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Will the Supreme Court Allow Unions to Collectively Bargain Away an Individual's Right to Pursue a Discrimination Claim in Court?

By Eric B. Meyer, Esq. and Sehyung Lee, Esq.

On December 1, 2008, the United States Supreme Court heard oral argument in the matter of *14 Penn Plaza LLC v. Pyett*, a labor case which asks just one simple question: Can a union and employer prevent employees from pursuing individual discrimination claims in court by collectively bargaining for mandatory arbitration of such claims? While the question is simple, the ruling will reveal just how much faith the Supreme Court has in collective bargaining and the arbitration process.

In *Pyett*, three union employees sued their employer, 14 Penn Plaza LLC (Penn Plaza), in federal court under the Age Discrimination in Employment Act (ADEA). Pyett and his two co-workers were members of a union. That union and Penn Plaza were parties to a collective bargaining agreement (CBA) which explicitly provided that all discrimination claims between union members and Penn Plaza would be resolved exclusively through arbitration. Furthermore, the CBA provided that only the union could pursue claims on behalf of its members. Moreover, no union member was permitted to settle or compromise a claim against Penn Plaza without the permission of the union.

Before the employees had initiated litigation in Federal court, the union filed a grievance against Penn Plaza on behalf of Pyett and his two co-workers. The grievance set forth both contractual and age discrimination claims. Later, however, the union unilaterally dropped the age discrimination claim of the employees. Penn Plaza moved to dismiss the ADEA claims because the employees filed their ADEA claims in federal court and the CBA mandated arbitration of discrimination claims. The district court denied Penn Plaza's motion and, on appeal, the appellate court affirmed. Both courts reasoned that a union did not have the authority to waive a union member's right to a judicial forum for an individual statutory discrimination claim. The United States Supreme Court granted certiorari.

The Contentions of the Parties:

The employer, Penn Plaza, first argues that unions have the authority to collectively bargain for an employee's economic and non-economic interests, including discrimination claims -- essentially, anything germane to the working environment. Second, Penn Plaza contends that arbitration is a suitable forum to handle discrimination claims, as the United States

Supreme Court concluded in its 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corp.* In *Gilmer,* the Supreme Court upheld an individual employment contract which provided that all of the employee's claims against the employer must be arbitrated. Finally, Penn Plaza maintains that Congress passed the Federal Arbitration Act (FAA) in an effort to promote arbitration. Under the FAA, arbitration agreements involving commerce are enforceable except where grounds exist for the revocation of any contract. Penn Plaza argued that nothing in the ADEA evinces Congress' intent to exclude ADEA claims from arbitration.

Pyett and his two co-workers make several arguments in response. First, they focus on the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver*, where the Supreme Court held the existence of an arbitration clause does not preclude an individual from filing a court action for a federal anti-discrimination claim. Second, the employees contend that a union may have a disincentive to pursue certain individual claims through arbitration if not otherwise in the best interests of the entire membership. Since the ADEA requires that a "knowing and voluntary" waiver of ADEA claims be made by an "individual," it follows that a union has no power to waive an individual's ADEA rights. Finally, the employees maintain that the CBA itself was flawed because if the union decides not to pursue the employees' individual discrimination claims, they have no other forum in which to seek a remedy. The FAA only authorizes arbitration where it is assured that an employee has a forum to effectively argue his claim.

What *Pyett* Means for Employers:

The worst case scenario for an employer would be for the Supreme Court to overrule *Gilmer* and hold that arbitration clauses for individual discrimination claims are invalid, regardless of whether they are contained in a CBA or in an individual employee agreement. Employers who already collectively bargained for such a clause by sacrificing other economic benefits would become double losers.

Furthermore, although arbitration is widely considered to be a more efficient alternative to the court system because it removes the ever-unpredictable jury from the equation, a *Gilmer* reversal will hamstring all employers from avoiding courts when litigating discrimination claims.

A *Gilmer* reversal; however, is highly unlikely. Justices Breyer and Souter recognize that invalidating mandatory arbitration clauses for discrimination claims could create a slippery slope by invalidating agreements between a union and employer to arbitrate other causes of action (e.g., tort claims, contract claims) that an individual employee may assert against his employer in a court action.

