PAYNE & FEARS LLP

IRVINE · LAS VEGAS · LOS ANGELES · SAN FRANCISCO

EMPLOYMENT LAW UPDATE

APRIL 2009

Supreme Court Upholds Enforceability Of Collective Bargaining Agreements That Mandate Arbitration For Statutory Claims

In the decision *14 Penn Plaza v. Pyett*, the United States Supreme Court held that a provision in a collective bargaining agreement expressly requiring union members to arbitrate age-discrimination claims is enforceable. The decision illustrates a continuing trend favoring arbitration of disputes – even ones involving statutory rights – and gives effect to collectively bargained provisions that most jurisdictions had treated as unenforceable.

Factual Background

The plaintiffs in *14 Penn Plaza*, former night lobby watchpersons at a New York City office building, were unionized employees of Temco Service Industries, a building services provider. With the union's consent, the building contracted with a Temco affiliate to provide security services, rendering the plaintiffs' services unnecessary and causing them to be reassigned to positions they considered less desirable. The union grieved the reassignments, claiming, among other things, age discrimination. Obtaining no relief from the grievance process, the union requested arbitration, as provided for in the collective bargaining agreement ("CBA"). The union eventually withdrew the age-discrimination claims from arbitration, reasoning that it could not allege that the reassignments had been discriminatory when the union itself had consented to the contract for new security personnel.

The individual plaintiffs then filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), and later a federal lawsuit, claiming age discrimination by Temco and 14 Penn Plaza, the owner-operator of the building. The defendants moved to compel arbitration, relying on a CBA provision providing that "[a]ll [discrimination] claims shall be subject to…grievance and arbitration procedures…as the sole and exclusive remedies for violations." The district court denied the motion and the U.S. Court of Appeals for the Second Circuit affirmed, holding that even an express waiver of the right to litigate certain statutory claims in a federal forum is unenforceable if negotiated by a union.

Supreme Court Decision

A divided U.S. Supreme Court reversed. Justice Thomas, writing for a five-justice majority, concluded that the National Labor Relations Act ("NLRA") gave the union, as the employees' exclusive bargaining agent, the authority to agree to binding arbitration of age-discrimination claims, and nothing in the federal Age Discrimination in Employment Act ("ADEA") superseded that

authority. The Supreme Court reasoned that because an arbitration provision is a mandatory subject of bargaining, the NLRA demands that courts respect the parties' contractual bargain, unless a specific provision in the ADEA removes this type of grievance from the contract's sweep. Finding no such language in the text of the statute, and relying on *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), which held that ADEA claims are subject to arbitration in agreements outside the collective bargaining context, the Court concluded that the CBA arbitration clause mandated arbitration of age discrimination claims.

The Court distinguished *Alexander v. Gardner-Denver*, 415 U.S. 36 (1975) and its progeny on the ground that those cases involved collective bargaining agreements that contained no express waiver of the right to litigate statutory discrimination claims. It declined to follow "broad dicta" in the earlier cases "that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights," observing that this "skepticism…rested on a misconceived view of arbitration that this Court has since abandoned." It also declined to resolve a factual dispute as to whether, under the CBA, the union could block employees from individually arbitrating discrimination claims that the union chose not to press, leaving open the question whether, if such authority existed, the arbitration provision would be unenforceable.

In a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter argued that the question presented in the case was controlled by *Gardner-Denver*. Justice Stevens wrote a separate dissent, expressing concern about what he termed the "subversion of precedent to the policy favoring arbitration."

Practical Implications

Although the *14 Penn Plaza LLC* case arises in the ADEA context, its holding will likely be applied in cases involving other discrimination statutes. Thus, unless an employment discrimination law specifically prohibits, or has been interpreted as prohibiting, the mandatory arbitration of claims arising under that law, courts will likely find that a collective bargaining agreement expressly mandating the arbitration of such claims is enforceable. Because the language of *14 Penn Plaza LLC* emphasizes that agreements to arbitrate employment discrimination claims must be explicit, unmistakable, and clear, employers negotiating and drafting collective bargaining agreements covering their unionized employees should ensure that any mandatory arbitration provision included in the agreements specifically identifies those employment statutes to which it applies. Specifically stating the statute will provide the "clear and unmistakable" language necessary to require binding arbitration of an employee's claim.

Rodney B. Sorensen is a partner in the San Francisco office of Payne & Fears LLP, where he represents employers in all types of employment-related litigation, including wrongful termination, discrimination, sexual harassment, unfair competition and wage and hour class actions in state and federal court proceedings, administrative hearings, mediation and arbitration. Mr. Sorensen can be reached at (415) 277-2255.

Leila S. Narvid is an associate in the San Francisco office of Payne & Fears LLP, where she focuses on the representation of employers in all aspects of labor and employment law, including discrimination, sexual harassment, wrongful termination, retaliation, disability and wage and hour violations. Ms. Narvid can be reached at (415) 277-2253.

Sheela H. Shah is an associate attorney in the Irvine office of Payne & Fears LLP, where she focuses on the representation of employers in all aspects of labor and employment law, including discrimination, sexual harassment, wrongful termination, retaliation, disability and wage and hour violations. Ms. Shah can be reached at (949) 797-1261.

If you would like further information, please contact your Payne & Fears LLP attorney.