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Supreme Court Holds That Employees May Be Compelled To Arbitrate Statutory Discrimination Claims Under Certain Collective Bargaining Agreements

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On April 1, 2009, the United States Supreme Court issued its long-awaited decision in *14 Penn Plaza LLC, et al., v. Steven Pyett et al.*, No. 07-581, 556 U.S. ___ (2009), upholding mandatory arbitration of statutory employment discrimination disputes under union collective bargaining agreements. This decision is of potentially great significance to those employers who are currently defending employment discrimination claims brought by employees covered by such contracts. Under the Court's *14 Penn Plaza* decision, employers may now have a basis to move to dismiss such claims on the grounds that they must be grieved and arbitrated and may not be the basis of private discrimination litigation brought by the employees. The decision also offers a way to help ensure that future employment discrimination claims proceed through arbitration, rather than through burdensome and time-consuming litigation.

The Court's Decision

The issue before the Court in this case was whether a provision in a collective bargaining agreement ("CBA") that clearly and unmistakably required employees covered by the CBA to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 ("ADEA") was enforceable. The Second Circuit United States Court of Appeals held the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, forbade enforcement of such arbitration provisions, stating an employee could pursue such a claim in court notwithstanding the terms of the contract between the employee's union and employer.

The CBA was between the Realty Advisory Board on Labor Relations, Inc. ("RAB"), a multi-employer bargaining association for employers in the New York City real estate industry, and Service Employees International Union, Local 32BJ ("Union"). The CBA required covered employees to submit all claims of employment discrimination to binding arbitration under specified dispute resolution procedures. After a change in business operations, a number of jobs were reassigned and the employees filed grievances challenging the reassignments. The grievances alleged that the job reassignments violated the CBA's seniority provisions and the ADEA's prohibition against age discrimination. During the arbitration proceedings, the

Union withdrew the age discrimination claims but continued to pursue the employees' claims that their contractual seniority and overtime rights had been violated, which claims were subsequently denied by the arbitrator. The employees then filed a complaint with the EEOC, alleging age discrimination under the ADEA. After the EEOC issued a right-to-sue letter, the employees filed suit in the United States District Court for the Southern District of New York, alleging the changes in their assignments violated the ADEA and applicable New York state and city laws prohibiting age discrimination. The employer responded by filing a motion to compel arbitration of the age discrimination claims, under the Federal Arbitration Act.

The District Court denied the motion because, it said, "Even a clear and unmistakable union negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable." It cited in support the decision of the United States Supreme Court in *Gardner-Denver*. The Court of Appeals for the Second Circuit affirmed, holding that *Gardner-Denver* remained the law and that a CBA could not waive covered workers' rights to a judicial forum for causes of action created by Congress.

In reaching its decision, the Second Circuit recognized that *Gardner-Denver* was "in tension" with the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), where the high court held that an individual employee who had agreed to waive rights to a federal forum could be compelled to arbitrate a federal age discrimination claim. The Second Circuit also noted the Supreme Court had previously declined to resolve this tension in its 1998 decision in *Wright v. Universal Maritime Services Corp.*, 525 U.S. 70, 82 (1998), finding that the waiver at issue was not "clear and unmistakable."

In the Court's 5 to 4 majority opinion in *14 Penn Plaza*, Justice Thomas pointed out that the Union had negotiated on behalf of the employees and RAB had negotiated on behalf of 14 Penn Plaza, each had bargained in good faith and they had together agreed that all employment-related discrimination claims, including claims under the ADEA, would be resolved through arbitration. This, the majority found, was a freely negotiated term between the Union and RAB that readily qualified as a "condition of employment" that was subject to "mandatory bargaining" under the National Labor Relations Act ("NLRA"). Such contractual arbitration provisions, the Supreme Court said, must be honored unless Congress, in enacting the ADEA, had itself removed this particular class of grievances from the NLRA's broad sweep in the field of labor-management relations. Since the ADEA did not preclude arbitration (and the Supreme Court had so held in *Gilmer*), the Court found the employees were bound to arbitrate their age discrimination claims. Arbitration, the Court noted, did not deprive the employees of any substantive statutory rights; rather, it merely was a substitute for a judicial forum.

