A Timely Analysis of Legal Developments

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On April 1, 2009, the U.S. Supreme Court in *14 Penn Plaza L.L.C. v. Pyett*, held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate federal age discrimination claims is enforceable as a matter of law.

The Supreme Court Opens the Door to Mandatory Arbitration of Discrimination Claims for Union Members

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On April 1, 2009, a divided U.S. Supreme Court upheld the ability of an employer and a labor organization, as the employees' exclusive representative for purposes of collective bargaining, to agree that employees can be required to arbitrate their statutory employment discrimination or retaliation claims in accordance with an express requirement to do so under the terms of a bargained-for collective agreement. While the decision in *14 Penn Plaza L.L.C. v. Pyett* specifically addressed age discrimination claims arising under a federal statute, the Court's decision is significant in that it now provides an opportunity for employers with unionized workforces to require that union members' discrimination and other statutory employment claims be privately arbitrated, rather than litigated in federal court. To get to that result, however, the relevant provision in the collective bargaining agreement must constitute a clear and unmistakable waiver of the right to pursue such claims in court.

Justice Thomas, writing for the majority, held that where the union and the employer have clearly and unmistakably agreed that statutory employment discrimination claims must be processed through the grievance and arbitration procedure in the parties' collective bargaining agreement, an employee will be required to file a grievance and ultimately submit the claim to a private arbitrator. Further, that employee will in most instances be barred from filing the same claims as a lawsuit in federal or state court.[1] While there remain a number of unanswered questions about the *14 Penn Plaza* decision, the Supreme Court clearly continues to consider arbitration a legitimate, if not preferred, method of dispute resolution.

Arbitration and Labor-Management Relations

Collective bargaining agreements set forth the terms and conditions of employment for employees in a bargaining unit where the union is the exclusive bargaining representative of those employees. Until the Supreme Court's decision in *14 Penn Plaza*, it had been generally accepted that the parties could not include in those terms and conditions of employment a requirement that employees submit statutory claims of

employment discrimination under federal or state employment statutes, such as Title VII and the Age Discrimination in Employment Act (ADEA), to the grievance and arbitration provisions in the applicable collective bargaining agreement.

As background, the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*,[2] strongly suggested that both the prospective waiver of statutory employment claims as well as the ability to require arbitration of such claims were prohibited. *Gardner-Denver* seemed somewhat at odds with the Supreme Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[3] in which the Court 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." In short, an individual employee was free to agree to compulsory arbitration of age discrimination claims under *Gilmer*, but a labor organization was apparently prohibited under *Gardner-Denver* from agreeing in collective bargaining to a similar provision on behalf of the members it represents. It is against this backdrop that the Supreme Court was presented in *14 Penn Plaza* with the opportunity to harmonize *Gardner-Denver* and *Gilmer*.

Factual Background

The employees at issue in *14 Penn Plaza* were members of Local 32BJ of the Service Employees International Union (SEIU), which had the exclusive authority to bargain for and represent those employees regarding "rates of pay, wages, hours of employment, or other conditions of employment." The employer in the case, 14 Penn Plaza L.L.C., owned and operated an office building and was a member of the Realty Advisory Board (RAB), a multi-employer bargaining association. The collective bargaining agreement between the SEIU and RAB required union members to submit their claims for employment discrimination to binding arbitration in accordance with the grievance and arbitration procedures set forth in the applicable collective bargaining agreement. Specifically, the agreement stated:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, 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, the New York City Human Rights Code, ... or any other similar laws, 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 upon claims of discrimination.

14 Penn Plaza employed a variety of workers, including night watchmen. After a change in the existing subcontracting arrangement rendered the night watchmen's services unnecessary, the employees were reassigned to jobs as night porters and light-duty cleaners in other locations in the building. The employees claimed that this reassignment resulted in a loss of income and emotional distress.

The SEIU filed grievances on behalf of the employees claiming that the reassignments violated the collective bargaining agreement's prohibition against age discrimination and its seniority rules, and that the employer failed to equitably rotate overtime. Although the grievances ultimately proceeded to arbitration, the SEIU withdrew its claims of age discrimination, but it continued to arbitrate the seniority and overtime claims. In the meantime, the employees filed an administrative charge with the EEOC claiming that the reassignments violated the ADEA. The EEOC ultimately dismissed the employees' charge and provided them with a right-to-sue letter.

