Labor and Employment Law Information Memo

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U.S. SUPREME COURT VALIDATES ARBITRATION OF STATUTORY DISCRIMINATION CLAIMS UNDER UNION LABOR AGREEMENTS

Recently, the U.S. Supreme Court addressed the validity of a provision in a collective bargaining agreement that required workers to grieve and arbitrate claims based on anti-discrimination statutes, and thereby waive their right to sue such claims in court. The Supreme Court, in *14 Penn Plaza LLC v. Pyett*, ruled that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."

While the Supreme Court's "clear and unmistakable" standard to compel arbitration of statutory claims is rigorous, the decision in *14 Penn Plaza* opens a door for those unionized employers that want to require arbitration of employee discrimination claims and are willing to negotiate with the union to achieve this goal.

The Facts

The employer, 14 Penn Plaza, was a member of the Realty Advisory Board, a multi-employer bargaining association for the New York City real estate industry that had a collective bargaining agreement with SEIU Local 32BJ. That agreement had a detailed non-discrimination clause that expressly stated:

> There shall be no discrimination against any [employee] by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including. . . 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, . . . or any other similar law, rules, or regulations. All such claims shall be subject to the grievance and arbitration

> procedures . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based on claims of discrimination.

Several workers filed a grievance challenging their work reassignment as contrary to various provisions of the collective bargaining agreement, including the non-discrimination provision, as they contended that they had been selected for reassignment because of their age. Eventually, the grievance was submitted to arbitration. The union concluded that it could not assert the age discrimination claim because it had consented to the underlying subcontracting decision that led to the reassignments, and withdrew that portion of the grievance; the arbitrator denied the remainder of the grievance.

Undeterred, the grievants filed an age discrimination charge with the U.S. Equal Employment Opportunity Commission ("EEOC") challenging their reassignment as a violation of the Age Discrimination in Employment Act ("ADEA"). The EEOC issued a right to sue notice and the grievants pursued their age discrimination claim in federal court. The employer moved to compel arbitration, based on the collective bargaining agreement, but its motion was denied by the trial court and that ruling was affirmed by the Second Circuit Court of Appeals. Both courts relied upon the U.S. Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*, for the proposition that a collective bargaining agreement may not waive an individual employee's right to judicial resolution of claims created by federal anti-discrimination statutes.

The Supreme Court's Reasoning

The Supreme Court reversed, in a 5-4 decision. First, the Court held that a contract provision requiring arbitration of statutory discrimination claims "easily qualifie[d]" as a mandatory subject of bargaining under the National Labor Relations Act ("NLRA"), noting that such a provision "is no different from the many other decisions made by parties in designing grievance machinery." In so holding, the Court rejected the contention that the provision at issue was not a permissible subject of bargaining because it affected individual, non-economic statutory rights. Citing its prior decision in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court explained that a waiver of the right to a judicial forum in favor of arbitration is not a waiver of substantive rights, but merely the choice of one forum over the other. Thus, the Court concluded that the arbitration provision must be honored, unless the ADEA itself "removes this particular class of grievances from the NLRA's broad sweep." In reviewing the language and legislative history of the ADEA, the Court found no Congressional prohibition against arbitration of age discrimination claims.

Because the *14 Penn Plaza* decision is at odds with many lower courts' interpretation of *Gardner-Denver*, the Court also engaged in a careful analysis of that precedent and its progeny. Essentially, this analysis focused on the fact that the collective bargaining agreement in *Gardner-Denver* barred discrimination on the basis of age and the other protected characteristics *without* incorporating anti-discrimination statutes or the law that had developed in applying those statutes. In that earlier case, the Court had been principally concerned that an arbitrator's contractual definition of discrimination might not comport with the definitions supplied by the law. By contrast, the contractual provision in *14 Penn Plaza* covered both statutory discrimination *and* contractual claims, and required the arbitrator to apply the relevant law in resolving discrimination grievances. The Court reasoned, that in view of its holding in *Gilmer* that arbitration was no less adequate a forum for the resolution of statutory discrimination claims than the judicial forum, there was no basis to apply *Gardner-Denver* to invalidate the arbitration clause at issue in *14 Penn Plaza*.

