ARBITRATION IN THE UNIONIZED WORKFORCE: THE SUPREME COURT SPEAKS IN *14 PENN PLAZA*

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I. INTRODUCTION

Steven Pyett worked as a porter/night watchman in a New York City office building. Following September 11, 2001, the building's management began using licensed security guards. Consequently, Pyett's employer[1] reassigned him to perform cleaning tasks in the building, which were within his job description. Pyett was upset with his new job duties, and he turned to his union, Service Employees International Union, Local 32BJ ("Local 32BJ"), for help. Pyett claimed the reassignment violated his contract and constituted age discrimination. His union filed a grievance challenging the reassignment under the Collective Bargaining Agreement (CBA) and the Age Discrimination in Employment Act. At the start of the arbitration, the union withdrew the age discrimination claims. The union proceeded to arbitrate Pyett's seniority and overtime claims, and ultimately the claims were denied.

The Collective Bargaining Agreement (CBA) between Local 32BJ and the Realty Advisory Board on Labor Relations, Inc. (RAB), a multi-employer bargaining association, required that all discrimination claims be brought in arbitration. Instead of bringing his discrimination claim in arbitration, Pyett filed suit in federal court, alleging that his employer violated the Age Discrimination in Employment Act (ADEA).[2] Defendants then moved to compel arbitration under the Federal Arbitration Act (FAA), based on the clear language of the CBA, which requires arbitration of all discrimination claims. The federal district court found that a union could not agree on behalf of its members that they must arbitrate their statutory discrimination claims.[3] The Court of Appeals affirmed.[4] The Supreme Court granted certiorari, agreeing to hear the case.[5]

On April 1, 2009, the Supreme Court decided *14 Penn Plaza v. Pyett*[6] and reversed, holding that a CBA that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. Pyett's age discrimination claim was not dead. But, he would have to bring it in an arbitral rather than judicial forum. The Supreme Court's decision has significant implications on the role of arbitration in our modern legal system, and the role of unions in protecting their members' rights to be free from discrimination in the workplace. This article will discuss the basis behind the Supreme Court's decision in *14 Penn Plaza*, and the effects it may have on employees, employers, unions, and arbitration.

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II. THE LEGAL LANDSCAPE

In 1974, the Supreme Court decided *Alexander v. Gardner-Denver Co.,* a case about whether an employee could bring statutory discrimination claims in court following his union's arbitration of a factually related contractual grievance. The plaintiff in *Gardner-Denver*, Mr. Alexander, in contrast to Mr. Pyett, could not bring his statutory discrimination claims in arbitration and the arbitrator had no right to remedy statutory claims of discrimination. The arbitration only involved his contractual rights, and after that arbitration was over, Mr. Alexander's employer attempted to prevent him from bringing his statutory discrimination claims in court. If the employer had been successful, Mr. Alexander would have been without *any* forum for his claims. The *Gardner-Denver* Court held that "mere resort to the arbitral forum to enforce contractual rights" cannot waive statutory rights if the arbitrator merely sits as "the proctor of the bargain" and without authority to resolve statutory claims.[8]

Despite this limited holding, the *Gardner-Denver* Court included broad dicta in its unanimous decision that caused many judges (including the dissenting Justices in *14 Penn Plaza*) and commentators to conclude that "an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive."[9] Indeed, the Court in *Gardner-Denver* (consistent with widespread sentiment at the time) was distrustful of arbitration in general, and expressed concern over "the union's exclusive control over the manner and extent to which an individual grievance is presented," noting that "[i]n arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit."[10]

These concerns expressed by the *Gardner-Denver* Court reappear in two subsequent Supreme Court decisions, *Barrentine v. Arkansas-Best Freight Sys., Inc.* and *McDonald v. West Branch*. In both of these cases, as in *Gardner-Denver* itself, the Court dealt with the question of whether a prior arbitration precluded an employee from bringing a later statutory claim in court under collateral estoppel or *res judicata*—doctrines that stop an individual from re-litigating the same issue or claim—when the arbitration did not address the claim. *Gardner-Denver* and its progeny involved the waiver of substantive rights because the employees were not allowed to bring their statutory claims in any forum—arbitral or judicial. Thus, after *Gardner-Denver*, *Barrentine*, and *McDonald*, two questions remained: (1) would a court allow any pre-dispute waiver of an individual's right to bring his statutory discrimination claims in a judicial forum, and (2) would a court allow a union to waive that right on behalf of its members.

