTION: Yes, it's interstate or foreign
20 commerce. They're not covered by that.
21 MR. EDWARDS: It's interstate or foreign
22 commerce, and I think we -- sections 1 and 2 of the --
23 QUESTION: Right.
24 MR. EDWARDS: Of the FAA just take us out of
25 that loop, but the principles are, I would submit, the

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1 same, so I don't believe that the FAA or National Labor
2 Relations Act issue is one that should be determinative.
3 QUESTION: Your answer is no, it does not cover
4 it, the FAA?
5 MR. EDWARDS: No, the FAA does not, not under
6 binding Fourth Circuit precedent, which is what I'm having
7 to deal with in the absence of any specific ruling by this
8 Court.
9 QUESTION: Well, in the language of the FAA
10 itself, the --
11 QUESTION: These people are longshoremen, are
12 they not?
13 MR. EDWARDS: They are longshoremen. There --
14 QUESTION: So --
15 MR. EDWARDS: -- are arguments that have been
16 raised and that I have seen concerning the FAA that say
17 that the exclusion was intended to deal only with seamen
18 and railroad workers, but I think that it's pretty
19 hazardous for us to speculate about the legislative
20 history of a statute enacted in 1925, which as has been
21 interpreted by this court so many times --
22 QUESTION: Is your answer to me that there's an
23 independent arbitrator, that's only if the committee's
24 unable to reach a majority decision within 72 hours.
25 MR. EDWARDS: Well, actually there's a -- there

1 are two steps in the appeals process. There's the port
2 committee and then there's the district committee.
3 But in actual practice, the way it has always
4 worked under this collective bargaining agreement, and
5 under the bargaining agreement that applies in the five
6 southeastern ports that have the same language, is that
7 management votes one way, labor voters the other way.
8 There is a deadlock. It goes to arbitration.
9 QUESTION: But the --
10 QUESTION: May I ask you, Mr. Edwards, about
11 some -- a part of this picture that is troublesome to me,
12 particularly in light of a case that we heard Monday and
13 that I think really distinguishes Gilmer, however arm-
14 twisting you think that arrangement might be, it's signed
15 by the individual.
16 Now, we know that there are people covered by
17 collective bargaining contracts who don't want to have one
18 thing more to do with that union than they are absolutely
19 forced by the law to do, so I'm thinking about, if you're
20 right, what about Abood, Beck -- do those people who say,
21 I don't want the union to be my representative, have to
22 say that the union is going to be in the driver's seat and
23 handling all these claims?
24 MR. EDWARDS: The nature of collective
25 representation is that the union is in the driver's seat

1 except to the extent that the individual can and will
2 assert his or her rights under section 9(a) or can show,
3 for example, that the grievance and arbitration process
4 would be futile, which is quite another exception
5 recognized by this Court on numerous occasions for
6 avoiding a collectively bargained grievance and
7 arbitration procedure altogether.
8 QUESTION: How could you show that an
9 arbitration process would be futile?
10 MR. EDWARDS: If the grievant is able to show
11 that there is a manifested hostility toward protected
12 rights by the union in question, I think that brings us
13 back --
14 QUESTION: Well, but --
15 MR. EDWARDS: Yes.
16 QUESTION: But the union wouldn't control the
17 arbitrator.
18 MR. EDWARDS: No, the union doesn't control the
19 arbitrator, but the union to some degree is involved in
20 the presentation of the grievance.
21 Now, in -- under this agreement there is no
22 prohibition of the grievant being separately represented
23 by counsel. There are many agreements that do prohibit
24 such activities, but this one does not, and so we're
25 writing pretty much on a blank slate, and it's rather

1 hypothetical to allege futility, or to conceive of
2 futility in this context, and in fact --
3 QUESTION: My only question was --
4 MR. EDWARDS: Right.
5 QUESTION: -- in deciding what these two
6 statutes mean, putting them all together, isn't that a
7 relevant consideration, that Gilmer is an individual who
8 speaks for himself or herself. Here is a collective
9 bargaining contract, and it includes some people who may
10 just love the union, other people who hate it.
11 MR. EDWARDS: Actually, I believe it cuts in the
12 other direction, Your Honor, because the employee covered
13 by a collective bargaining agreement is given enhanced
14 bargaining power, is given free representation, is given a
15 representative experience --
16 QUESTION: But we know there are workers who
17 say, we don't want it. We just -- we don't believe in
18 unions. We don't want to be represented by unions. The
19 Federal law forces us to some extent, but --
20 MR. EDWARDS: Then that employee's remedy is the
21 same as Robert Gilmer's remedy was. He doesn't work
22 there.
23 The situation with Gilmer was that he was faced
24 with what by anything that any of us I think could
25 conceive of would be properly characterized as a contract

