14 PENN PLAZA L.L.C V. PYETT

U.S. SUPREME COURT EXPANDS ARBITRATION OF DISCRIMINATION CLAIMS

by M. Trevor Lyons

In an opinion released April 1, 2009, the United States Supreme Court, in *14 Penn Plaza L.L.C v. Pyett,*[1] held that a provision in a collective bargaining agreement clearly and unmistakably requiring unit members to arbitrate Age Discrimination in Employment Act (ADEA) claims is enforceable as a matter of federal law. Moreover, given the ADEA's similarity to other federal discrimination laws, such as Title VII of the Civil Rights Act of 1964, the Court's decision clarifies that arbitration provisions in collective bargaining agreements clearly and unmistakably making arbitration the exclusive method for resolving federal statutory discrimination claims are enforceable.

An employer who has such a provision in its collective bargaining agreement, or negotiates for one in the future, should be able to require unit members to arbitrate such claims rather than proceed with a lawsuit in court.

The case before the Supreme Court involved three current and former employees of Temco Service Industries Inc., working in an office building in New York operated by 14 Penn Plaza LLC. The employees were night watchmen and porters monitoring the building's lobby. After these employees were transferred to different duties following the building's hiring of security guards to monitor the lobby, the Service Employees International Union (SEIU) filed grievances alleging the men were wrongfully transferred and denied overtime in violation of various contractual provisions, including the labor contract's anti-discrimination provisions.

The anti-discrimination provisions in the parties' collective bargaining agreement required the submission of statutory discrimination claims to the grievance process and binding arbitration. When the grievances proceeded to arbitration, the union decided not to pursue the claims of wrongful transfer and age discrimination, but instead chose to arbitrate only overtime claims and one worker's denial-of-promotion claim. When the remaining contractual grievances were rejected by an arbitrator, the employees filed a federal age discrimination suit in the Southern District of New York.

The employer, 14 Penn Plaza, moved before the district court to compel arbitration pursuant to the collective bargaining agreement's arbitration provision, but the district court denied the motion to compel arbitration. The Second Circuit affirmed the lower court, holding that under the United States Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.,*[2] "a collective-bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." The Supreme Court agreed to hear the case.

A five-member majority of the Supreme Court reversed the Second Circuit, and held that "...a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate age discrimination claims is enforceable as a matter of federal law."

In fact, the Supreme Court found that an examination of both the ADEA and the National Labor Relations Act (NLRA) yielded a "straightforward answer" to the question posed by the Second Circuit's decision. The union and the employer had freely negotiated a collective bargaining agreement expressly and unmistakably providing that statutory employment-related discrimination claims, including ADEA claims, would be subject to mandatory arbitration. That provision was a subject of bargaining under the NLRA, and, therefore, the Supreme Court's majority found this provision was entitled to judicial deference unless Congress, in the statutory language of the ADEA, had expressly removed this type of claim from the NLRA's broad sweep.

Based largely upon its decision in *Gilmer v. Interstate/Johnson Lane Corp.,*[3] which "held that an individual employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate a federal age discrimination claim," the Supreme Court's majority held that the ADEA does not inhibit or bar parties from arbitrating claims brought pursuant to the ADEA. Therefore, the majority found that a collectively bargained provision requiring arbitration of ADEA claims was fully enforceable.

In reaching this conclusion, the Supreme Court essentially held that the ADEA does not differentiate between single-employee and union-negotiated arbitration agreements, stating:

> The [National Labor Relations Act] provided the Union and the RAB [the Realty Advisory Board on Labor Relations, Inc. or Penn Plaza's bargaining representative] with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in the CBA, which was freely negotiat-

ed...and which clearly and unmistakably requires respondents to arbitrate the age discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

The Supreme Court did not directly overturn its decision in *Alexander v. Gardner-Denver Co.,* but instead pointed out that it was a very narrow holding given its facts, dealing only with the issue of whether, absent expressed provisions in the labor contract, the arbitration of discrimination claims under the contract precludes a subsequent court suit over those statutory claims. Specifically, Justice Clarence Thomas, writing for the majority, commented that in *Gardner-Denver* the union had not expressly agreed to submit statutory discrimination claims to arbitration, but had only contracted for a discrimination-free workplace. Therefore, the arbitrator in *Gardner-Denver* could decide only the contractual claim of discrimination brought before him, and was not empowered to hear statutory claims.