The Supreme Court answered the first of these questions in 1991. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that an agreement to arbitrate statutory discrimination claims between an employer and an employee is enforceable in a non-union setting. The Court found that an individual can waive his or her own right to bring a discrimination claim in a judicial forum because nothing in the ADEA indicates that Congress intended to preclude the use of the arbitral forum for these claims.[14] Mr. Gilmer raised a host of challenges to the adequacy of the arbitral forum, including that the arbitration panels would be biased and that discovery is more limited in arbitration than in federal courts. The Court dismissed such generalized attacks on arbitration as "out of step" with the Court's current strong endorsement of federal statutes favoring arbitration. Mr. Gilmer also argued there is often unequal bargaining power between employers and employees, but the Court determined that this was not a sufficient reason to hold arbitration agreements are never enforceable in the employment context, and such claims are best left for resolution in specific cases.

The Supreme Court made its first attempt at answering the latter question of whether unions can waive their members' right to bring statutory discrimination claims in a judicial forum in *Wright v. Universal Maritime Service Corp.* Ultimately, the Court in *Wright* held that, at a minimum, any waiver of rights to adjudicate statutory claims must be "clear and unmistakable." But, since the waiver in that case did not meet this threshold, the Court did not need to decide whether such a clear and unmistakable union-negotiated waiver would be enforceable.

The RAB and Local 32BJ drafted just such a clear and unmistakable waiver in its CBA, leaving the Court in *14 Penn Plaza* to answer the question it left open over ten years prior in *Wright*: can a union waive on behalf of its members the right to bring a statutory discrimination claim in court, just as the *Gilmer* Court held an individual can do

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for himself? The *14 Penn Plaza* Court revisited the conflict-of-interest rationale first set out over 35 years ago in the dicta of *Gardner-Denver* and examined whether unions could be entrusted with the responsibility of bargaining over the forum in which their members can vindicate their statutory rights to be free from discrimination in the workplace.

III. THE SUPREME COURT SPEAKS: THE *14 PENN PLAZA* DECISION

In a long-awaited and hotly contested 5–4 decision, the Supreme Court decided that an arbitration agreement negotiated in a CBA that waives employees' right to bring statutory discrimination claims in court is enforceable. Justice Clarence Thomas wrote the majority opinion, joined by Chief Justice Roberts, and Justices Scalia, Kennedy and Alito.

The Court held that Section 9(a) of the National Labor Relations Act (NLRA), which governs federal labor-relations law, gives unions the ability to negotiate with employers regarding the terms and conditions of employment. The Court held a clause that requires arbitration of statutory discrimination "easily qualifies" as a condition of employment that is subject to mandatory bargaining.

The majority noted that "Courts generally may not interfere in this bargained-for exchange," and so the collective bargaining agreement's arbitration provision must be enforced unless the ADEA precludes arbitration of claims brought under the statute. As the Court previously recognized in *Gilmer*, the ADEA does not preclude arbitration of claims brought under it. The Court concluded that "Congress has chosen to allow arbitration of ADEA claims," and "[t]he Judiciary must respect that choice." Therefore, the Court held "there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate age-discrimination claims at issue in this appeal."