The employees then filed a lawsuit in federal district court alleging age discrimination under the ADEA and state law. The employer filed a motion to compel arbitration under the Federal Arbitration Act. However, the federal district court denied the motion and held that under existing precedent in the U.S. Court of Appeals for the Second Circuit, "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."

The Second Circuit Concludes that Agreements to Arbitrate Contained in Individual Arbitration Agreements and Collective Bargaining Agreements Should Be Treated Differently

The Second Circuit refused to compel arbitration of the employees' ADEA claims based on its belief that the Supreme Court's decision

in *Gardner-Denver* prohibited the parties to a collective bargaining agreement from "waiv[ing] covered workers' rights to a judicial forum for causes of action created by Congress." Although the Second Circuit recognized the tension between the Supreme Court's holding in *Gardner-Denver* and its more recent decision in *Gilmer*, the court attempted to reconcile the two decisions. Comparing individual rights to waive claims and arbitration provisions in a collective bargaining agreement, the court concluded that labor agreement provisions "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." In short, the Second Circuit considered individual arbitration agreements to be different from the grievance and arbitration provisions set forth in a negotiated collective bargaining agreement.

The Supreme Court Holds that Employees May Be Compelled to Utilize the Grievance and Arbitration Machinery Set Forth in a Collective Bargaining Agreement

The Supreme Court overruled the Second Circuit's analysis. The Court started with the general proposition that an agreement between an employer and a union to submit employment-related discrimination claims to arbitration qualifies as a condition of employment and is "no different from the many other decisions made by the parties in designing grievance machinery." Although the individual employees involved in the case argued that the arbitration clause was outside the permissible scope of collective bargaining because it affected "employees' individual, non-economic statutory rights," the Court rejected this contention. It instead found that the law "generally favor[s] arbitration precisely because of the economics of dispute resolution" and that, as a general matter, courts "may not interfere in this bargained-for exchange." The Court then reasoned that the collective bargaining agreement's requirement that employees arbitrate these types of disputes "must be honored unless the ADEA itself removes this particular class of grievances from the [National Labor Relations Act's] broad sweep." The Court then held that the ADEA did not contain such a prohibition.

The holding in *14 Penn Plaza* is consistent with *Gilmer*. Once parties to a contract agree that a particular dispute must be submitted to arbitration, an employee is bound to that agreement "unless Congress itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Finding that there was nothing in the language or legislative history of the ADEA that expressly precluded arbitration, the Court concluded in Gilmer that arbitrating disputes under the ADEA would not undermine the statute's "remedial and deterrent function."[4]

In *14 Penn Plaza*, the Court specifically stated that its earlier interpretation of the ADEA in *Gilmer*, which involved an individual employment agreement, "fully applies in the collective-bargaining context." As Justice Thomas explained, "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."

Further, Justice Thomas opined that *Gardner-Denver* was decided at a time when arbitration was perceived as insufficient for a fair and reasoned determination of federal statutory claims. Over 20 years later, however, a wide range of federal claims are commonly arbitrated, and objections centered on the abilities of arbitrators, or the nature of arbitration itself, are no longer justified. Thus, the Court held that to the extent *Gardner-Denver* concluded that arbitrators are not capable of fairly deciding complex federal discrimination claims, that precedent has been overturned. Nevertheless, the Court explicitly left in place the holding from *Gardener-Denver* that the waiver of a federal statutory employment claim that is not clear and unmistakable, will not be enforced. Thus "a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." A labor agreement that is not so clear would not require compulsory arbitration.

Implications, Opportunities, and Other Issues

Generally speaking, few existing collective bargaining agreements will meet the standard required for a court to hold that employees have waived their rights to a judicial forum. In *14 Penn Plaza*, the collective bargaining agreement: (1) contained an express prohibition against discrimination based on protected characteristics under federal, state, and local laws; (2) specifically named the statutes at

issue; and (3) explicitly stated, "[a]ll such claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations." Such a provision is relatively unusual in today's labor agreements. While most labor agreements contain antidiscrimination provisions, those provisions are not typically worded as a waiver clause. Given the specific language in the labor agreement in *14 Penn Plaza*, however, the Supreme Court concluded that the SEIU and the employees it represented had met the high "clear and unmistakable" standard originally set forth in *Gardner-Denver*.

