No. 19-0459

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

AC&S INC.,

Appellant,

v.

JEFFREY R. GEORGE,

Appellee,

From the Circuit Court of
Putnam County, West Virginia
Civil Action No. 17-C-196

RESPONDENT'S BRIEF

Michael P. Addair (WVSB # 10561)
Todd S. Bailess (WVSB # 10482)
Rodney A. Smith (WVSB # 9750)
BAILESS SMITH PLLC
108 ½ Capitol Street, Suite 300
Charleston, West Virginia 25301
Telephone: (304) 342-0550
Facsimile: (304) 344-5529
maddair@bailesssmith.com
tbailess@bailesssmith.com
rsmith@bailesssmith.com
Counsel for Jeffrey R. George

Dated October 21, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. STATEMENT OF THE CASE

This is an employment discrimination case involving the unlawful termination of a bargaining unit employee wherein the trial court relied upon well-established precedent from the United States Supreme Court to deny Petitioner's Motion to Compel Arbitration because the collective bargaining agreement ("CBA") at issue does not contain a "clear and unmistakable" agreement to arbitrate his employment discrimination claims as required pursuant to the uniform federal case law applicable to the interpretation of CBAs.

During his employment with the Petitioner, AC&S, Inc., the Respondent, Jeffrey R. George, was a member of The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO ("Respondent's Union"), which is the sole and exclusive agent of all bargaining unit employees at Petitioner's Nitro, West Virginia facility. *See Appx.* at A.000121. On September 1, 2014, Respondent's Union entered into a CBA on behalf of Respondent and other bargaining unit employees (the "AC&S CBA"). *See Appx.* at A.000118 – 000153.

Article XI of the AC&S CBA contains an arbitration agreement employing broad and general language requiring that all

> "complaints, disputes, controversies, or grievances arising between the Employer and . . . [covered employees], which involves only questions of interpretation or application of any provisions of this Agreement shall be shall be adjusted and resolved . . . in the manner provided by this **ARTICLE, ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES**.

Appx. at A.000138 (bold in original). Article X, Section 2 of the Agreement prescribes that "disputes regarding disciplinary actions" are subject to the terms of the arbitration agreement set forth in Article XI:

> **SECTION 2**: It is expressly understood and agreed . . . that the sole remedy for disputes regarding disciplinary actions . . . shall be in accordance with **ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES** . . . .

Appx. at A.000135 (bold in original).

On or about April 26, 2017, Petitioner terminated Mr. George's employment, purportedly for issues of performance and misconduct. *See Appx.* at 000073. After his termination, Respondent's union filed a grievance on his behalf. *See Appx.* at 000154 – 000155.

The "Grievance Report" form provided to employees for the filing of grievances directs employees to describe the nature of the grievance and specify what provisions of the AC&S CBA are alleged to have been violated. *See id.* at A.000154. There is no place to allege violations of state or federal law. The nature of Respondent's grievance was described as follows: "On or about 4/26/2016 the Company terminated the above named grievant without cause." *Id.* The grievance alleges that Petitioner violated "[Article] II. Employer's rights and all other areas of the contract that may pertain as well as any applicable state or federal laws that may apply." *Id.* There is no evidence in the record that Respondent ever alleged in his grievance state law employment discrimination claims or violation of any specific state or federal laws.

Respondent's grievance was denied, *see id.* at A.000155, and he subsequently filed the instant action in the Circuit Court of Putnam County, West Virginia alleging 1) Workers' Compensation Retaliation/Discrimination in violation of the West Virginia Workers' Compensation Act; 2) Disability Discrimination in violation of the West Virginia Human Rights Act ("WVHRA"); 3) Failure to Accommodate in violation of the WVHRA; and 4) a *Harless*-style[1] claim for retaliatory discharge in violation of substantial West Virginia public policy. *See Appx.* at A.000011 – 000024.

[1] *See Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

Petitioner moved the trial court to compel arbitration pursuant to the CBA. The trial court denied the motion, finding that the CBA does not contain a "clear and unmistakable" agreement to arbitrate Respondent's employment discrimination claims as required by the uniform federal law developed around the interpretation of CBAs. *See Appx.* at 000001 – 000010.

II. SUMMARY OF ARGUMENT

A. The trial court was correct in applying the "clear and unmistakable" standard.

Because the issue before the Court involves the interpretation of a CBA, this Court (and the trial court below) is required to apply the uniform federal law that has developed around the interpretation of CBAs. *See Lowe v. Imperial Colliery Co.*, 180 W. Va. 518, 523, 377 S.E.2d 652, 657 (1988); *Livadas v. Bradshaw*, 512 U.S. 107, 1222 (1994) (Souter, J.).

The United States Supreme Court has long held that in order to compel an employment discrimination claim to arbitration pursuant to an arbitration agreement contained in a CBA, the requirement to arbitrate such claims must be "clear and unmistakable."[2] *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79 - 80 (1998) (Scalia, J.); *14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 258 – 259, 274 (2009) (Thomas, J.).

Wright v. Universal Mar. Serv. Corp., the case establishing the "clear and unmistakable" standard, has never been overruled. In fact, the United States Supreme Court reaffirmed the "clear and unmistakable" standard eleven years after *Wright, see 14 Penn Plaza,* 556 U.S. at 258 – 259, 274, and the federal courts of appeal have not wavered in their recognition of the standard in the twenty-one years post-*Wright*.[3]

---

[2] The petitioner does not dispute that *Wright* requires application of the "clear and unmistakable" standard or that Wright is currently good law. *See Pet. Brief* at 7 – 9; *Appx* at 000031.

