Supreme Court Enforces CBA's Mandatory Arbitration Clause

4/1/2009 By Allen Smith

In a 5-4 decision, the U.S. Supreme Court on April 1 enforced a collective-bargaining agreement (CBA) clause that clearly and unmistakably required union members to arbitrate claims arising under the Age Discrimination in Employment Act (ADEA), reversing a lower court decision.

"We are very pleased the Supreme Court clarified the law in this important area," Paul Salvatore, a Proskauer Rose attorney who argued for the employer in this case, said in an April 1 interview. "The decision brings the union sector in line with the nonunion sector," he added, referring to a 1991 Supreme Court decision (*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20) that enforced an individual's agreement to binding arbitration in another age discrimination case.

Challenged Reassignments

The more recent case arose after job reassignments to improve office security following the Sept. 11, 2001, terrorist attacks. The owner and operator of a New York office building, 14 Penn Plaza LLC, reassigned night lobby watchmen as night porters and light-duty cleaners after it contracted with a security services firm to provide licensed security guards to staff the lobby and building entrances. The owner made the switch with the union's consent.

The reassigned workers asked the union to file grievances challenging the reassignments, which they said were less desirable, led to a reduction in their income and caused them emotional distress. The union filed grievances alleging that the employer violated the ban on workplace discrimination by reassigning the workers on account of their age, violated seniority rules by failing to promote one of the workers to a handyman position and failed to rotate overtime equitably. After the union failed to obtain relief through the grievance process, it requested arbitration. But after the initial arbitration hearing, the union withdrew the age discrimination claims in light of its consenting to the contract for new security personnel. The other claims were denied.

The workers filed a charge with the Equal Employment Opportunity Commission and then filed suit under the ADEA in federal district court. The employer moved to compel arbitration, but the district court denied the motion, concluding that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable."

The 2nd U.S. Circuit Court of Appeals affirmed, relying on *Alexander v. Gardner-Denver* (415 U.S. 36 (1974)), where the Supreme Court ruled that a CBA's mandatory arbitration clause was not enforceable.

Lower Court Ruling Reversed

The Supreme Court reversed, noting that judicial nullification of contractual concessions "is contrary to what the court has recognized as one of the fundamental policies of the National Labor Relations Act (NLRA)—freedom of contract." The CBA's arbitration provision must be honored under the ADEA unless the ADEA removes this class of grievances from the NLRA's broad sweep, the Supreme Court

stated. Citing *Gilmer*, the court noted that "this court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute."

The court distinguished the facts from this case from those in *Gardner-Denver*, saying that *Gardner-Denver* does not control the outcome when, as was the case here, "the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims."

And the court characterized criticism in *Gardner-Denver* of arbitration to vindicate statutory anti-discrimination rights as resting on "a misconceived view of arbitration that this court has since abandoned" (***14 Penn Plaza v. Pyett***, No. 07-581).

Vigorous Dissent

Writing in dissent, Justice David Souter said that the court's decision misread *Gardner –Denver* by claiming that it turned solely "on the narrow ground that the arbitration was not preclusive because the CBA did not cover statutory claims. That, however, was merely one of several reasons given in support of the decision."

Souter concluded that "on one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, which 'is usually the case.'" But, he added, "As a treatment of precedent in statutory interpretation, the majority's opinion cannot be reconciled with the *Gardner-Denver* court's own view of its holding, repeated over the years and generally understood."

Salvatore disagreed, saying that the workers were interpreting *Gardner-Denver* much too broadly. When asked to predict how Congress might react to the recent decision, Salvatore acknowledged that some legislators do not like mandatory arbitration.

Salvatore defended mandatory arbitration though, saying that it is "a terrific alternative way to resolve claims." He said arbitration is "less expensive, quicker, less formal and well suited for the types of facts and circumstances that underlie employment discrimination claims."

However, Jeffrey Braff, an attorney with Cozen O'Connor in Philadelphia, noted that employees sometimes prefer trying their cases in court in order to have a longer **discovery** period and have their case heard by a jury. "There's a sense that juries are more sympathetic to employees," Braff remarked.

Allen Smith, J.D., is manager of workplace law content for SHRM.

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