



Supreme Court Upholds Provisions in Collective Bargaining Agreement Requiring Employees to Arbitrate Discrimination Claims

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The United States Supreme Court recently held that a collective bargaining agreement ("CBA") that clearly and unmistakably required union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") was enforceable as a matter of federal law. Although the decision in *14 Penn Plaza LLC v. Pyett* only dealt with the ADEA, its reasoning may be interpreted to extend to discrimination claims based on other statutes that, like the ADEA, do not explicitly prohibit compulsory arbitration.

BACKGROUND

The Penn Plaza case involved employees who were members of the Service Employees International Union ("Union"). The Union, as the exclusive bargaining representative of the employees, entered into an industry-wide CBA with the Realty Advisory Board on Labor Relations, a multi-employer bargaining association for the New York real estate industry. The CBA prohibited employment discrimination and provided that "[a]ll such claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations."

After several employees were reassigned to less desirable jobs, the Union filed a grievance alleging that the reassignments were the result of the employees' ages. The Union eventually withdrew the age discrimination claims from arbitration, but the employees still filed a complaint with the Equal Employment Opportunity Commission, which issued a dismissal and notified the employees of their right to sue. The employees then filed suit in the United States District Court for the Southern District of New York. In response, the defendants filed a motion to compel arbitration of the employees' claims, arguing that the CBA's mandatory arbitration provisions required this result.

The district court denied the motion and held that a union-negotiated waiver of a right to litigate certain statutory claims in a judicial forum was unenforceable. The Court of Appeals for the Second Circuit affirmed, relying heavily on the Second Circuit's holding in *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir. 2000). The court explained that "Rogers squarely decided that a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable."

THE COURT'S REASONING

In a 5-4 decision delivered by Justice Thomas, the Supreme Court reversed the Second Circuit and held that the National Labor Relations Act ("NLRA") authorizes unions to collectively

bargain for arbitration of discrimination claims and that the ADEA did not terminate that authority. This holding was based largely on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), a Supreme Court decision that held that an individual employee who had agreed to waive his right to a federal forum could be compelled to arbitrate an age discrimination claim under the ADEA. The Court saw no reason to distinguish between arbitration agreements signed by individuals and arbitration provisions agreed to by union representatives, so long as the agreement to arbitrate was "explicitly stated" in the CBA.

In so holding, the Court considered and rejected the argument that *Alexander v. Gardner-Denver Co.*, 415 U. S. 36 (1974), and its progeny prohibited unions from waiving employees' right to a judicial forum under federal anti-discrimination laws. The Court explained that *Gardner-Denver* did not involve the issue of enforceability of an agreement to arbitrate statutory claims. Rather, that decision focused on whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. The Court further noted that language in the *Gardner-Denver* line of cases that was critical of arbitration as a means of vindicating statutory anti-discrimination rights had been abandoned in more recent decisions.

Finally, the Court found unpersuasive the *Gardner-Denver* Court's concern that a union's exclusive control over the presentation of a grievance might create a conflict of interest and cause a union to subordinate the interests of individual employees. This "judicial policy concern," stated the Court, was not enough to create a qualification not found in the text of the ADEA. The Court further explained that a judicially-created exception was unnecessary because the NLRA had been interpreted to impose a duty of fair representation on labor unions and because unions themselves are subject to liability for illegal discrimination against older workers. The Court left unresolved the question whether a mandatory arbitration provision could be enforced if it allowed a union to block individuals from arbitrating ADEA claims.

THE DISSENT

Justice Souter's dissent, joined by Justices Stevens, Ginsburg and Breyer, argued that the Court should have followed the *Gardner-Denver* decision, which imposed a "seemingly absolute prohibition of union waiver of employees' federal forum rights." Although *Gardner-Denver* involved a waiver of Title VII rights, Justice Souter argued that the Title VII analysis was "just as pertinent to the ADEA in this case.

PRACTICAL IMPLICATIONS

- There does not seem to be any substantive basis for distinguishing the requirement that ADEA claims be arbitrated under CBA language, such as was present in Penn Plaza, from claims brought under Title VII, the Family and Medical Leave Act, the Fair Labor Standards Act or other federal, state and local statutes.
- Unions will likely incur substantial additional expenses in prosecuting EEO claims on behalf of employees in the bargaining unit, or risk expensive and time-consuming claims being brought against the unions for breach of the duty of fair representation. Employees may see arbitration as a cost-free (for them) way to bring EEO claims against the employer, without the necessity of obtaining private counsel, being charged for

litigation-related disbursements associated with filing fees and discovery, with the unions bearing those costs. For this reason, unions may be hesitant to include statutory EEO claims within the scope of the arbitration provisions in CBAs.

- Traditionally, labor arbitration has been a fast and efficient process largely unencumbered by concepts of document production, depositions, other forms of discovery, motion practice, strict adherence to evidentiary rules and even formal transcription of testimony. Some of the most well-respected labor arbitrators have not been lawyers. This process has worked very well in settling contractual and discipline disputes. With the now-inevitable future judicial scrutiny of the legal sufficiency of the labor arbitral process for adjudication of EEO statutory claims, employers and unions may find that they will be saddled with increased collateral litigation by disgruntled grievants over the adequacy of the remedy, and a spill-over effect of increased levels of formality and discovery in all types of labor arbitration.
- It is uncertain how the duty of fair representation will develop in this area, as a union may choose to proceed to arbitration on some, or none, of a grievant's claims. Where, historically, a union can consider in making its decision the effects on the greater bargaining unit were it to expend its resources in pursuing a particular grievance to arbitration (involving either contract interpretation or discipline), query whether such extrinsic concerns will be lawful considerations if the EEO claims that the employee wishes to advance are arguably meritorious.
- It is likely that the arbitrators' powers to award relief on EEO grievances will now need to include the power to award compensatory and punitive damages, as provided for under Title VII and many state and local fair employment practice statutes. Once again, litigation over such claimed damages has been absent from labor arbitration in the past but will be practiced in connection with arbitration proceedings brought as a result of the Penn Plaza decision.

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