[3] *See* pg. 17, *infra*.

Although Petitioner argues that a shift in jurisprudence toward favoring arbitration signals that *Wright* is ripe for overruling, it fails to cite a single case that credibly supports such a proposition. Petitioner's argument is based upon jurisprudence that has developed around Section 2 of the *Federal Arbitration Act* ("FAA"), which prescribes that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C § 201 (Lexis Nexis, Lexis Advance 2019). Petitioner argues that this shift toward favoring arbitration should lead this Court to find that the "clear and unmistakable" standard does not qualify as a ground that exists for the revocation of any contract under Section 2's savings clause.

However, the "clear and unmistakable" standard is an interpretive rule employed to determine parties' intent to form an agreement to arbitrate a particular claim and not a validity defense to the enforcement of such an agreement. These are two completely different issues. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 -2 (2010) (Scalia, J.). While Section 2 of the FAA governs validity defenses to enforcement of arbitration agreements, it does not apply to a court's interpretation of whether a CBA contains an agreement to arbitrate a particular claim. *See id.* Accordingly, the principal case that the Petitioner argues to signal a willingness to overrule the "clear and unmistakable" standard pursuant to Section 2 of the FAA, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (Gorsuch, J.), has no bearing on the trial court's order because *Epic* dealt with an illegality defense to the enforcement of a non-collectively bargained arbitration agreement under the savings clause of Section 2 and not an interpretation of the intent of the parties to a CBA regarding the scope of a collectively bargained arbitration agreement.

Even if the "clear and unmistakable" standard was a validity defense to the enforcement of an agreement to arbitrate Respondent's claims, it would pass FAA Section 2 muster as a generally

applicable CBA contract principal pursuant to Section 2's savings clause because it is applied to union-negotiated waivers of legal rights generally, not just the right to a judicial forum. *See Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983) (Powell, J.); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 409 n.9, (1988) (Stevens, J.); *Livadas*, 512 U.S. at 125. It is not a standard that reflects disfavor of union arbitration agreements. *See Abdullayeva v. Attending Homecare Servs. LLC*, 928 F.3d 218, 223 (2d Cir. 2019).

Alternatively, the Petitioner attempts to attack *Wright* indirectly through the United States Supreme Court's criticism of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Powell, J.), by erroneously arguing that *Wright* was based upon the *Gardner-Denver* line of cases and that the United States Supreme Court's dicta in footnote 8 of *14 Penn Plaza, see* 556 U.S. at 264 n. 8., expressing a willingness to overrule G*ardner-Denver*, signals that the United States Supreme Court would overrule *Wright's* "clear and unmistakable" standard in this case.

However, even if the United States Supreme Court overruled *Gardner-Denver*, such a decision would have no effect on the "clear and unmistakable" standard because it was not born out of the *Gardner-Denver* line of cases, but rather out of federal labor law precedent regarding union-negotiated waivers of legal rights. *See Wright*, 525 U.S. at 79 – 80 (citing *e.g., Metropolitan Edison Co.*, 460 U.S. 693 (holding that union negotiated waivers of the statutory right to be free of anti-union discrimination must be "clear and unmistakable")).

Additionally, the discussion of *Gardner-Denver* in footnote 8 of *14 Penn Plaza* centers on differences between the majority and dissenting opinions' reading of the scope of *Gardner-Denver*. Footnote 8 merely states that if the dissent's broad reading of *Gardner-Denver* to invalidate any union-negotiated prospective waiver of a judicial forum for employment discrimination claims is correct, then *Gardner-Denver* would be a strong candidate for overruling

in order to arrive at the same result at which the majority arrived based upon its much narrower reading of *Gardner-Denver*. *See 14 Penn Plaza,* 556 U.S. at 264 n. 8.

Based upon the foregoing, the trial court did not err in applying the "clear and unmistakable" standard.

B. The AC&S CBA does not contain a "clear and unmistakable" agreement to arbitrate Respondent's employment discrimination claims.

The clear and unmistakable standard can be satisfied in two ways: 1) inclusion of an explicit arbitration agreement with "a clear and unmistakable provision under which the employees agree to submit to arbitration ***all . . . causes of action arising out of their employment.*** . . ." or 2) inclusion of a provision elsewhere in the CBA explicitly incorporating the anti-discrimination laws at issue, which "makes it unmistakably clear" that such laws are part of the agreement. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999) (emphasis added).

The AC&S CBA at issue herein contains an arbitration agreement employing broad and general language with no explicit provision requiring the arbitration of all employment causes of action. Additionally, the AC&S CBA in no way references specific anti-discrimination laws, employment discrimination claims, or employment discrimination generally. What's more, the subject arbitration agreement ***explicitly excludes*** from its scope any claims involving issues beyond the interpretation of the CBA's contractual provisions. Therefore, instead of clearly and unmistakably requiring arbitration of Respondent's employment discrimination claims, the AC&S CBA clearly and unmistakably excludes such claims from the scope of its arbitration agreement.

Accordingly, the trial court correctly found that the CBA does not contain a "clear and unmistakable" waiver of a judicial forum for such claims.

C. The trial court did nor err in refusing to consider Respondent's filing of a grievance as evidence of a "clear and unmistakable" agreement to arbitrate his claims.

