Advisory
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Employers May Compel Arbitration of Statutory Discrimination Claims Under Certain Collective Bargaining Agreements

BACKGROUND

On April 1, 2009, the United States Supreme Court resolved a long-standing controversy over the arbitration of employment discrimination claims by union-represented employees, ruling that a collective bargaining agreement ("CBA") that "clearly and unmistakably" requires employees to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable as a matter of federal law. *14 Penn Plaza LLC v. Pyett,* U.S., No. 07-581, 4/1/09.

The 5-4 decision, penned by Justice Clarence Thomas, is based on an action initially brought by three night watchmen who worked at a New York City office building owned and operated by 14 Penn Plaza LLC ("14 Penn Plaza"). The watchmen were direct employees of the contractor Temco Service Industries ("Temco") and represented by Local 32BJ of the Service Employees International Union (the "Union"). Under the CBA between the Union and the multi-employer association to which 14 Penn Plaza belonged, union members were required to submit all claims of employment discrimination to binding arbitration pursuant to the CBA's grievance and dispute resolution procedures.

In August 2003, the watchmen were reassigned to porter positions and cleaning jobs after 14 Penn Plaza, with the Union's consent, engaged another contractor to provide licensed security guards for the building. Contending that their reassignments resulted in lower income and generally less desirable positions, the watchmen asked the Union to file grievances on their behalf alleging, *interalia* that the company discriminated against them on the basis of their age in violation of the ADEA. The Union proceeded to request arbitration on several overtime and promotion issues, but declined to pursue the age-discrimination claims on the basis that its consent to the new security contract precluded it from claiming that the reassignments were discriminatory. The watchmen then filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), and the EEOC issued each of them a right-to-sue notice. In the ensuing lawsuit, the District Court denied the motion brought by 14 Penn Plaza and Temco to compel arbitration of the ADEA claim. The Second Circuit affirmed, holding that *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), forbids enforcement of CBAs that require arbitration of ADEA claims.

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THE SUPREME COURT'S DECISION

The majority cited several grounds for reversing the Second Circuit's ruling. First, the employees had designated the Union as their exclusive bargaining agent, and the Union had negotiated a CBA that expressly provided for the arbitration of employment discrimination claims. This negotiated arbitration provision, reasoned Justice Thomas, must be honored unless the ADEA itself removes this particular class of grievance from the "broad sweep" of disputes employees and unions may lawfully agree to submit to arbitration under the National Labor Relations Act ("NLRA"). Citing its prior holding in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), that the ADEA does not foreclose arbitration as a means of resolving statutory claims, the Court maintained that there is no difference between an arbitration agreement signed by an individual and one agreed to by a union representative. The Court also concluded that the CBA's provision requiring that statutory discrimination claims be arbitrated was "explicitly stated." Furthermore, the Court emphasized that enforcement of a "freely negotiated" arbitration clause does not result in the loss of any substantive rights of the employees under the ADEA.

The main contention of the dissenting opinions was that the majority disregarded the Court's ruling in *Gardner-Denver*, in which the Court held that Title VII rights, including the right to a judicial forum, cannot be waived in collective bargaining. But the majority differentiated *Gardner-Denver* by pointing out that the case related to the specific issue of whether arbitration of contract claims precluded subsequent judicial resolution of a statutory claim and does not apply where, as here, the CBA's arbitration provision expressly covers both statutory and contractual discrimination claims. The Court also stated that an agreement to submit statutory claims to arbitration is not a waiver of those rights, and that *Gardner-Denver's* criticism of the use of arbitration to address statutory rights was based on a misconceived view of arbitration that has since been abandoned.

IMPLICATIONS OF THE DECISION

The *Pyett* decision has several significant implications for employers whose employees are covered by CBAs. First, employers with compliant arbitration provisions who are currently facing discrimination litigation should evaluate whether it would be advantageous to move to dismiss such claims in light of the

decision. Second, employers who seek to avoid expensive litigation costs by using an arbitral forum to resolve future discrimination claims should carefully review their CBAs to evaluate whether they meet the *Pyett* requirements. To the extent that the arbitration provision is absent or does not satisfy Pyett's requirements, these employers should consider proposing appropriate revisions to the CBA during contract negotiations. In drafting or revising the arbitration clauses, employers should use clear, unambiguous language that (a) specifically identifies the types of statutory discrimination claims that must be submitted to arbitration, and (b) describes the specific procedures that must be followed in such arbitrations.

Overall, the decision's impact should prove significant, but some questions remain. For example, the Court specifically based its decision on legal principles under the NLRA and the ADEA, and not the particular facts of this case. It will therefore be left to the lower courts to decide whether an arbitration clause "clearly and unmistakably" covers statutory claims. The Court also did not expressly address the very important question of what happens to individual statutory discrimination claims if a union withdraws or refuses to submit them to arbitration, although the Court indicated that in such cases the employee may not be able to bring a discrimination action if the relevant CBA "clearly and unmistakably" requires arbitration of the claim. The employee's only recourse would therefore be a duty of fair representation claim against the union. The Court also raised the possibility that unions would be open to discrimination claims themselves if they breached the duty of fair representation for discriminatory reasons. The decision thus places more pressure on unions regarding their duty of fair representation because courts are now likely to be more protective of individual employees who effectively lose their statutory discrimination claims if the union decides to forego arbitration.

Overall, *Pyett* reflects a general shift among the courts in favor of the use of arbitration, and will undoubtedly lead to an increase in the number of arbitrations going forward. This increased use of arbitration, some commentators have posited, could trigger a number of unintended consequences. For example, arbitration may lose its traditional advantage as an efficient, informal means of resolving disputes. Further, *Pyett* would basically become moot if Congress, as it did with *Ledbetter*, decides to amend the federal anti-discrimination laws to expressly preclude arbitration of such claims.

Wiggin and Dana attorneys have extensive experience counseling a broad range of employers in interpreting complex labor and employment laws, handling discrimination claims and labor arbitrations, and negotiating and implementing CBAs. Please do not hesitate to contact us if you would like to discuss this new development or any related issues.

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