Supreme Court Rules Employers May Compel Union Employees to Arbitrate Discrimination Claims

In a 5-4 decision on April 1, 2009, the United States Supreme Court upheld the enforceability of a provision in a collective bargaining agreement that "clearly and unmistakably" compels union members to arbitrate Age Discrimination in Employment Act (ADEA) claims. *14 Penn Plaza LLC et al. v. Pyett et al., No.07-581* (April 1, 2009). In providing this favorable ruling to employers nationwide, the Supreme Court effectively changed the generally held view, based on a 1974 Supreme Court decision, that unionized employees could not be forced to adjudicate discrimination claims through a collectively bargained arbitration provision.

Justice Thomas authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Alito. Justice Souter filed a dissenting opinion, joined by Justices Stevens, Ginsburg and Breyer, and Justice Stevens filed his own dissenting opinion as well.

As a result of the ruling, a unionized employer with a valid arbitration clause in its collective bargaining agreement may now require employees claiming discrimination to adjudicate the claim within the arbitration framework and preclude a jury trial in court. The ruling applies to claims of discrimination under the ADEA, and likely also to claims arising under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA).

Background

The underlying case stems from complaints of three night watchmen at 14 Penn Plaza who were members of the Service Employees International Union, Local 32BJ, and covered by a collective bargaining agreement with the New York City Realty Advisory Board (RAB). When the watchmen were reassigned involuntarily to new positions, they filed a grievance with the union alleging that the reassignments were discriminatorily based on their ages. After the union declined to pursue the age discrimination claims through the arbitration provision of the collective bargaining agreement, the employees filed a federal court action for age discrimination under the ADEA.

The Supreme Court's decision allows unionized employers with properly-tailored arbitration provisions in their collective bargaining agreements to effectively compel arbitration of statutory discrimination claims.

In response, the employer moved to compel arbitration of the discrimination claims, citing the collective bargaining agreement provision that stated that all claims made under Title VII, the ADA, and the ADEA were subject to the grievance and arbitration procedures in the agreement "as the sole and exclusive remedy for violations." Underlying the arbitration provision was a history of intense negotiation throughout the bargaining process where the employer conceded large wage increases and benefit enhancements in exchange for the provision's inclusion. Despite the clear and unmistakable language of the provision and the bargaining history behind it, the district court denied the employer's motion to compel arbitration and allowed the employees to proceed with their ADEA claims in federal court.

On appeal, the Court of Appeals for the Second Circuit affirmed the district court's decision and refused to compel arbitration of the ADEA claims. Citing the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, the Second Circuit held that "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." *Pyett v. Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007).

The Supreme Court Holding

The Supreme Court reversed the Second Circuit 5-4, holding that "the decision to fashion a [collective bargaining agreement] to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery." The Court further held that it was not its place to interfere in the collective bargaining process where the arbitration clause resulted from free negotiation that included concessions made by the employer in exchange for the provision.

Justice Thomas summarized the majority's conclusion, stating, "The [National Labor Relations Act] provided the Union and the [Employer] 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 negotiated by the union and the [employer], and which clearly and unmistakably requires [the employees] 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."

In his dissent, Justice Souter argued that the *Gardner-Denver* decision, which imposed "a seemingly absolute prohibition of union waiver of employees' federal forum rights[,]" was controlling in this case and should not be disturbed. Similarly, in his dissent, Justice Stevens contended that the majority had inappropriately and self-servingly reversed the *Gardner-Denver* precedent to further its own policy preference for dispute resolution through arbitration.

The Supreme Court's decision allows unionized employers with properly-tailored arbitration provisions in their collective bargaining agreements to effectively compel arbitration of statutory discrimination claims. Note, however, that this holding may prove somewhat narrow in practice as many existing collective bargaining agreements are unlikely to have the proper "clear and unmistakable" language. In this case, the agreement had a rare degree of specificity, expressly naming the applicable statutes and stating that the grievance and arbitration procedures in the agreement were "the sole and exclusive remedy for violations." In addition, the Supreme Court's decision left unanswered the question of an employee's remedies in situations where the union refuses to take the employee's claim to arbitration; it remains to be seen whether, in such situations, an

employee will be permitted to pursue the claim against the employer in court or will be limited to a claim against the union for a breach of its duty of fair representation of the employee.

Arbitration often can provide employers with relatively quick and cost-efficient resolutions of these types of claims. It also generally lessens the risks and uncertainty that are present in a jury trial. It is important to note, however, that arbitration has potential disadvantages and is not always the best dispute resolution procedure for every employer. Any unionized employer seeking to negotiate arbitration into a collective bargaining agreement (and, for that matter, any non-unionized employer seeking to implement mandatory arbitration for its workforce) should consult experienced labor and employment counsel, both to determine whether arbitration is in its best interests and, if so, to ensure that the provision is properly drafted to be enforceable pursuant to this decision.

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