Finally, the trial court did not err in refusing to consider Respondent's initial filing of a grievance regarding his termination as evidence of the parties' intent as to the scope of the arbitration agreement because "[n]either historical practice nor the parties' unexpressed intent can fulfill this standard. CBA waivers of the right to a judicial forum must be 'explicitly stated.'" *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App'x 556, 558-59 (9th Cir. 2016) (unpublished).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary under Rule 18(a) of the *West Virginia Rules of Appellate Procedure*. The dispositive legal issues regarding application of the "clear and unmistakable" standard have been authoritatively decided. *See* W. VA. R. APP. PRO. 18(a)(3) (Lexis Nexis Lexis Advance 2019). Additionally, the facts and legal arguments are adequately presented in the briefs and record on appeal and it is clear on the face of the subject CBA that Respondent's claims are excluded from the scope of the subject arbitration agreement, such that the decisional process would not be significantly aided by oral argument. *See id.* at 18(a)(4).

IV. ARGUMENT

A. Standard Of Review

Appellate review of an Order denying a Motion to Dismiss is *de novo*. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013).

B. The circuit court did not err in applying the "clear and unmistakable" standard.

1. *Wright v. Universal Mar. Serv. Corp.* remains binding precedent.

The ultimate question presented here is whether the arbitration agreement contained in the AC&S CBA includes within its scope the requirement to arbitrate Respondent's employment

discrimination claims. In deciding this question, this Court must necessarily interpret the meaning and scope of the language contained in the CBA.

This Court has observed that "[i]t is federal law alone that defines the relationship between the parties to a labor contract, and '[a] state rule that purports to define the meaning or scope of a term in [such] a contract' is preempted." *Lowe v. Imperial Colliery Co.*, 180 W. Va. 518, 523, 377 S.E.2d 652, 657 (1988) (quoting *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 210 (1985) (Blacknum, J.). Thus, questions relating to what the parties to a [CBA] agreed . . . must be resolved by reference to uniform federal law . . . ." *Id.* (quoting *Lueck,* 471 U.S. at 211). *See also Livadas v. Bradshaw*, 512 U.S. 107, 1222 (1994) (In "deciding disputes over the interpretation of [CBAs], state contract law must yield to the developing federal common law, lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions").

Because this Court must necessarily interpret the scope and meaning of the arbitration agreement contained within the AC&S CBA to determine if the parties agreed to arbitrate Respondent's employment discrimination claims, it must follow the uniform federal law that has developed around the interpretation of CBAs.

Well-settled federal law mandates that arbitration agreements contained within CBAs will not be read to include within their scope employment discrimination claims unless the agreement to arbitrate such claims is "clear and unmistakable." *See e.g., Wright*, 525 U.S. at 79-80.[4] The "clear and unmistakable" standard was first recognized twenty-one years ago by Justice Antonin

[4] The "clear and unmistakable" standard also squarely aligns with the precedent of this Court. *See* Syl. Pt. 1, *State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013) ("'Under the Federal Arbitration Act, 9 U.S.C. § 2, parties are ***only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate***.").

Scalia, writing for a ***unanimous*** United States Supreme Court, in *Wright v. Universal Mar. Serv. Corp. See* 525 U.S. 70. Like this Court and the trial court below, the *Wright* Court was charged with deciding the scope and meaning of a CBA's arbitration agreement, *to wit*: whether the arbitration agreement included within its scope a requirement to arbitrate Mr. Wright's disability discrimination claims. In deciding this dispositive question, the Court framed the issue in terms of whether there had been a waiver by Mr. Wright's Union of his right to bring his ADA claim in a judicial forum. *See Wright,* 525 U.S. at 79 – 82.

In examining what standard to apply, the Court looked to its prior labor law precedent regarding purported CBA waivers of other legal rights. Specifically, the *Wright* Court looked to *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), wherein the Court held that union waivers of the statutory right under the *National Labor Relations Act* ("NLRA") to be free of antiunion discrimination must be "clear and unmistakable.'" *See Wright*, 525 U.S. at 79 – 80.

Justice Scalia then reasoned that, although the right to a judicial forum for employment discrimination claims is not a substantive right like the right to be free of anti-union discrimination considered in *Metropolitan Edison Co.*, it was important enough to warrant similar protection from "a less than explicit union waiver in a CBA." *Id.* at 80. Accordingly, the *Wright* Court unequivocally held that any CBA requirement to arbitrate employment discrimination claims must be explicitly stated so that it is "clear and unmistakable." *See id.* at 79 – 80.

Wright has never been overruled and remains good law. Moreover, federal courts have not waivered on applying the "clear and unmistakable" standard post-*Wright*. In fact, the United States Supreme Court applied the clear and unmistakable standard again eleven years post-*Wright* in the

2009 case of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (Thomas, J.). Similarly, the federal courts of appeal to this day continue to apply this standard.[5]

Accordingly, *Wright* remains binding United States Supreme Court precedent, which this Court (and the trial court below) is bound to follow. Accordingly, the trial court did not err in applying the "clear and unmistakable" standard.

2. *Wright* is not ripe for overruling.

Conceding that the United States Supreme Court held in *Wright* more than 20 years ago[6] that any CBA requirement to arbitrate employment discrimination claims must be "clear and unmistakable" and unable to cite to any subsequent decision overruling *Wright*, Petitioner is forced to retreat to the untenable position that this Court should essentially overrule the United States Supreme Court by ignoring the long-standing precedent it set in *Wright*. However, the reasoning of Petitioner's argument is fatally flawed.

a. Petitioner's arguments are misplaced because the "clear and unmistakable standard is not subject to scrutiny under Section 2 of the FAA.

