

## **U.S. Supreme Court Rules 5-4 that Union-Represented Employees Can be Forced to Arbitrate Statutory Employment Discrimination Claims**

**April 3, 2009**

On April 1, in *14 Penn Plaza LLC v. Pyett*, No. 07-581, the U.S. Supreme Court upheld the enforceability of provisions contained in collective bargaining agreements (CBAs) mandating the arbitration of statutory claims, including claims based on employment discrimination. This decision is an important victory for the collective bargaining process, and gives both employers and unions a roadmap for how to preclude lawsuits and instead make labor arbitration the exclusive remedy for such claims.

### **Background**

In *14 Penn Plaza*, the three plaintiffs were former night-watchmen at a commercial office building in New York and members of the Service Employees International Union Local 32BJ (SEIU). As members of the SEIU, the plaintiffs were subject to a CBA that provided, among other things, that all employees submit any employment discrimination claim, including any brought under the Age Discrimination in Employment Act of 1967 (ADEA), to binding arbitration under procedures set out in the CBA, with the arbitration being the “sole and exclusive remedy for violations.”

In August 2003, after the commercial office building hired a new security service company, the three plaintiffs were reassigned to duties in other locations of the office building. The plaintiffs, through the SEIU, filed a grievance alleging that their employer and the company that owned the building in which they worked discriminated against them on the basis of their age. Prior to arbitration, the union withdrew the ADEA claim, and opted instead to pursue only contractual claims before the arbitrator (though the employees were later permitted to pursue arbitration without the union’s participation). The grievance was ultimately denied by the arbitrator.

The plaintiffs then filed a lawsuit in federal court alleging that their transfers amounted to age discrimination in violation of the ADEA. Defendants moved to compel arbitration, arguing that the CBA mandated arbitration of plaintiffs’ statutory claims. The district court denied the motion to compel arbitration.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed, holding, similarly to other federal appellate courts, that a union-negotiated provision in a CBA waiving an employee’s right to bring a statutory claim in court is unenforceable. Those decisions, however, rested on an arguably outdated Supreme Court precedent decided prior to the Court’s *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) decision, upholding an arbitration agreement negotiated by an individual employee in

which the employee waived the right to assert statutory claims in court.

## **Decision**

In a 5-4 opinion written by Justice Thomas for the majority, the Court held that a provision within a CBA that “clearly and unmistakably” requires arbitration of statutory claims is enforceable as a matter of law. The Court held that employees had designated SEIU as their exclusive representative under the National Labor Relations Act, and SEIU and the employer had “freely negotiated” the arbitration clause, which encompassed claims under the ADEA. The Court also found that because individual employees could agree with their employer to arbitrate rather than litigate statutory discrimination claims, a union could reach a similar agreement with an employer on behalf of employees it represents. Since nothing in the ADEA prohibits arbitration of claims, the clause was valid, and the Court had no legal basis to strike the arbitration provision.

Relying in part on the Court’s relatively recent receptivity to arbitration of disputes, the Court stated that “[t]he decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance.”

However, one important caveat to *14 Penn Plaza* could limit the scope of the decision. The Court reserved judgment regarding whether the waiver of the right to proceed in court would be effective where the union controlled whether or not the discrimination claim would proceed to arbitration. In *14 Penn Plaza*, despite the union’s failure to take the discrimination claim to arbitration, the employees were ultimately permitted to pursue the claim before an arbitrator. If a union is permitted to block any potential arbitration of a discrimination claim, it could potentially result in an unlawful substantive waiver of employee statutory rights.

## **What Does This Mean for Employers?**

While generally employers would prefer to arbitrate rather than litigate employment discrimination claims due to cost, the potential for more expeditious resolution, and the likelihood of lower exposure on the claim, this decision can dramatically change the landscape for both unions and employers who arbitrate. If employers and unions agree to include language in their CBA providing for arbitration as the exclusive forum for employment discrimination claims, the labor arbitration forum is likely to become more formal. Just as has been seen in nonunion exclusive arbitration of employment discrimination claims, it is likely that union arbitrations will take on many of the worst characteristics of court litigation. Discovery, motion practice, and closer adherence to the Federal Rules of Evidence are likely. The more formal procedures often prolong the process and remove the advantage of speedy resolution through arbitration.

The *14 Penn Plaza* decision leaves open the question as to what remedies the arbitrator must be empowered to order. Typically, for termination cases the most drastic CBA remedy can be reinstatement and back pay. If a labor arbitrator cannot award compensatory and/or punitive damages, will the arbitration provision be upheld? If an arbitrator has those powers, is arbitration preferable to litigation?

The decision explicitly left the door open for a host of duty-of-fair-representation claims, which can be brought against the union (and in some cases derivatively against the employer). Since nearly every CBA leaves it to the union to determine whether or not to take a grievance to arbitration, the Court’s note that it was “reserving judgment” in cases where the union makes that determination, seems to undermine a body of well-developed law that finds no breach of the duty of fair representation unless



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