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Employment Law

Justices Allow Mandatory Arbitration of ADEA Claims

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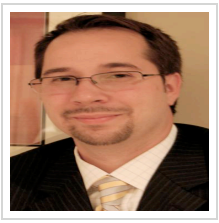

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In what experts predict will be another obstacle, for now, for employee rights, the U.S. Supreme Court in a 5-4 decision in *14 Penn Plaza LLC v. Pyett* held that, where a collective bargaining agreement clearly and unmistakably assigns statutory discrimination claims to arbitration, the employee in the bargaining unit forgoes the right to proceed with a claim in court. The Supreme Court has resolved a tension between prior rulings on whether arbitration agreements can preclude an employee's access to the courts for claims arising under the Age Discrimination in Employment Act, or ADEA.

The plaintiffs in *14 Penn Plaza* were members of the Service Employees International Union who were employed by Temco Service Industries as security guards at the 14 Penn Plaza building. 14 Penn Plaza negotiated a new contract with a security services company, with the consent of the plaintiffs' union. As a result, the plaintiffs received unfavorable position reassignments.

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The union brought grievances against Temco on the plaintiffs' behalf on the basis of, among other claims, age discrimination. However, the union ended up dropping the discrimination claims from the grievance, which the plaintiffs ultimately lost. "Because it had consented to the contract for new security personnel at 14 Penn Plaza, the Union believed that it could not legitimately object to respondents' reassignments as discriminatory," the opinion said.

Plaintiffs sought further relief by filing an administrative complaint at the EEOC, and ultimately ended up in federal court. The defendants filed a motion to compel arbitration, which the district court denied. The 2nd U.S. Circuit Court of Appeals affirmed, citing the 1974 Supreme Court decision in *Alexander v. Gardner-Denver Co.* , for the proposition that individual employees cannot be required to arbitrate federal employment discrimination claims.

In *Gardner* , the Supreme Court decided that a union's agreement to arbitrate contractual grievances does not bar an employee from bringing a statutory claim, such as under the ADEA, in federal court. While *Gardner* specifically related to agreements to arbitrate only contractual claims, in subsequent district and circuit court decisions there was some consensus that the decision should be read more broadly as to disallow union arbitration agreements from divesting individuals of the right to seek a judicial forum to protect their statutory rights.

Gardner declined to adopt a rule that would require courts to defer to an arbitrator's decision in employment discrimination cases, both because it would be contrary to congressional intent that federal courts have final enforcement responsibilities in such cases and because such a rule would wrongly presume "arbitral processes are commensurate with judicial processes." *Gardner* expressed concerns about an arbitrator's obligations being focused

on interpreting contractual obligations rather than applying statutory law, and about an arbitrator's ability and willingness to fashion equitable relief. The court was clearly concerned about instances when a union cannot fairly represent an individual's interests when those interests may be contrary to the interests of the whole.

The reach of *Gardner* was called into question in 1991 when the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that an individual employee whose negotiated employment contract waives the right to sue in court for statutory claims is bound to an arbitrator's decision and cannot seek judicial relief. *Gilmer* did not expressly overrule *Gardner* , so rectifying the two rulings presented some difficulties. One view was that *Gilmer* held that any agreement to arbitrate all claims, particularly when statutory discrimination claims are expressly included in the agreement, is binding and one cannot seek judicial review of the arbitrator's decision.

Another view was that *Gilmer* 's holding was confined to employee contracts that were individually negotiated, whereas *Gardner* applied to collective bargaining agreements where the individual employee does not negotiate his or her own contract and the individual is subject to the interests of the union. To some extent, the issue to be decided in *14 Penn Plaza* was whether collective bargaining agreements were subject to the rule from *Gardner* or from *Gilmer* .

Like *Gilmer* , the arbitration agreement in *14 Penn Plaza* required that discrimination claims be subjected to binding arbitration. The specific language from the collective bargaining agreement in *14 Penn Plaza* provided: "All such [discrimination] claims shall be subject to the grievance and arbitration procedures as the sole and exclusive remedy for such violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." While *Gilmer* involved an individual's ability to waive his or her right to the courts, this was a collective bargaining agreement. Thus, the 2nd Circuit relied on *Gardner* in holding that the collective bargaining agreement did not waive their right to seek redress for their statutory rights in court.

Upon review, the Supreme Court disagreed. The court held that *Gardner* did not prevent union employees from being bound to arbitration under the ADEA.

Justice Clarence Thomas, writing for the majority, declared 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 *Gardner* expressed concerns about the union's ability to fairly represent both an individual and the union as a whole, *14 Penn Plaza* points to relief under the National Labor Relations Act as being a solution to such a problem. The court noted the ability of union members to file grievances against the union if it fails to meet its duties of fair representation, and the ability to file ADEA claims against the union itself through the National Labor Relations Board.

While this may be a valid legal interpretation, it ignores the reality of collective bargaining. The more powerful economic party — invariably the employer — often drives collective bargaining. Typically, the language in the collective bargaining agreement is the result of intense labor negotiations, resulting in compromise and substantial sacrifice. When the employer has more economic power than the employee, there is nothing to prevent the CBA from waiving civil rights conferred by Congress.

In fact, one anticipated result of *14 Penn Plaza* is that employers will insist on unequivocal language in CBAs that requires arbitration of discrimination claims. The bigger issue, perhaps, is the fact that the waiver of rights comes at the hands of a third party, in this case, the union. The aggrieved employee is never even involved in the decision to give up the right to pursue a discrimination claim in court.

As shown by the union's withdrawal of its representation of the plaintiffs' ADEA claims in *14 Penn Plaza* , unions are bound to represent the interests of the whole and often cannot adequately represent individual interests when those interests may be at odds with interests of one or more other union members. As a result, fewer arbitrations will be requested.

Savvy employers will realize this, and the chilling effect of *14 Penn Plaza* may truly be felt. The silver lining is that the decision is narrowly limited to situations where the CBA is "the sole and exclusive remedy," a situation that is still quite rare with labor agreements. •

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