Specifically, Petitioner perverts the trial court's order to fit its argument that *Wright* should be overruled. Petitioner construes the order as finding that *Wright's* "clear and unmistakable" standard is a validity defense under the savings clause of Section 2 of the FAA, *9 U.S.C. § 2*, which invalidates an otherwise valid, binding agreement to arbitrate Respondent's employment discrimination claims. *See Pet. Brief* at 8 – 9. In reality, the order finds that no such agreement exists in the first instance pursuant to a uniform federal law principle of CBA interpretation. *See Appx.* at A.000001 – 000010. Thus, Section 2 of the FAA is not implicated as explained below.

---

[5] *See pg. 17, infra.*

[6] *See* n. 2, *supra*.

Section 2 of the FAA prescribes 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 such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.S. § 2.

A bevy of case law has developed around the FAA, and particularly around Section 2. The United States Supreme Court has counseled that "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (Scalia, J.). Because arbitration is a matter of contract, a party cannot be required to arbitrate "'any dispute which he has not agreed so to submit.' This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances arbitration." *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 648 - 49 (1986) (White, J.) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (Douglas, J.); *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 570 – 571 (1960) (Brennan, J.)).

Accordingly, when an arbitration agreement is implicated, a court must first interpret the agreement to determine whether the parties intended to arbitrate the particular claims at issue. *See id.* at 651. The issue of the intent of the parties to form an agreement to arbitrate a particular claim is different than the issue of an arbitration agreement's validity (i.e., whether it is legally binding due to issues of fraud, duress, unconscionability, or other generally applicable contract defenses). *Rent-A-Center*, 561 U.S. at 69 n.1 -2. Unlike the question of validity, Section 2 of the FAA does not govern a court's interpretation of whether it was, in fact, agreed by the parties to arbitrate a particular claim in the first instance. *See id.*

Coincidentally, this principle was well-defined by Justice Scalia in a case where the "clear and unmistakable" standard was applied to determine whether parties had agreed to arbitrate arbitrability:[7]

> ***This mistakes the subject of the First Options "clear and unmistakable" requirement. It pertains to the parties' manifestation of intent, not the agreement's validity.*** As explained in *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) ***it is an "interpretive rule,"*** based on an assumption about the parties' expectations. . . . ***The validity of a written agreement to arbitrate (whether it is legally binding, as opposed to whether it was in fact agreed to--including, of course, whether it was void for unconscionability) is governed by § 2's provision that it shall be valid "save upon such grounds as exist at law or equity for the revocation of any contract."***

Rent-A-Center, 561 U.S. at 69 n.1 (emphasis added).

Clearly then, the "clear and unmistakable" standard applied by the trial court below is a rule of CBA interpretation employed to determine whether the parties agreed to arbitrate employment discrimination claims and not a defense to the validity of such an agreement. And unlike a validity defense, the "clear and unmistakable" standard is not subject to the scrutiny of Section 2 of the FAA, such that Petitioner's FAA-related arguments are not on point to the issues presented herein.

Even if Section 2 of the FAA could be applied to the clear and unmistakable standard, it would survive pursuant to Section 2's savings clause because it is a principal of contract law of general application which does not apply only to or specifically target arbitration. *See Abdullayeva*, 928 F.3d at 223 (The "clear and unmistakable standard does not reflect *disfavor* of union-negotiated arbitration agreements.") In fact, the "clear and unmistakable" standard has been

---

[7] The Respondent submits that further evidence that the "clear and unmistakable" standard for interpretations regarding the scope of arbitration agreements remains on solid footing can be found in the fact that the standard also is, and has long been, applied to determine whether parties agreed to arbitrate arbitrability. *See e.g., Patton v. Johnson*, 915 F.3d 827, 835 (1st Cir. 2019); *AT&T Techs.*, 475 U.S. at 649; *First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (Breyer, J.).*

applied or recognized by the United States Supreme Court in the context of union negotiated waivers of other legal rights that have no relationship to arbitration. *See Metropolitan Edison Co.*, 460 U.S. 693 (waiver of statutory right to be free of anti-union discrimination); *Lingle*, 486 U.S. at 409 n.9 (waiver of state law prohibition against retaliatory discharge); *Livadas*, 512 U.S. at 125 (waiver of rights under California wage payment laws).[8]

b. Petitioner's reliance on *Epic Sys. Corp. v. Lewis* is misplaced because *Epic* is completely distinguishable from *Wright* and the instant case.

For the above-stated reasons, Petitioner's reliance on *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), is misplaced. *Epic* presented the question of whether arbitration agreements prohibiting class or collective actions could be valid or whether such agreements prohibit employees from engaging in concerted activity and are, therefore, illegal under the NLRA. *See generally Epic*, 138 S. Ct. 1612. Thus, the issue in *Epic*, unlike in *Wright* and the instant case, was the ***validity*** of an agreement to arbitrate employment discrimination claims, the existence of which the parties did not dispute, and not the parties' intent to form an agreement to arbitrate such claims. *See id.* at 1622.

Justice Scalia makes clear in *Rent-A-Center* that these are fundamentally different issues – one (validity) to which FAA Section 2 scrutiny applies and one (intent) to which it does not. Therefore, because the "clear and unmistakable" standard is a rule of interpretation employed to determine if the parties agreed to arbitrate employment discrimination and not a validity defense rooted in the FAA Section 2's savings clause, *Epic's* FAA Section 2 analysis of the illegality defense at issue therein is not at all instructive on what might be the United States Supreme Court's

[8] This Court has also held the "clear and unmistakable" standard to be a general rule of contract law and applied it to contractual disputes outside the arbitration context. *See State ex rel. U-Haul Co* 232 W. Va. at 444, 752 S.E.2d. at 598; *Evans v. Bayles*, 237 W. Va. 269, 273, 787 S.E.2d 540, 544 (2016). *See also Jones v. Gibson*, 118 W. Va. 66, 69, 188 S.E. 773, 774 (1936).

current view of the "clear and unmistakable" standard. Moreover, *Epic* is even further distinguishable from *Wright* and the instant case because the arbitration agreements in *Epic* were not part of a CBA. *See generally Epic*, 138 S. Ct. 1612.