The Supreme Court did not find it necessary to overrule *Gardner-Denver*, as this case and its progeny stand only for the narrow legal rule that arbitration of an individual's contract-based claims does not preclude subsequent judicial resolution of separate, statutory claims. The Court also discounted the conflict-of-interest concern articulated in dicta in *Gardner-Denver*, that unions may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit. This conflict-of-interest attack on a union's ability to negotiate these arbitration agreements was dismissed by the Court as a "collateral attack on the NLRA" because the principle of majority rule is the central premise behind the NLRA. Moreover, the Court noted that employees have ample protection from such conflicts of interest by virtue of unions' "duty of fair representation" and potential liability under the ADEA if they discriminate against their members based on age, as well as the employees' enduring right to file age-discrimination claims with the Equal Employment Opportunity Commission (EEOC)[16] and NLRA claims with the National Labor Relations Board.

The Court in *14 Penn Plaza* relied only on the holding in *Gardner-Denver* because much of the dicta included in that opinion was based in the antiquated "mistrust of the arbitral process" harbored by the Court in 1974. This mistrust has disappeared and arbitration now is a universally accepted forum for resolving disputes—including employment disputes. The Court responded to the rehashing of generalized attacks on arbitration by praising this alternative dispute mechanism, noting that "[a]n arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims," and recognizing that the relative informality of arbitration is "one of the chief reasons that parties select arbitration."[17]

The *14 Penn Plaza* Court assured prospective plaintiffs that it would not enforce a "substantive waiver" of an employee's federally protected civil rights, noting that it was not positioned to resolve the speculative contention that a union could block employees from bringing their statutory discrimination claim in arbitration, leaving potential plaintiffs without a forum to bring their statutory claims. Justice Souter wrote a dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, that takes this guarantee and attempts to reshape it to nullify much of the rest of the majority opinion. The dissent states that "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" noting that this is "usually the case."

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This broad interpretation in Justice Souter's dissent misreads the majority opinion. The majority explicitly acknowledges that there may be situations where an individual's interests are subordinated to those of the other union members, and holds that an arbitration agreement is still enforceable in those situations because of the other potential remedies the individual retains. Moreover, the majority articulates the various remedies available to an employee who believes his union did not adequately protect his rights. The only question left open by the majority was what would happen if an employee was prevented from having his statutory claims heard in *any* forum—arbitral or judicial.

Aside from this provocative pronouncement, Justice Souter's dissent and Justice Stevens's separate dissent focus on the relatively bland need to adhere to *stare decisis* and follow the Court's precedent from *Gardner-Denver*. The dissents interpret *Gardner-Denver* far more broadly than the majority, as holding that a union does not have the power to waive its members' access to court for the enforcement of their statutory discrimination claims. In response, the majority states that "*Gardner-Denver* would appear to be a strong candidate for overruling if the dissent's broad view of its holding…were correct."

IV. A LOOK INTO THE FUTURE

Employers with unionized workforces are now wondering what the future holds for collectively-bargained arbitration of statutory discrimination claims. Future litigation may be on the horizon that will flesh out certain aspects of the Court's decision in *14 Penn Plaza*. Meanwhile, unions who agree to broad arbitration provisions may see their roles changing. Moreover, an increase in arbitration may bring about other changes in the workplace. All of these adjustments may be temporary, though, because there is a chance that Congress will legislatively overrule the Court's decision in *14 Penn Plaza*.

A. Future Litigation

The dissent's broad assertion in *14 Penn Plaza* that the majority opinion will have limited import raises the interesting question of under what circumstances, if any, a union negotiated arbitration agreement would be unenforceable. The Court left open the question of whether an individual would have the right to bring his statutory discrimination claims in court if his union refused to bring these claims in arbitration and the employee was unable to bring his claims independently from the union.