1 of adhesion. He signed on to a forum which required a
2 registration, which required the applicability of the New
3 York Stock Exchange arbitration rules, and so to look at
4 that as a knowing and intelligent waiver of a right to the
5 choice of a forum is pretty much of a stretch, but the --
6 QUESTION: Yes, but at least --
7 MR. EDWARDS: The question of --
8 QUESTION: At least --
9 MR. EDWARDS: -- knowing and intelligent, it
10 doesn't seem to me --
11 QUESTION: At least he individually, on his own,
12 signed that piece of paper. That's not true of this
13 employee.
14 MR. EDWARDS: No, it's not true of this
15 employee. He was represented by someone far more
16 experienced than he in dealing with employers.
17 We're not talking about the kind of
18 sophisticated employee that this Court deemed Mr. Gilmer
19 to be. Instead, we're dealing with an employee who the
20 record shows has a functional fourth grade education
21 level, and therefore the representation by a collective
22 bargaining representative should have been quite
23 beneficial to him.
24 QUESTION: But the union said they didn't want
25 to take it, told him to go to court.

1 MR. EDWARDS: That's not exactly correct, Your
2 Honor. The union said that -- referred him to private
3 counsel. There's nothing in the record that specifically
4 indicates whether the union refused to process his
5 grievance. There were, in fact --
6 QUESTION: But in any event, unions don't have
7 to process every grievance.
8 MR. EDWARDS: Certainly they don't, but from the
9 very beginning the union recognized this as a potential
10 ADA claim. Counsel, or the --
11 QUESTION: Which it did not want. I mean, it
12 seems to me that -- you say, well, it didn't unequivocally
13 refuse. When the representative who would otherwise be
14 pursuing the claim says, I advise you to bring it as a
15 private action, the handwriting's on the wall, isn't it?
16 MR. EDWARDS: They suggested that he go to
17 private counsel.
18 QUESTION: Yes.
19 MR. EDWARDS: He went to Mr. McClain, and --
20 QUESTION: They didn't want to press forward
21 with it, which is a pretty good idea of the vigor with
22 which they would have gone forward if they had had to.
23 MR. EDWARDS: I don't necessarily accept that,
24 Justice Souter, because --
25 QUESTION: Not necessarily, but if you were a

1 betting man, isn't that what you'd bet?

2 MR. EDWARDS: No --

3 (Laughter.)

4 MR. EDWARDS: No, I would not, because this

5 local union has been enjoined under Boys Markets four or

6 five times because they don't take anything to

7 arbitration. Most of these are individual claims, and

8 they have to be required by the court to take them to

9 arbitration, so this is a matter of conserving resources

10 on their part, I would suppose.

11 (Laughter.)

12 MR. EDWARDS: But in point of fact it winds up

13 being more expensive than less, and that's the whole point

14 of the arbitration choice.

15 QUESTION: And if you win with that history

16 we'll surely cut down the volume of litigation, I guess.

17 (Laughter.)

18 MR. EDWARDS: I doubt that very seriously,

19 because since the third Boys Markets injunction we

20 obtained there have been no further wildcat strikes, so I

21 think that the message has gotten across, and therefore I

22 believe -- and we've had numerous arbitrations since then

23 that were not required by -- or several arbitrations that

24 were not required by court order.

25 With that in mind, I think that the appropriate

1 focus really is, should it make any difference that Ceasar
2 Wright was a longshoreman covered by a collective
3 bargaining agreement rather than a foreman working for the
4 same stevedoring contractor in the port of Charleston.
5 If one had an arbitration clause that was
6 incorporated in an application for employment, or an
7 employee handbook, or a policy and procedure manual, while
8 this Court certainly hasn't squarely addressed any of
9 those issues, it would seem to me that the clear weight of
10 Gilmer would be that this agreement, quote unquote,
11 reached without bargaining by the individual would be
12 binding upon him or her as a forum choice.
13 Why should not an agreement reached between an
14 employer and a collective bargaining representative who is
15 obligated under statute and under Federal common law to
16 provide a duty of fair representation to the employee
17 receive a similar degree of deference?
18 We think that the result is quite clear, and
19 that whatever continuing vitality there might be to
20 Alexander has been so severely undermined both by the
21 course of this Court's decisions and by changes in the
22 historic framework, if you will.
23 In 1974, this Court was concerned with massive,
24 systemic discrimination by employers and labor
25 organizations. We have come a long way since that time,

1 and during that period of time it's instructive in my view
2 to note that labor organizations have been accorded
3 standing to represent the rights of members of collective
4 bargaining units in asserting claims under title VII and
5 other antidiscrimination statutes.
6 So if they can do that in court, why can't they
7 do it in arbitration? I see no basis for a distinction.
8 Thank you.
9 CHIEF JUSTICE REHNQUIST: Thank you,
10 Mr. Edwards.
11 The case is submitted.
12 (Whereupon, at 12:05 p.m, the case in the above-
13 entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CEASAR WRIGHT, Petitioner v. UNIVERSAL MARITIME SERVICE CORPORATION, ET AL.
CASE NO: 97-889

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)