Accordingly, *Epic* provides no support for the proposition that *Wright's* "clear and unmistakable" standard is ripe for overruling. In fact, at least two circuits have recognized the "clear and unmistakable" standard well after *Epic* was handed down. *See Abdullayeva*, 928 F.3d at 222[9]; *NBC Universal Media, LLC v. Pickett*, 747 F. App'x 644, 646 (9th Cir. 2019).

c. Any purported disfavor of *Gardner-Denver* has no effect on the viability of *Wright* or the "clear and unmistakable" standard.

Petitioner fails to cite a single case that is on point to the issue presented herein or that overrules, or even so much as directly criticizes, *Wright*, *14 Penn Plaza*, or the "clear and unmistakable" standard. Instead, Petitioner offers the Court a red herring in the form of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Powell, J.). Specifically, Petitioner incorrectly asserts that *Wright* relied upon *Gardner-Denver* for its application of the "clear and unmistakable" standard and that because the Court has subsequently questioned *Gardner-Denver*, *Wright* must be subject to overruling. *Pet. Brief* at 5.

Petitioner is wrong. Justice Scalia *did not* rely upon *Gardner-Denver* for the court's holding in *Wright*. As set forth in Section B.1., *supra*, Justice Scalia relied upon the United States Supreme Court's prior labor law jurisprudence holding that union waivers of the statutory right to be free of antiunion discrimination must be "clear and unmistakable.'" *See Wright*, 525 U.S. at 79 – 80 (citing *Metropolitan Edison Co.*, 460 U.S. 693; *Livadas*, 512 U.S. at 125 (dictum); *Lingle*, 486 U.S. at 409, n. 9 (dictum)). After discussing the court's application of the "clear and

[9] *Abdullayeva* even contains a citation to *Epic*, but nevertheless applies the "clear and unmistakable" standard. *See* 928 F.3d at 222.

unmistakable" standard in that context, Justice Scalia wrote: "[w]e think the same standard applicable to a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination." *Id.* Thus, *Wright's* holding was not based upon any anti-arbitration sentiment expressed in *Gardner-Denver*, but rather upon long-established labor law precedent that a purported union-negotiated waiver of individual employees' important legal rights must be "clear and unmistakable."

The only reference Justice Scalia made to *Gardner-Denver* in the context of the "clear and unmistakable" standard was to clarify that, while the legal right to pursue employment discrimination claims in a judicial forum is not a substantive right like the one considered in *Metropolitan Edison Co.*, it warranted similar protection from a less than explicit union waiver in a CBA. *See Wright*, 525 U.S. at 80. Petitioner misreads this reference to *Gardner-Denver* to be an endorsement of *Gardner-Denver's* broad language expressing hostility toward the validity of union negotiated waivers of judicial forum rights for employment discrimination claims (arbitration agreements). But the U.S. Supreme Court recognized several years later in *14 Penn Plaza* that *Wright did not* endorse *Gardner-Denver's* "broad language." *See 14 Penn Plaza*, 556 U.S. at 264 n.7. Similarly, the United States Court of Appeals for the Second Circuit has recognized that the "clear and unmistakable standard does not reflect disfavor of union-negotiated arbitration agreements." *Abdullayeva*, 928 F.3d at 223.

Moreover, Petitioner's argument that *Gardner-Denver* is a strong candidate for overruling is taken straight from footnote 8 of the United States Supreme Court's opinion in *14 Penn Plaza*. However, *14 Penn Plaza* wholly supports the proposition that *Wright* remains on solid footing, as it re-affirmed and applied the "clear and unmistakable" standard without any criticism of *Wright*. *14 Penn Plaza* LLC, 556 U.S. at 258 – 259, 274.

Additionally, a close reading of the text of footnote 8 of *14 Penn Plaza* shows us that it has no relevance *whatsoever* as to whether the Court might be inclined at present to overrule *Wright*. Footnote 8 states as follows:

> Because today's decision does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions. . . . But given the development of this Court's arbitration jurisprudence in the intervening years . . . *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents' broad view of its holding . . . were correct. . . .

14 Penn Plaza LLC, 556 U.S. at 264 n.8 (internal citations omitted).

As is evident from the above text, the majority and dissenting opinions in *14 Penn Plaza* took very different positions regarding the scope of *Gardner-Denver's* holding. *See id.* The majority found that the ultimate holding in *Gardner-Denver* did not involve the issue of enforceability of an agreement to arbitrate statutory claims, but rather the "quite different" issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *See id.* at 264. Conversely, the dissent read *Gardner-Denver* broadly to hold that "an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive." *See id.* at 280 (Souter, J., dissenting).

