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High Court Rules to Enforce Collective Bargaining Agreement Term Requiring Arbitration of Employment Discrimination Claims

On April 1, the U.S. Supreme Court ruled 5 to 4 that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination Employment Act ("ADEA") is enforceable. *14 Penn Plaza LLC v. Pyett*, No. 07-571 (April 1, 2009) ("Penn Plaza"). The decision is significant because it departs from a 35-year-old ruling that had been construed to preclude exclusive arbitration of statutory discrimination claims and to allow employees to pursue discrimination claims arising under a collective bargaining agreement independent of those arising under a statute.

Summary of the *Penn Plaza* Decision

Stephen Pyett was one of three employees working as night watchmen at 14 Penn Plaza in New York City. Pyett and his co-workers were members of a union that had exclusive authority to bargain on behalf of its members relating to conditions of employment. The union had negotiated a collective bargaining agreement with the multi-employer bargaining association for the New York City real estate industry. The collective bargaining agreement prohibited discrimination based on race, creed, color, age, disability, national origin, sex, union membership or any other characteristic protected by law and expressly mentioned the ADEA and Title VII, among other statutes. The collective bargaining agreement also provided that its grievance and arbitration procedures were "the sole and exclusive remedy" for all such discrimination claims.

When another unionized security services contractor was employed to provide security at the building in which they worked, Pyett and his co-workers were re-assigned to less desirable and lower paying night porter and light duty cleaning positions in the building. The employees filed grievances asserting that the reassignment was done for reasons that included age discrimination. The union withdrew the grievance as to the age discrimination claims, and the employees filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), which dismissed their charges. The employees subsequently filed suit in federal court in New York, prompting their employer to move to bar the suit and compel arbitration. The lower federal courts ruled that the Supreme Court's 1974 decision in *Alexander Gardner-Denver Co.*, 415 U.S. 36 (1974), forbade enforcement of collective bargaining provisions requiring arbitration of ADEA claims, and rejected the employer's effort to enforce the collective bargaining agreement. The Supreme Court disagreed.

The Supreme Court observed that under federal labor relations law, a union, as the exclusive bargaining representative of its members, enjoys broad authority to negotiate and administer collective bargaining contracts. The Court found that judicial nullification of contractual provisions negotiated in good faith by unions and employers requiring arbitration of claims, including discrimination claims, would be contrary to the fundamental policies underlying federal labor relations law. This policy could be defeated, the Court found, only if Congress had precluded arbitration of ADEA or other statutory claims, which the Court noted was not the case. Accordingly, the Court found that because federal labor law provided the union with statutory authority to collectively bargain for the arbitration of workplace discrimination claims and because Congress had not terminated that authority with respect to claims under the ADEA, the lower courts erred in refusing to honor the arbitration provision in the collective bargaining agreement.

The Court found the reliance by the lower courts on the 35-year-old ruling in the *Gardner-Denver* case to be misplaced. The Court found that the ruling in *Gardner-Denver* was not inconsistent with its ruling because, unlike the agreement in *Penn Plaza*, the collective bargaining agreement in *Gardner-Denver* did not expressly and exclusively mandate the arbitration of statutory anti-discrimination claims.

Impact of the *Penn Plaza* Decision on Employers

The decision of the Supreme Court is welcome news for employers who may prefer to arbitrate claims under the ADEA and other statutes. Nevertheless, although the Supreme Court's decision reflects the Court's current receptivity to arbitration and its willingness to abandon the time worn mistrust of arbitration reflected in the *Gardner-Denver* decision and other similar cases, the Court's decision is not unbounded.

First, the Court's discussion makes it clear that the requirement to arbitrate the claim must be *clear and unmistakable*. If it is not, the claim may be construed as a contractual claim that is separate from, and independent of, any statutory claim, as was the case in *Gardner-Denver*.

Second, the Court's discussion makes it clear that a promise to resolve ADEA and similar statutory claims by way of arbitration instead of litigation is not intended to authorize waivers of substantive statutory protection. Thus, a collective bargaining provision is likely to be found unenforceable if, for example, it purports to restrict the substantive protections or remedies afforded to an employee under the statute. Rather, the decision should be viewed as endorsing a right to choose in what forum an employee's claim will be heard – court or arbitration. In this regard, the Court's reasoning is consonant with the holdings in several other cases.

Finally, although the Supreme Court has affirmed that a collective bargaining provision requiring arbitration of federal anti-discrimination statutory claims is enforceable if it is sufficiently explicit to preclude a lawsuit, employers should carefully consider the benefits and detriments of arbitration. For employers with an existing union relationship, inclusion of a provision mandating arbitration may be worth pursuing to prevent dual proceedings and to prevent employees from getting two bites of the apple. For employers lacking a unionized workforce, the decision reaffirms the ability generally to require arbitration of statutory claims. Such employers, however, should carefully assess that choice. Increasingly, the perceived advantages of arbitration—streamlined discovery, procedural informality, expediency, and cost savings—are being questioned. Moreover, an arbitrator's authority under a collective bargaining agreement is likely to be broader and, in the event of perceived error,

substantially more difficult to overturn.

In the end, the Court's holding that a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA and other statutory discrimination claims is enforceable as a matter of federal law is significant because it allows employers and unions desiring arbitration of such claims to effect their intentions. It does not answer, and leaves to the employer to consider, whether such provisions will be beneficial.

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