If a union agreed that employees will arbitrate all of their statutory discrimination claims, but retained the exclusive right to bring these claims on behalf of employees, a union could conceivably bar an employee from bringing his claim in arbitration, and the arbitration agreement in the CBA would bar him from bringing the claim in court. An employee in this scenario would likely bring his claim in court and assert that his statutory rights are violated when he is not allowed to bring his statutory claim in any forum. The employee might argue that his predicament hearkens back to that of Mr. Alexander in *Gardner-Denver*, and that, just like Mr. Alexander, he should not be deprived of his substantive rights under the discrimination laws. The employer, on the other hand, might argue that a union is able the negotiate over an arbitration provision under the NLRA, and there is nothing in the text of the NLRA that would stop a union from controlling an employee's access to the arbitration. Indeed, a union is traditionally able to screen which grievances it will bring to arbitration based on its assessment of the merits of claims and the union's resources.

Questions of this sort may ultimately work their way back up to the Supreme Court.

B. The Future for Unions

Unions may worry that they will be unable to take on all of their members' discrimination claims. Significantly, the Supreme Court did not hold that all unions must agree to these arbitration provisions. Thus, only those unions prepared to deal with the burden of litigating discrimination claims or willing to permit their members to handle such discrimination claims on their own will take on this responsibility. Unions may also be concerned that if they do take on this responsibility, they could see a spike in claims that they have breached their duty of fair representation or that they have discriminated against the employees they represent in arbitration. Such suits against unions are the remedy the *14 Penn Plaza* majority said employees could turn to when they take issue with the manner and extent to which unions present their grievances. Although claims against unions may increase, courts have set a high bar for employees to pass in order to win such duty of fair representation claims against their unions: a union is only liable for breaching its duty of fair representation when its conduct toward a

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member of its collective bargaining unit is arbitrary, discriminatory, or in bad faith.[18] Any action taken based on a union's reasonable investigation of an employee's claims and consistent with other similar union decisions, would likely be upheld against any potential employee claims.

Unions may seek to avoid liability by tailoring arbitration provisions in their future CBAs to place more responsibility in the hands of employees. Although unions typically bring their members' claims in arbitration, there is no rule that they *must* bring members' statutory discrimination claims for them. Therefore, two types of provisions may become common in CBAs when the union and employer agree to an arbitration provision. *First*, unions and employers may provide employees with the right to arbitrate discrimination claims independently of the union if the union does not proceed with the claim. *Second*, unions and employers may include a provision in their arbitration agreements through which an employee can opt-out of union representation and pursue his statutory discrimination claims independently, even if the union would otherwise want to bring the claims on his behalf. Such an opt-out provision could help absolve unions from liability and alleviate some of the burden unions would face in representing their members with respect to discrimination claims.

The Court's decision in *14 Penn Plaza* brings unions to the table and gives them an opportunity to negotiate over such nuanced arbitration provisions. If the Court had ruled the other way and found that such arbitration clauses were not mandatory subjects of bargaining, unions would be cut out of the equation,[19] leaving employers free to make individual agreements to arbitrate discrimination claims with unionized employees, just as employers often do in the non-union context. The advantages employees derive from belonging to a union would be diminished, and they likely would agree to arbitrate their discrimination claims without receiving many of the benefits available through the collective bargaining process. Unions may agree to arbitration provisions in order to gain such benefits, like higher wages, for their members. As Justice Roberts pointed out during oral argument, this "bargaining leverage" is "the whole reason you have a union."[20] Moreover, unions that are willing to take on their members' statutory discrimination claims will be able to provide a valuable, tangible service for their members.

C. The Future of Arbitration

Employers and unions likely will seek to include broad arbitration provisions in future collective bargaining agreements. Arbitration is a much more efficient and, generally, less costly process for resolving workplace disputes. Also, without such broad arbitration provisions, employers face the heavy burden of employees bringing two claims over the same factual circumstances, one with respect to contractual claims in arbitration, and another alleging related statutory claims in court.