Footnote 8 of *14 Penn Plaza*, then, merely says that the case could be decided without implicating *Gardner-Denver* in light of the majority's narrow reading of it, but that if the dissent's broader view of *Gardner-Denver* (prohibiting any prospective waiver of a judicial forum for employment discrimination claims) was correct, then the majority likely would have overruled *Gardner-Denver* to decide *14 Penn Plaza*. However, such an overruling would not implicate *Wright* because *Wright* does not stand for the proposition that union negotiated waivers of a judicial forum for employment discrimination claims are not permitted, but only that if the parties to a CBA wish to agree to such a waiver, they must do so clearly and unmistakably. *See generally*

Wright, 525 U.S. 70. In fact, *14 Penn Plaza* makes it explicit in footnote 7 that "*Wright* . . . neither endorsed *Gardner-Denver*'s broad language nor suggested a particular result in [*14 Penn Plaza*]." 556 U.S. at 264 n.7.

Clearly then, even if the United States Supreme Court was at present inclined to overrule *Gardner-Denver*, as suggested by Petitioner, it would have no effect on *Wright* because *Wright* did not rely upon Gardner-Denver for its holding, it is not in the *Gardner-Denver* line of cases, and it does not rely upon *Gardner-Denver's* hostility toward arbitration.

d. Petitioner's argument that a shift in arbitration jurisprudence signals a willingness to overrule the "clear and unmistakable" standard is belied by the text of *Wright* and the continued application of the standard by federal courts.

Finally, Petitioner's argument that the "clear and unmistakable" standard is ripe for overruling based upon a shift in arbitration jurisprudence toward a federal policy favoring arbitration is belied by the fact that the *Wright* and *14 Penn Plaza* Courts were well aware of this shift in arbitration jurisprudence and nevertheless applied the "clear and unmistakable" standard. *See Wright*, 525 U.S. at 77; *14 Penn Plaza,* 556 U.S. 265. Likewise, the federal courts of appeal have continued to apply the "clear and unmistakable" standard despite the shift in arbitration jurisprudence. *See Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 52 (1st Cir. 2013); *Abdullayeva*, 928 F.3d at 222 (2d Cir. 2019); *Doyle v. SEPTA*, 398 F. App'x 779, 783 (3d Cir. 2010); *Aleman v. Chugach Support Servs., Inc.,* 485 F.3d 206, 216 (4th Cir. 2007); *Gilbert v. Donahoe*, 751 F.3d 303, 308-09 (5th Cir. 2014); *Mitchell v. Chapman*, 343 F.3d 811, 824 (6th Cir. 2003); *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1134 (7th Cir. 2017); *NBC Universal Media, LLC*, 747 F. App'x at 646 (9th Cir. 2019); *Mathews v. Denver Newspaper Agency LLP*, No. 09-1233, 2011 U.S. App. LEXIS 11454, at 17 (10th Cir. May 17, 2011).

Based upon the foregoing, there is no basis for this Court to ignore long-standing United States Supreme Court precedent and refuse to apply the "clear and unmistakable" standard.

C. The trial Court did not err in finding that the AC&S CBA does not contain a "clear and unmistakable" agreement to arbitrate employment discrimination claims.

Because the trial court did not err in applying the "clear and unmistakable" standard, this Court must next determine whether the arbitration agreement in the AC&S CBA met that standard. The trial court was correct in finding that it does not.

As set forth above, the United States Supreme Court held in *Wright* that in order to compel an employment discrimination claim to arbitration pursuant to a CBA's arbitration agreement, the requirement to arbitrate such claims must be particularly clear such that the waiver of a judicial forum is "clear and unmistakable." *See Wright,* 525 U.S. at 79-80*; 14 Penn Plaza*, 556 U.S. at 258 – 259, 274. In other words, a Court "'will not infer from a general contractual provision that the parties intended to waive a [legally] protected right unless the undertaking is ***explicitly stated***.'" *See Wright*, 525 U.S. at 80 (quoting *Metropolitan Edison Co.*, 460 U.S. at 708). Anything less than an explicit waiver fails to meet the "clear and unmistakable" standard. *Wright*, 525 U.S. at 80.

A comparison of the decisions of the United States Supreme Court in *Wright* and *14 Penn Plaza* provides a perfect illustration of what is (*14 Penn Plaza*) and is not (*Wright*) a sufficiently explicit union-negotiated waiver of a judicial forum to meet the "clear and unmistakable" standard.

In *Wright*, the court held that the CBA at issue therein did not clearly and unmistakably require arbitration of Mr. Wright's disability discrimination claim where the arbitration provision was "very general, providing for arbitration of "matters under dispute," "the remainder of the contract contain[ed] no explicit incorporation of statutory antidiscrimination requirements," and the CBA did not contain any other anti-discrimination provisions. *Wright*, 525 U.S. at 80.

Conversely, the *14 Penn Plaza* Court found that the CBA at issue in that case *did* clearly and unmistakably require arbitration of age discrimination claims. *See 14 Penn Plaza*, 556 U.S. at 258-59, 274. Unlike in *Wright*, the CBA in *14 Penn Plaza* clearly and explicitly incorporated such claims into the scope of the arbitration agreement:

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

14 Penn Plaza LLC, 556 U.S. at 252 (emphasis added).

The United States Court of Appeals for the Fourth Circuit has provided further guidance. It has held that a CBA can meet the "clear and unmistakable" standard in either of the following two ways: (1) inclusion of an explicit arbitration agreement with "a clear and unmistakable provision under which the employees agree to submit to arbitration ***all . . . causes of action arising out of their employment.*** . . ." or 2) inclusion of a provision elsewhere in the CBA explicitly incorporating the anti-discrimination laws at issue, which "makes it unmistakably clear" that such laws are part of the agreement. *Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999) (emphasis added).[10]

---

[10] Other circuits that have construed the "clear and unmistakable" standard agree that specific incorporation of the anti-discrimination laws at issue is required in absence of an explicit arbitration agreement requiring arbitration of all employment causes of action. *See Manning*, 725 F.3d at 52-53; *Abdullayeva*, 928 F.3d at 224; *Ibarra v. UPS,* 695 F.3d 354, 358 – 60 (5th Cir. 2012); *Wawock,* 649 F. App'x at 558; *Mathews,* 2011 U.S. App. LEXIS 11454 at 17-20.

