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Supreme Court Holds CBA Requiring ADEA Arbitration is Enforceable

BY NEAL D. MOLLEN, STEPHEN B. KINNAIRD AND DARA H. FRELING

A labor agreement that channels statutory discrimination claims into arbitration is enforceable, the Supreme Court has held. *14 Penn Plaza LLC v. Pyett*, __ S. Ct. __, 556 U.S. ___, 2009 WL 838159 (April 1, 2009). The Court held, in a sharply divided five-to-four decision, that the public policy favoring the arbitration of disputes reflected in the National Labor Relations Act applies with equal force to statutory claims such as those arising under the Age Discrimination in Employment Act of 1967 ("ADEA"). This decision is a victory for the employer, and represents something of a counterpoint to recent Court decisions that restricted the utility of pre-dispute arbitration agreements.

Collectively Bargained Promise to Arbitrate

This case started when unionized employees filed grievances under their collective bargaining agreement ("CBA") arising from reassignments made by the employer, Penn Plaza. The employees alleged, among other things, that the reassignments were based on the age of the reassigned employees. These reassignments, the employees claimed, "led to a loss in income, caused them emotional distress, and were otherwise less desirable than their former positions." 2009 WL 838159, at *5.

On their behalf, the Union pursued the claims in arbitration. After the initial arbitration hearing, the Union withdrew the age discrimination claims from arbitration. The Union then filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). After the EEOC issued a Dismissal and Notice of Rights, the Union filed suit in federal court. Penn Plaza then filed a motion to compel arbitration.

The employer's motion was based on the CBA, which prohibited age discrimination, and channeled allegations of age discrimination into the CBA's grievance and arbitration procedure. The CBA provided that ADEA and other discrimination claims would "be subject to the grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination." App. to Pet. for Cert. 48a.

The trial court denied the motion to compel arbitration, and the Second Circuit affirmed that decision. This week, the Supreme Court reversed the Second Circuit and remanded this case for further proceedings consistent with its opinion.

Individual or Collective Rights?

The Court's decision in this case resolves a tension between *Alexander v. Gardner-Denver Co.*., 415 U. S. 36, 49-51 (1974), which declared

"that a collective bargaining agreement [cannot] waive covered workers' rights to a judicial forum for causes of action created by Congress," and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 33-35 (1991), which held that "an individual employee who had agreed individually to waive his right to a federal forum *could* be compelled to arbitrate a federal age discrimination claim." Prior to this decision, it had commonly been held that the union's bargaining authority extended only to *collective* rights, and not to the sort of *individual* rights that are embodied in Title VII and the ADEA.

Here, though, the Court gave a much broader reach to the union's bargaining power under the National Labor Relations Act. The Union and the employer, the Court held, had "collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term [between the parties] easily qualifies as a "conditio[n] of employment" that is subject to mandatory bargaining under" the NLRA. 2009 WL 838159, at *7. Because courts generally may not interfere with such a bargained-for exchange, the Court found that such a bargain must be enforced unless the ADEA itself removed this particular class of grievances from the NLRA's broad sweep.

After analyzing the text of the ADEA and its legislative history, the Court found that there is nothing that explicitly precludes arbitration and thus held:

The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, 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. 2009 WL 838159, at *8.

Practical Considerations

Litigation can be extraordinarily expensive; arbitration is generally expected to be less so. "Parties generally favor arbitration precisely because of the economics of dispute resolution." *Penn Plaza*, 2009 WL 838159, at *7. Arbitration has worked for nearly 75 years as an efficient and definitive mechanism for promptly resolving management-labor contract disputes. *Penn Plaza* vastly expands the scope of disputes that may now be brought within the ambit of this dispute resolution mechanism.