As arbitration of statutory claims becomes more prevalent in unionized workforces, employers may experience a rise in discrimination claims. Discrimination claims will be easy for employees to tack on to existing contractual claims once the two are being brought in the same arbitral forum. Moreover, if a union agrees to represent an employee with respect to both his contractual and statutory discrimination claims, the employee will not incur any extra cost in bringing the discrimination claim. The ease and familiarity of this process of bringing a discrimination claim through a union stands in stark contrast to the difficulties of obtaining a lawyer and filing a complaint in state or federal court.

As discrimination claims shift from courts to arbitration in unionized workforces, it is important to examine how arbitration differs from court and what effects these differences may have. For example, arbitrators are free to determine what evidence they will consider, and are not bound by the rigid rules of evidence that exist in federal and state courts. This means that documents and statements that might have been inadmissible in court, may be key evidence in discrimination suits that are brought in arbitration. Another difference is that arbitrators decide cases on the merits more frequently than courts, which often grant motions to dismiss or motions for summary judgment. In-house counsel and human resources departments at unionized organizations will adapt to such differences between arbitration and litigation, just as their counterparts at non-union organizations did following *Gilmer*.

D. Will it Last?

The Arbitration Fairness Act of 2009,[21] introduced in the House of Representatives in February 2009, would amend the Federal Arbitration Act to invalidate all pre-dispute arbitration agreements mandating the arbitration of employment disputes and civil rights

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claims.[22] The House of Representatives' version of this bill was introduced prior to the Court's *14 Penn Plaza* decision and does not apply to any arbitration provisions that are adopted as part of a collective bargaining agreement. On April 29, 2009, Senator Feingold introduced a version of the Arbitration Fairness Act in the Senate, which explicitly prohibits arbitration provisions in CBAs from waiving an individual's right to judicial enforcement of statutory or constitutional claims.[23] Senator Feingold's Web site acknowledges that this new provision was added to "reverse a recent Supreme Court ruling (*14 Penn Plaza v. Pyett*) that arbitration provisions contained in such agreements can waive an employee's right to enforce employment discrimination laws in court."[24] This legislation would effectively overrule *14 Penn Plaza* and *Gilmer*, and stop any employer from having a mandatory arbitration procedure for employment discrimination claims.[25] The highly controversial Arbitration Fairness Act may gain additional publicity because of the Court's decision in *14 Penn Plaza*, but mainly is being motivated by other forms of arbitration agreements, such as general consumer and employment agreements to arbitrate (outside of the union context). Employers, employees and unions will all have to wait and see what the effects of *14 Penn Plaza* will be on the prevalence of arbitration and whether Congress will step in to change the law in response.