In *14 Penn Plaza*, by contrast, because "the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims," *Gardner-Denver* and its progeny were clearly distinguishable.

Justice Thomas further commented that, to the extent the *Gardner-Denver* line of cases included broad *dicta* highly critical of using arbitration to vindicate statutory anti-discrimination rights, such *dicta* rested upon a misconceived view of arbitration that the Supreme Court had subsequently abandoned. In fact, Justice Thomas suggested that given the Supreme Court's favored view of arbitration in recent years, if *Gardner-Denver* could be broadly read to disfavor the submission of statutory discrimination claims to arbitration, then it is a strong candidate to be overruled. These comments were clearly directed at the four-justice dissent that argued the Court in *Gardner-Denver* had decided unions cannot bargain away employees' rights to a court forum for their discrimination claims, and saw no justification for abandoning that result in this case.

The full significance of the Supreme Court's decision in *14 Penn Plaza* remains to be seen. Presently most collective bargaining agreements do not expressly require statutory employment discrimination claims to be arbitrated under the agreement, or contain a sufficiently clear and unmistakable waiver of any right employees may have to bring such statutory discrimination claims in court. It seems unlikely that labor unions will readily agree to such clauses in bargaining new agreements in the immediate future.

Nonetheless, this decision clearly opens the door to the possibility of statutory discrimination claims being resolved in a final and binding manner via labor-contract arbitration in the future. In fact, beginning with the development of the workers' compensation courts at the turn of the past century, continuing with the judicial deference to labor arbitration reflected in the *Steelworkers* trilogy,[4] and particularly in the judicial acceptance of arbitration in recent years, there has been growing consensus that the judicial system is not an efficient mechanism for resolving employment disputes.

The *Penn Plaza* decision may be another step in the process toward establishing arbitration as a viable alternative to the present emphasis on the litigation of employment matters. It also may motivate employers to seek specifically tailored arbitration provisions for statutory discrimination claims in future collective-bargaining agreements. Moreover, employers whose labor contracts contain non-discrimination provisions expressly and undeniably requiring the submission of statutory employment discrimination claims to arbitration, may have additional defenses available to them in subsequent litigation.

The real question, however, is whether the current Congress will continue its recent trend of using legislative enactments to 'clarify' existing statutes by effectively overturning Supreme Court decisions it views as narrowing employees' access to courts for statutory discrimination claims. If Congress does consider such legislative action, it is to be hoped that Congress remains mindful of the established public policies favoring the arbitration of employment claims. The reasons for effectuating those policies is particularly compelling in these difficult economic times, when the costs of litigation should militate in favor of greater resort to final and binding arbitration as the method for resolving workplace claims. ■

Endnotes

1. ___ U.S. ___, 129 S. Ct. 1456 (2009).
2. 415 U.S. 36 (1974).
3. 500 U.S. 20 (1991).
4. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

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grievance, because he cannot be similarly informed.") (363 U.S. at 582). However, the ablest labor arbitrator is not necessarily the ablest statutory arbitrator.

10. *Compare, e.g., Rogers v. New York Univ.,* 220 F.3d 73, 75 (2d Cir. 2000) (*per curiam*); *O'Brien v. Agawam*, 350 F.3d 279, 285 (1st Cir. 2003); *Mitchell v. Chapman*, 343 F.2d 811, 824 (6th Cir. 2003); *Tice v. American Airlines, Inc.*, 288 F.3d 313, 317 (7th Cir. 2002), *with, e.g., Eastern Associated Coal Corp. v. Massey*, 373 F.3d 530, 533 (4th Cir. 2004).
11. *14 Penn Plaza*, 498 F3rd 88 (2nd Cir. 2007).
12. 500 U.S. 20 (1991).
13. In 1991, Justice Souter joined in the majority in *Gilmer*, but dissented in *14 Penn Plaza.*
14. *See, Barrentine v. Arkansas Best Freight Company, supra.*

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