In summarizing, the Supreme Court stated that its examination of the two federal statutes at issue in the case, the NLRA and the ADEA, yielded a straightforward answer to the question presented: the NLRA provides the Union and the RAB with the statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not limit that authority in the ADEA. Accordingly, the Court held, there was no legal basis for it to strike an arbitration clause that was freely negotiated and which clearly and unmistakably required the parties to arbitrate the age discrimination claims at issue.

In reaching its decision, the Supreme Court did not overturn *Gardner-Denver* but went to great lengths to narrow the holdings and invalidate dicta in *Gardner-Denver* and its progeny. The employees in *14 Penn Plaza* argued that allowing a union to waive their right to a judicial

forum in discrimination cases would substitute the union's interests for the employees' right to protection against discrimination, and that unions did not always represent the interests of certain of the employees as is their legal duty. The Court expressly rejected these arguments. The majority found that *Gardner-Denver, Barrantine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) and *McDonald v. West Branch*, 446 U.S. 284 (1984) were all distinguishable from *14 Penn Plaza* because, in each of those cases, the grievance and contractual arbitration provisions at issue did not expressly encompass statutory discrimination claims, as did the CBA between the RAB and the Union. In this regard, the Court noted that in *14 Penn Plaza*, the Union-RAB CBA not only contained express anti-discrimination language referencing the ADEA specifically but, most significantly, it also identified as disputes that were required to be arbitrated under the CBA's arbitration mechanism, all alleged violations of the enumerated anti-discrimination statutes.

Justice Thomas' opinion, in which he was joined by Chief Justice Roberts and Justices Scalia, Kennedy and Alito, resolves, at least for the moment, the question of whether and in what circumstances contractual provisions calling for the mandatory arbitration of statutory discrimination claims that arise under collective bargaining agreements that expressly cover such claims and provide for arbitration of such claims, will be upheld. Further, the majority justices went to great lengths once again to emphasize their preference for arbitration and to reject judicial suspicion of arbitration's desirability or arbitral tribunals' competence to resolve statutory discrimination claims. Arbitral tribunals, the majority stated, are readily capable of handling the factual and legal complexities of statutory claims, and there is no reason to assume that arbitrators will not follow the law.

Addressing the concern that unions might not always rigorously pursue a bargaining unit employee's discrimination claims, Justice Thomas highlighted the duty of fair representation imposed on labor unions by the NLRA, and the fact that an employee would have a claim against the union for breach of that duty if it were to be found to have discriminated or otherwise been guided by bad faith in addressing an employee's grievance over discrimination. Thus, a union itself would be subject to liability under the NLRA if it illegally discriminated against older workers in either the negotiation or enforcement of a CBA or in deciding whether to pursue a grievance on behalf of an employee for discriminatory reasons. Further, notwithstanding *14 Penn Plaza*, under the Supreme Court's 2002 decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), employees covered by arbitration agreements retain the right to file age and other statutory discrimination claims with the EEOC, which may initiate court action and seek judicial intervention, although not financial remedies for the adversely affected employees. In sum, the Court noted, Congress has already provided remedies to employees if a union is less than vigorous in addressing its members' discrimination claims.

Significant Impact for Employers

The *14 Penn Plaza v. Pyett* decision has a number of significant and immediate practical implications for employers whose employees are covered by union contracts. These relate to any pending claims of discrimination and the defense of future claims, as well as future union contract negotiations.

First, employers with CBAs should examine their non-discrimination and arbitration provisions to determine if these provisions are within the scope of the *14 Penn Plaza* decision and require arbitration of pending and future statutory discrimination claims without more

expensive and time-consuming judicial proceedings. In those instances where contract language is either ambiguous or would not support arbitration under *14 Penn Plaza*, employers should consider whether to seek to secure the inclusion of such terms in their contracts as they come up for renegotiation. Well-crafted revisions could potentially enable employers to limit dramatically the litigation of a significant number of discrimination cases and the potential for runaway jury verdicts.

Second, employers with existing union contracts prohibiting discrimination should review any pending discrimination litigation involving covered employees to determine whether there is a basis for motions to dismiss such claims under *14 Penn Plaza*, and if so, to take timely and appropriate action based upon such analysis.

Of course, all of this may become moot if, as it did with *Ledbetter*, Congress ultimately moves to amend the ADEA and other federal anti-discrimination laws to expressly preclude the arbitration of such claims.

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