Technically, the Court's decision in *14 Penn Plaza* is limited to claims arising under the ADEA, but ultimately it may be applied to a broad range of federal, state, and local employment statutes, provided that the text and legislative history of the applicable statutes do not expressly exclude the claims covered by the statute from compulsory arbitration. As a result, during bargaining, employers may want to consider whether they can benefit from requiring bargaining unit employees to submit their discrimination claims to arbitration and, if so, the nature and types of claims that should be covered. This is especially true for employers in jurisdictions that have been confronted with the onslaught of wage and hour class action litigation. Depending upon other laws and how they have been interpreted, restricting these types of claims to arbitration could provide protection to employers who are concerned about possible class actions.

Of course, it goes without saying that a union may not be willing to consider expanding the areas that a collective bargaining agreement's grievance and arbitration procedure covers, and hard bargaining and/or concessions may be needed to obtain this expansion. In fact, while unions have traditionally sought "antidiscrimination" language in labor agreements as part of their duty to push for employee rights, if a waiver of a jury trial is now part of the process, unions may quickly back off such a strategy.

A further, serious concern was raised by the dissent in *14 Penn Plaza* - where the union acts as a gatekeeper to its members' statutory employment claims, it may fail to pursue valid claims, to the detriment of the employees. While those employees may file a subsequent claim against their union for unlawful discrimination or breach of the duty of fair representation, the success of such claims is limited as unions have a meaningful amount of discretion as to which cases they choose to arbitrate.

Recommendations and Practical Considerations

With the above analysis in mind, there are numerous points for employers to consider:

1. Employers should not immediately conclude that the best strategy is to require that claims of discrimination be processed through the contractual grievance and arbitration process. For some employers, that will be the best answer; but other employers may decide that choosing to fight discrimination claims in court is a better strategy.
2. Arguments in favor of binding arbitration are factors such as cost savings (arbitration is almost always cheaper than litigation), less delay and less risk of punitive damages. Particularly in states where damages are not capped and where juries are considered more pro-employee, labor arbitration may indeed be the better option.
3. Binding arbitration, however, is not necessarily the best method for resolving these types of statutory claims. Arbitrators can be as unpredictable as juries, and the favored arbitration remedy of reinstatement can be more costly in a real sense than damages. Further, unfavorable arbitration decisions are extremely difficult to overturn. Even an arbitrator's "manifest disregard for the law" may not be a valid ground for appealing an arbitrator's ruling. By comparison, federal and state courts provide for a significantly more robust system of appeal.
4. Another factor to consider is the potential for obtaining summary judgment in discrimination cases. Some federal courts are amenable to granting summary judgment motions in such cases absent relatively clear evidence of direct or indirect discrimination. In other jurisdictions, by comparison, summary judgment is difficult to obtain.
5. Following the advent of punitive damages and jury trial rights created by the Civil Rights Act of 1991, compulsory arbitration became more common. Some employers that went in that direction, however, subsequently moved away from binding arbitration. Others

continue to find that compulsory arbitration is better for them than litigation. In short, employers should not necessarily view 14 Penn Plaza as a bandwagon on which to jump. They should instead confer with experienced labor counsel and make a determination as to which road to go down. That determination will include such diverse factors as the relationship between the employer and the union, the pool of available arbitrators and their willingness to uphold reasonable employer decisions, the ability of the same arbitrators to understand the difference between a claim of discrimination and "just cause" in a discharge case, the general demeanor of judges and juries in the jurisdiction in question, and, of course, cost and employee morale. Capable labor counsel can provide an analysis of all these factors and more.

6. Finally, if an employer does decide to negotiate with a union to require compulsory arbitration of employment statutory rights, it should confer with labor counsel to create language that will likely be upheld under 14 Penn Plaza. Some courts will undoubtedly seek to restrict the Supreme Court's decision, so crafting language will be an important task. As noted earlier, congressional action could also lead to future restrictions that would have to be considered.

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[1] While this change is certainly significant in the labor-relations context, it likely will not prevent the Equal Employment Opportunity Commission (EEOC) or any other federal or state agency from filing a lawsuit against the employer on behalf of the employee. However, as a practical matter, that is a fairly rare event.

[2] 415 U.S. 36 (1974).

[3] 500 U.S. 20 (1991).

[4] The Arbitration Fairness Act (AFA), recently introduced in Congress, would prohibit the enforcement of mandatory agreements that require employees to submit their statutory employment claims to binding arbitration. Should the *14 Penn Plaza* decision inspire greater interest in the AFA, Congress could legislatively overrule the Supreme Court's *14 Penn Plaza* and *Gilmer* decisions. Littler's *DC Employment Law Update* blog is tracking this legislation and other labor and employment-related developments in Washington.