At bottom, the "clear and unmistakable" standard "require[s] that collective bargaining agreements eliminate any doubt that a waiver of a [judicial] forum was intended" for employment discrimination claims. *Aleman.,* 485 F.3d at 216. The AC&S CBA clearly does not.

The arbitration agreement contained in the AC&S CBA at Article XI is not an explicit agreement to submit individual employment discrimination causes of action to arbitration. Rather, the arbitration agreement contained in the AC&S CBA is written in broad and general language that makes no specific reference to the arbitration of any types of employment discrimination causes of action. Specifically, the arbitration clause generally requires arbitration of "[a]ll complaints, disputes, controversies, or grievances . . . ." *See Appx.* at A.000138.

This is a broad and general arbitration agreement analogous to the one rejected by *Wright. See* 525 U.S. at 80 (arbitration clause is "very general, providing for arbitration of matters under dispute"). In *Wright*, the court concluded that such an arbitration clause could be susceptible to a reading that the arbitration provision applied only to matters in dispute under the contract. *See id.*

In the instant case, the AC&S CBA's arbitration agreement explicitly states that it *must* be read in such a fashion. *See Appx.* at A.000138 ("All complaints, disputes, controversies, or grievances arising between the employer and [covered employees] . . . ***which involves only questions of interpretation or application of any provisions of this agreement***" shall be subject to arbitration.) (emphasis added). Thus, the arbitration agreement at issue here not only fails to make it unmistakably clear that extra-contractual state law employment discrimination claims are subject to arbitration, it clearly and unmistakably ***excludes*** such claims.

Additionally, like in *Wright*, there is no other provision in the CBA that clearly and unmistakably incorporates the anti-discrimination requirements of West Virginia law as a contractual obligation subject to arbitration. Neither the West Virginia Human Rights Act nor the

West Virginia Workers' Compensation Act, the statutes under which many of Respondent's claims are asserted, is referenced anywhere in the document. Likewise, there is not a single reference in the CBA to *Harless*-style claims or retaliatory discharge claims generally. Moreover, no provision of the CBA even attempts to generally incorporate employment discrimination claims or any anti-discrimination laws, statutes, or obligations generally into the agreement. In fact, just as in the *Wright* case, *supra*, the CBA here does not even contain a general anti-discrimination provision.

Nevertheless, Petitioner attempts to rely upon Article X, Section 2 of the AC&S CBA, which prescribes that "the sole remedy for ***disputes*** regarding disciplinary actions . . . shall be in accordance with **ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES**, of this Agreement." *Appx.* at A.000135. Specifically, Petitioner argues that this provision meets the clear and unmistakable standard because it explicitly states that disputes regarding disciplinary actions are subject to the arbitration agreement and Respondent's claims relate to a disciplinary action (termination of his employment).

This argument ignores and/or seriously misconstrues the relevant case law discussed above, which clearly requires that a CBA contain an arbitration agreement explicitly requiring the arbitration of all ***causes of action*** arising from employment (not contractual "disputes" regarding discipline) or the explicit incorporation elsewhere in the CBA of the specific anti-discrimination laws at issue, which makes it unmistakably clear that extra-contractual anti-discrimination requirements are a contractual requirement subject to arbitration. Neither Article X, Section 2 nor the remainder of the AC&S CBA contains either.

Moreover, Petitioner's argument ignores the explicit language of Article XI, discussed above, which explicitly excludes state law discrimination claims like Respondent's from the scope of the arbitration agreement. Petitioner attempts to run from this explicit exclusion by framing

Article X, Section 2 as a "specific, self-contained arbitration clause." *See Pet. Brief* at 6. But this construction of the AC&S CBA strains all credulity, as Article X, Section 2 states that "the remedy for all disputes regarding disciplinary actions taken . . . against employees . . . shall be ***in accordance with*** **ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES**, of this Agreement." *Appx.* at A.000135 (emphasis added). As explained above, Respondent's calims are explicitly excluded from the scope of arbitrable disputes by Article XI's grievance and arbitration procedures.

Based upon the foregoing, it cannot be said that the AC&S CBA contains "clear and unmistakable" language that eliminates all doubt that the parties intended a waiver of a judicial forum for state law-based employment discrimination claims.[11] Conversely, it *is* "clear and unmistakable" that the AC&S CBA explicitly excludes such claims from the scope of arbitrable claims. Accordingly, the trial court did not err in finding that the AC&S CBA does not contain a "clear and unmistakable" waiver of a judicial forum sufficient to require arbitration of Respondents' claims.

D. The Circuit Court did not err in refusing to consider Respondent's course of conduct as evidence of a "clear and unmistakable" agreement to arbitrate his claims.

Petitioner argues that the trial court erred by failing to consider Respondent's course of conduct of initially filing a grievance as evidence of a "clear and unmistakable" agreement to arbitrate his claims.

