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Supreme Court Endorses Union-Negotiated Arbitration of Discrimination Claims

Proskauer Prevails As The Court Holds That Collectively Bargained Agreements for The Arbitration of Statutory Discrimination Claims are Enforceable

On April 1, 2009, the United States Supreme Court, in a 5-4 decision, ruled in favor of Proskauer Rose's client 14 Penn Plaza LLC, holding that a collective bargaining agreement ("CBA") that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act ("ADEA") claims is enforceable as a matter of federal law. The Court's decision validates the right of an employer and a union to negotiate about the way disputes can be resolved, even when those disputes involve individual statutory rights. Accordingly, *14 Penn Plaza LLC. v. Pyett*, is significant to all employers who have collective bargaining relationships.

Proskauer negotiated the CBA at issue on behalf of the Realty Advisory Board on Labor Relations, Inc., ("RAB") and handled this litigation on behalf of 14 Penn Plaza — from the district court through argument of the matter before the Supreme Court by Paul Salvatore, co-chair of Proskauer's Labor and Employment Law Department.

Background

The lawsuit was brought by three night watchmen and porters employed by Temco Service Industries, Inc., and represented by Local 32BJ, SEIU ("Local 32BJ" or "Union"), to monitor the lobby of 14 Penn Plaza in New York City. As a result of the building's hiring of licensed security guards to monitor the building lobby after September 11, the employees were transferred to different duties within their job description. Local 32BJ proceeded to arbitration under the RAB / Local 32BJ CBA's arbitration provision, alleging both contractual and statutory age discrimination claims. After the Union withdrew the age discrimination claims from the arbitration, the employees refused repeated requests from Temco and 14 Penn Plaza to arbitrate the discrimination claims on their own.

After their contractual grievances were rejected by the arbitrator, the employees filed suit in the Southern District of New York alleging that the transfer was due to age discrimination. Defendants moved to compel arbitration pursuant to the CBA's requirement that all claims of discrimination, including claims under the ADEA and other statutes, be submitted to arbitration.

The district court denied the motion to compel and the Second Circuit sustained the denial based upon *Alexander v. Gardner-Denver*, a 35 year old Supreme Court decision holding that a terminated employee was not precluded from bringing a Title VII lawsuit by an arbitrator's decision finding that his discharge did not violate a CBA.

The Supreme Court's Decision

The Supreme Court reversed, holding that the National Labor Relations Act ("NLRA") gives unions the ability to negotiate with employers over a clause that requires arbitration of ADEA claims, as such a term "easily qualifies" as a condition of employment that is subject to mandatory bargaining. The majority opinion, written by Justice Clarence Thomas, joined by Justices Scalia, Kennedy, Alito, and the Chief Justice, noted that "Courts generally may not interfere in this bargained-for exchange," and, thus, a CBA's arbitration provision must be enforced unless the ADEA precludes arbitration of claims brought under the statute. As no such prohibition is contained within the text of the ADEA, 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 the age-discrimination claims at issue in this appeal."

The absence of any ADEA prohibition against arbitration was previously recognized by the *Supreme Court in Gilmer v. Interstate/Johnson Lane Corp*. In *Gilmer*, the Supreme Court decided that the ADEA does not preclude arbitration of claims brought under the statute when an employer enters into an arbitration agreement with an individual employee. The majority in *14 Penn Plaza* found nothing in the ADEA suggesting a distinction between arbitration agreements with an individual employee and those agreed to by a union representative. The Court therefore concluded that "Congress has chosen to allow arbitration of ADEA claims," and "[t]he Judiciary must respect that choice."

The Court did not find it necessary to overrule *Gardner-Denver* as that case and its progeny stand for the narrow legal rule that arbitration of an individual's contract-based claims does not preclude subsequent judicial resolution of separate, statutory claims. Although *Gardner-Denver* includes broad dicta that is quite critical of arbitration, the Court concluded this suspicion of arbitration is a relic of the past.

The majority also discounted *Gardner-Denver's* articulated concern that a union may have a conflict of interest and, therefore, subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit. The Court found that it could not rely on such a policy concern for introducing a qualification into the ADEA that is not in the statute's text. Any argument that the Respondents' were deprived of a judicial forum by a union with a conflict of interest was dismissed by the Court as a "collateral attack on 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 union members' enduring right to file age-discrimination claims with the Equal Employment Opportunity Commission and NLRA claims with the National Labor Relations Board.

The dissent focused on the need to adhere to *stare decisis* and follow the Court's ruling in *Gardner-Denver*, which it interpreted far more broadly than the majority, as holding that "an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive."

Implications for Employers

As a result of the Supreme Court's ruling, and absent any intervening legislation, employers should consider bargaining over provisions requiring the arbitration of statutory discrimination claims in future union negotiations. Arbitration of statutory claims in the unionized workplace has at least the same advantages as arbitration in the non-unionized setting – including having the more efficient process of arbitration resolve workplace disputes rather than lengthy and costly litigation. Agreements to arbitrate of statutory claims has the additional advantage in unionized settings of preventing employees from having "two bites at the apple" over claims arising out of the same factual circumstances – once with respect to contractual claims in arbitration and then again in a judicial forum with respect to related statutory claims. In negotiating and drafting such clauses, employers should:

- Use clear and unmistakable language specifically identifying the types of statutory discrimination claims to be arbitrated – such as the ADEA, Title VII, Americans with Disabilities Act, and state and local statutory claims.
- Ensure that all of an employee's substantive statutory rights are preserved, including the right to all remedies available under the law.
- Develop specific procedures that will be followed in such arbitrations, and set out these procedures in their CBAs.
- Consider providing an employee with the right to arbitrate discrimination claims independently of the union if the union does not, or cannot, proceed with the claim.

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