NOTES

1. Temco Service Industries, Inc., a maintenance service and cleaning contractor, employed Pyett.
2. Steven Pyett and two other night watchmen brought their claims together in Pyett v. Pennsylvania Bldg. Co., 2006 WL 1520517 (S.D. N.Y. 2006), order aff'd, 498 F.3d 88, 104 Fair Empl. Prac. Cas. (BNA) 807, 182 L.R.R.M. (BNA) 2359, 90 Empl. Prac. Dec. (CCH) P 42937 (2d Cir. 2007), cert. granted, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008) and rev'd and remanded, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009).
3. Pyett v. Pennsylvania Bldg. Co., 2006 WL 1520517 (S.D. N.Y. 2006), order aff'd, 498 F.3d 88, 104 Fair Empl. Prac. Cas. (BNA) 807, 182 L.R.R.M. (BNA) 2359, 90 Empl. Prac. Dec. (CCH) P 42937 (2d Cir. 2007), cert. granted, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008) and rev'd and remanded, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009).
4. Pyett v. Pennsylvania Bldg. Co., 498 F.3d 88, 104 Fair Empl. Prac. Cas. (BNA) 807, 182 L.R.R.M. (BNA) 2359, 90 Empl. Prac. Dec. (CCH) P 42937 (2d Cir. 2007), cert. granted, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008) and rev'd and remanded, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009).
5. 14 Penn Plaza LLC v. Pyett, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008).
6. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 105 Fair Empl. Prac. Cas. (BNA) 1441, 186 L.R.R.M. (BNA) 2065, 92 Empl. Prac. Dec. (CCH) P 43507, 157 Lab. Cas. (CCH) P 11208 (2009).
7. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147, 7 Fair Empl. Prac. Cas. (BNA) 81, 7 Empl. Prac. Dec. (CCH) P 9148 (1974).
8. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52, 94 S. Ct. 1011, 39 L. Ed. 2d 147, 7 Fair Empl. Prac. Cas. (BNA) 81, 7 Empl. Prac. Dec. (CCH) P 9148 (1974).
9. 14 Penn Plaza LLC v. Pyett, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008), Souter dissent at 3.
10. Alexander v. Gardner-Denver Co., 415 U.S. 36, 58 n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147, 7 Fair Empl. Prac. Cas. (BNA) 81, 7 Empl. Prac. Dec. (CCH) P 9148 (1974).
11. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 745, 101 S. Ct. 1437, 67 L. Ed. 2d 641, 24 Wage & Hour Cas. (BNA) 1284, 90 Lab. Cas. (CCH) P 33990 (1981).
12. McDonald v. City of West Branch, Michigan, 464 U.S. 813, 104 S. Ct. 66, 78 L. Ed. 2d 81 (1983).
13. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 55 Fair Empl. Prac. Cas. (BNA) 1116, 56 Empl. Prac. Dec. (CCH) P 40704 (1991).
14. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 55 Fair Empl. Prac. Cas. (BNA) 1116, 56 Empl. Prac. Dec. (CCH) P 40704 (1991).
15. Wright v. Universal Maritime Service Corp., 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361, 8 A.D. Cas. (BNA) 1429, 159 L.R.R.M. (BNA) 2769, 1999 A.M.C. 201 (1998).
16. In *EEOC v. Waffle House, Inc.*, the Supreme Court held that an employee is able to pursue a claim with the EEOC regardless of any arbitration agreement he has with his employer. E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 12 A.D. Cas. (BNA) 1001, 81 Empl. Prac. Dec. (CCH) P 40850 (2002).
17. Petitioners in *14 Penn Plaza* cite empirical studies by Professor Theodore St. Antoine that concluded "employees do considerably better in arbitration than litigation, and that '[e]mployees, particularly those at the lower end of the pay scale, will find readier access to effective relief in arbitration' than litigation." Petitioner's Reply Brief at 20, (quoting Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 796 (2009)).
18. Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842, 64 L.R.R.M. (BNA) 2369, 1 Empl. Prac. Dec. (CCH) P 9767, 55 Lab. Cas. (CCH) P 11731 (1967).
19. *See* Air Line Pilots Ass'n, Intern. v. Northwest Airlines, Inc., 199 F.3d 477, 484, 81 Fair Empl. Prac. Cas. (BNA) 830, 163 L.R.R.M. (BNA) 2072 (D.C. Cir. 1999), reh'g en banc granted, judgment vacated, (Mar. 9, 2000) and judgment reinstated, 211 F.3d 1312, 83 Fair Empl. Prac. Cas. (BNA) 21, 164 L.R.R.M. (BNA) 2632, 140 Lab. Cas. (CCH) P 10724 (D.C. Cir. 2000) (holding that because unions cannot agree on behalf of their members to pre-dispute arbitration of statutory discrimination claims, such a term is a non-mandatory subject of bargaining, which an employer can impose on employees, bypassing the union).
20. *14 Penn Plaza* 12/1/08 Oral Argument Transcript at 49-50.
21. H.R. 1020.
22. A similar bill was proposed in 2007, but never became law. H.R. 3010.
23. S. 931.
24. http://feingold.senate.gov/record.cfm?id=312222.
25. Employers would still be able to agree with employees after a dispute arises to have the claim decided in arbitration rather than in court, as the proposed litigation only affects pre-dispute arbitration agreements. H.R. 1020, S. 931.

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