The Court further rejected the argument that the contractual arbitration provision should be invalidated because of the potential for a conflict of interest between the grievants' discrimination claim and the union's duty to represent the entire bargaining unit,

with its concomitant power to subordinate the rights of the individual to the greater good of the group. The Court concluded that this potential conflict was built into, and sanctioned by, the NLRA, and hence an issue for Congress, not the judiciary, to resolve. Moreover, the Court observed that the individual is afforded a measure of protection from such conflicts both by the union's duty of fair representation, and by the individual's right, as declared in *EEOC v. Waffle House*, to file an EEOC charge notwithstanding an obligation to arbitrate discrimination claims.

The Practical Implications

The *14 Penn Plaza* decision creates an opportunity for unionized employers, namely, to evaluate whether mandatory arbitration of discrimination claims is a prudent strategy given the conditions facing their business. This is a complex analysis that requires consideration of several factors, including the potential cost and time savings from arbitration; the advantages and disadvantages of an arbitrator as compared to a jury; and the different standards of review on appeal.

In addition, many routine non-discrimination clauses in existing labor agreements are unlikely to satisfy the Court's requirement for a "clear and unmistakable" provision mandating arbitration of statutory claims. In the *14 Penn Plaza* agreement, the provision: (i) prohibited discrimination under specifically enumerated statutes; (ii) established the grievance and arbitration procedure as the "sole and exclusive" forum for resolution of such claims; and (iii) authorized and directed the arbitrator to apply statutory law in resolving discrimination claims. Presumably, the arbitrator would have the authority to award the full array of remedies available under the applicable federal statute (*e.g.*, reinstatement or other equitable relief, backpay, compensatory damages, punitive damages and attorneys' fees).

Further, *14 Penn Plaza* arose under the ADEA and the Court looked to the legislative history of that particular statute to confirm that arbitration of statutory claims was sanctioned by Congress. The extent to which the Court's rationale will be extended to other federal anti-discrimination statutes and whether it will be endorsed by state courts applying state law remain as open issues.

Those employers that seek to negotiate such clauses, in the future, will likely contend with increased opposition from unions. Under *Gardner-Denver*, unions risked little in agreeing to such provisions. Now, unions will face substantial burdens if they agree to "clear and unmistakable" provisions requiring arbitration of discrimination claims. For example, unions are not likely to have at their disposal much experience or expertise in the area of litigating statutory discrimination claims, and, even with the expertise, the unions would put themselves at substantial risk for duty of fair representation claims by undertaking such representation as the exclusive forum for all discrimination claims. While the union might allow the grievant to represent himself (or retain his own attorney), that would be a marked departure from current labor arbitration practice because, in grievance arbitration under a collective bargaining agreement, the grievant is not a party, and may participate as an individual only if, and to the extent that, the union permits. These problems could be particularly irksome in a case where the grievance raises both statutory discrimination claims and contractual claims that implicate concerns that are especially important to the union.

For these reasons, it does not seem likely that many unions would agree to a provision that would exclusively require submission of statutory discrimination claims for resolution through the contractual grievance machinery.

Another potential implication that *14 Penn Plaza* raises stems from the holding that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable *as a matter of federal law*." To date, courts that have invalidated provisions in mandatory arbitration programs that bar class arbitration have applied *state* law analyses (usually an unconscionability theory). While federal law concerning the enforceability of prohibitions against class action arbitration develops, the cited language from *14 Penn Plaza* appears to remove the obstacle that such state law has posed.

The Supreme Court's holding, however, faces a challenge in Congress. The Arbitration Fairness Act, which is currently pending in Congress, would prohibit enforcement of pre-dispute agreements that mandate arbitration of statutory employment claims, including discrimination claims under civil rights statutes. The House version of the bill exempts arbitrations under collective bargaining agreements, but the more recent Senate version would apply to labor arbitrations and would overrule the decision in *14 Penn Plaza*.

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