Petitioner's argument, however, is misplaced. None of the authority cited by Petitioner is on point regarding the construction of *Wright's* "clear and unmistakable" standard for purported

[11] The Petitioner has failed to cite a single case in which a court declared language analogous to that in the AC&S CBA to be "clear and unmistakable." In fact, the cases cited by Petitioner indicate that a CBA must contain something close to an explicit reference to the employment discrimination laws at issue. *See Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1135 (7th Cir. 2017); *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 7 n.7 (1st Cir. 2012); *Aleman*, 485 F.3d at 216.

union-negotiated waivers of a judicial forum for employment discrimination claims. On the other hand, the United States Court of Appeals for the Ninth Circuit has held that Respondent's course of conduct is not relevant whatsoever to whether there is a clear and unmistakable agreement contained in the relevant CBA to arbitrate employment discrimination claims because "[n]either historical practice nor the parties' unexpressed intent can fulfill this standard. CBA waivers of the right to a judicial forum must be 'explicitly stated.'" *Wawock,* 649 F. App'x at 558-59.

Moreover, even if course of conduct could be considered, only a ***prior*** course of conduct would be relevant. *See e.g.,* RESTATEMENT (SECOND) CONTRACTS § 223 ("A course of dealing is a sequence of ***previous*** conduct between the parties to an agreement . . . .") (emphasis added); *Old Colony Tr. Co. v. Omaha*, 230 U.S. 100, 118 (1913) (Van Devanter, J.) ("the practical interpretation of a contract by the parties to it for any ***considerable period of time before it comes to be the subject of controversy***" may be evidence of the parties' intent) (emphasis added); *New Jersey v. Delaware*, 552 U.S. 597, 618 (2008) (Ginsburg, J.) ("We turn, finally, to the parties' ***prior*** course of conduct, on which the Special Master placed considerable weight.") (emphasis added). Moreover, the course of conduct must be one in which the parties engaged for a considerable period of time. *Old Colony Tr. Co.*, 230 U.S. at 118.

Here, the supposed course of conduct relied upon by Petitioner is Respondent's filing of a grievance after he was terminated (i.e., after the contract became the subject of controversy), which does not constitute a prior course of conduct. Additionally, rather than constituting a course of conduct in which the parties engaged for a "considerable period of time," the course of conduct upon which Petitioner relies was a single instance in which the Respondent filed a grievance after he was terminated.

Because the conduct relied upon was not a previous "course of conduct" in which the parties engaged for a reasonable period of time, it cannot be used to evince the parties' intent even if it was proper to consider course of conduct to determine whether there was a "clear and unmistakable" agreement to arbitrate employment discrimination claims.

Finally, Petitioner's argument fails even if it was legally supported because Respondent's initial filing of a grievance could only be construed to provide insight on Respondent's intent to arbitrate contractual-based disputes regarding discipline and not employment discrimination claims that arise from state law.

Respondent's grievance merely challenges whether Petitioner was within its rights under the terms of the CBA to terminate his employment. *See Appx.*at 000154 – 000155. Specifically, the "Nature of Grievance" listed in Respondent's "Grievance Report" is that "the company terminated the above-named grievant without cause." *See id.* Moreover, the grievance specifically cited an alleged violation of Article II of the CBA and "all other areas of the contract that may pertain," further evidencing that Respondent's grievance concerned contractual rights. *See id.* Although the Grievance report also throws in for good measure the phrase "as well as any applicable state or federal laws that ***may*** apply," *see id.* (emphasis added), there is no evidence in the record of any specific assertion of employment discrimination claims or allegations that any specific state or federal law was violated to animate Respondent's grievance. Thus, the broadest conclusion that can be drawn from Respondent's decision to initially file a grievance is that he intended to arbitrate alleged contractual violations.

Moreover, if this Court were permitted to look to extrinsic evidence to determine whether there has been a "clear and unmistakable" agreement to arbitrate employment discrimination claims arising from state law, the "Grievance Report" form is cogent evidence that the parties

intended only violations of the CBA's contractual provisions to be arbitrable. Specifically, the "Grievance Report" provides the grievant a place to allege "Agreement Violation[s]," but no opportunity to allege violations of state or federal law. *See id.* at 000154.

The bottom line is that Respondent's grievance merely asserted his contractual rights under the CBA. Nowhere in Mr. George's grievance does he ask an arbitrator to decide whether he has been discriminated against under state law. Accordingly, Respondent submits that even if his course of conduct were relevant to whether there was a "clear and unmistakable" agreement to arbitrate his claims, his previously-filed grievance contains no indication of any intent to have an arbitrator decide his state law claims of employment discrimination.

V. CONCLUSION

In conclusion, the trial court below followed binding United States Supreme Court precedent in finding that the AC&S CBA must contain a "clear and unmistakable" agreement to arbitrate Respondent's employment discrimination claims. And because it is clear on the face of the CBA that it not only lacks a "clear and unmistakable" agreement to arbitrate Respondent's claims, but it explicitly excludes such claims from the scope of arbitral disputes. Accordingly, the trial court did not commit error in denying Petitioner's Motion to Compel Arbitration.

Accordingly, this Court should affirm the trial court's Order and remand this case back to the Circuit Court of Putnam County, West Virginia.

JEFFREY R. GEORGE,
By Counsel,

Michael P. Addair (WVSB # 10561)
Todd S. Bailess (WVSB # 10482)
Rodney A. Smith (WVSB # 9750)
BAILESS SMITH PLLC
108 ½ Capitol Street, Suite 300
Charleston, West Virginia 25301
Telephone: (304) 342-0550

Facsimile: (304) 344-5529
maddair@bailesssmith.com
tbailess@bailesssmith.com
rsmith@bailesssmith.com
Counsel for Jeffrey R. George