Coverage this broad will not be implied, however; to channel statutory claims to arbitration, the collective bargaining agreement's arbitration clause will have to include discrimination claims clearly and unmistakably. Any ambiguity in this regard will doom a claim of coverage. Indeed, we expect that *Penn Plaza* will be poorly received by many courts and applied in as grudgingly as its language permits. Thus, most existing arbitration clauses in CBAs will be inadequate to get the *Penn Plaza* result. Employers seeking to take advantage of *Penn Plaza* will need to push for absolutely unambiguous language compelling that result in future bargaining.

While arbitration can offer many advantages over litigation, employers should also carefully consider whether pushing for a *Penn Plaza* arbitration clause will be beneficial given all of the various competing bargaining priorities employers typically face. Recent decisions such as *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) and *Citigroup Global Markets, Inc. v. Bacon*, ___ F.3d ___, 2009 WL 542780 (5th Cir. March 5, 2009), sharply limit the options available to parties disappointed by an adverse result in arbitration, even when the award reflects a manifest disregard for controlling law. With no effective means of appeal, an arbitrator's award — for better or

worse — can be the employer's (and the employee's) only shot.

Moreover, it seems likely that unions will resist such clauses vigorously. Once statutory claims become subject to the collectively bargained arbitration process, the union will assume a duty of fair representation on the processing of those claims. Unions are not likely to embrace another opportunity to be sued for violating that duty. Leaving these claims in court leaves the union out of the matter, which is likely where the union will want to be.

Employers that decide to bargain for such a clause will want to keep these goals in mind:

- Ensure that all possible claims are arbitrable, with a universal definition of arbitrability. References to the "scope of employment" are unnecessarily limiting, and the employer may risk finding itself defending its actions in two forums — the worst possible result;
- Anticipate the likely defendants in a suit — *e.g.*, not just the company, but its affiliates, supervisors and benefit plans — and provide that they are third-party beneficiaries to the arbitration promise;
- Resist the temptation to impose a "designer" statute of limitations or constricted damage provisions for arbitrated statutory claims. Courts looking for a basis to void a *Penn Plaza* clause may well fix on such diminutions of statutory rights;
- Typically, collectively bargained arbitration provisions provide for little or no discovery. Indeed, this is a primary source of the efficiency the process promises. That sort of streamlined process is unlikely to pass judicial muster with respect to statutory discrimination claims. Employers drafting a *Penn Plaza* clause will have to provide certain minimum procedural protections, such as access to depositions, document discovery and interrogatories. Once these discovery devices are introduced to the arbitration process, employers can expect their unions to press to have those procedural guarantees applied more broadly to run of the mill contract grievances. This sort of "process creep" can undermine the primary value of arbitration and should be resisted;
- The Court left open the question whether an employer could compel arbitration of statutory claims where the union controls access to and management of the forum, as is usually the case with collectively bargained procedures. Again, courts unhappy about the result in *Penn Plaza* may well refuse to enforce arbitration where the individual cannot access and control the process without union involvement. Employers should consider this issue when designing their proposals; and
- Do not preclude an individual's access to administrative agencies (like the EEOC) that have an independent statutory mandate to investigate certain types of discrimination claims.

Many courts are far more hostile to arbitration than the Supreme Court majority; designing a clause that will withstand lower-court scrutiny will take considerable effort. We urge you to consult competent and experienced employment law counsel before embarking on such an effort.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Atlanta

John F. Wymer
404-815-2374
johnwymer@paulhastings.com

Chicago

Jon A. Geier
312-499-6054
jongeier@paulhastings.com

New York

Zachary D. Fasman
212-318-6315
zacharyfasman@paulhastings.com

Orange County

Stephen L. Berry
714-668-6246
stephenberry@paulhastings.com

San Francisco

Paul W. Cane
415-856-7014
paulcane@paulhastings.com

Robert P. Kristoff
415-856-7073
bobkristoff@paulhastings.com

Washington, D.C.

Neal D. Mollen
202-551-1738
nealmollen@paulhastings.com

18 Offices Worldwide Paul, Hastings, Janofsky & Walker LLP www.paulhastings.com

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