A more likely result would be for the Supreme Court to resolve the tension between *Gilmer* and *Gardner-Denver* by overruling, or cutting away at, the latter. Here's why:

1. <u>The Procedural Posture</u> – *Pyett* deals with the enforcement of an agreement to arbitrate a statutory discrimination claim. *Gardner-Denver* dealt with claim preclusion. That is, in *Gardner-Denver*, the Supreme Court held that an employee does not lose his right to a federal court trial by first submitting a discrimination claim to arbitration pursuant to the nondiscrimination clause of a CBA. *Pyett* concerns whether an employee should affirmatively litigate his claims.

2. <u>Scope of the Arbitration Clause</u> – The CBA in *Gardner-Denver* contained a very broad arbitration clause encompassing those claims relating to the "meaning and application of the provisions of [the CBA]." Conversely, in *Pyett*, the arbitration clause in the CBA specifically provides that discrimination claims are subject to mandatory binding arbitration, and also that the arbitrator has the power to apply applicable discrimination law and award the remedies that derive therefrom.

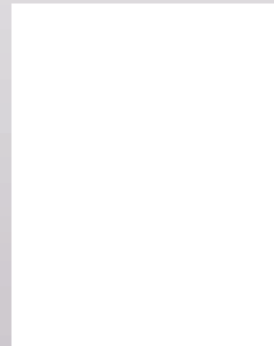
3. <u>State Decisis</u> – The Supreme Court has already broadly applied the FAA to agreements to arbitrate all types of legal claims, including discrimination claims arising under federal and state law,

4. <u>No Congressional Intent to Mandate Court Litigation</u> – Then there is Gilmer. Endorsing arbitration as a suitable alternative to adjudication, the Gilmer Court held that Congress did not intend to preclude arbitration of age discrimination claims.

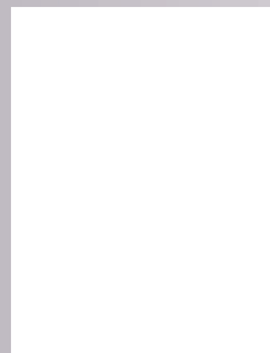
In the end, however, it all boils down to this: Is there truly a distinction between agreements to arbitrate discrimination claims made by individual employees -- which *Gilmer* held to be enforceable -- versus with the same agreement made by a union, acting as the duly authorized bargaining agent for its union members, when that agreement is subsequently voted upon and ratified by the union membership as a whole? If the answer is no, Penn Plaza will prevail and, as Chief Justice Roberts noted, unions will maintain an important negotiating chip in collective bargaining by being empowered to agree to require arbitration of all member claims -- including individual discrimination claims -- in exchange for other desired economic benefits, like higher wages.

Even if the Supreme Court invalidates collectively bargained mandatory arbitration of discrimination claims, it may still be possible for unionized employers to guarantee arbitration of discrimination claims. Justice Ginsburg acknowledged as much. If not an appropriate topic for collective bargaining, a unionized employer would be free to deal directly with its employees on this issue. Indeed, unionized employers may be able to condition acceptance of a job on an employee's agreement to arbitrate all claims against his employer.

Just as there are no guarantees in life, those unionized employers presently involved in collective bargaining negotiations, or with discrimination matters pending in arbitration based on a clause in a CBA, obviously face some uncertainty so long as *Pyett* remains undecided. Therefore, employers should be mindful that any mandatory arbitration clause to which they agree now may be invalidated by the Supreme Court's eventual ruling in *Pyett*. Employers presently in collective bargaining negotiations should factor this case into their equation and only begrudgingly agree to exchange monetary benefits for a mandatory arbitration clause that would cover all claims including individual discrimination claims. Employers presently scheduled for arbitration of discrimination matters based on a clause in a CBA may want to stay the proceedings pending a final ruling in *Pyett* rather than go through arbitration and risk a reversal of the arbitration decision or, even worse, a second bite at the apple in Court.



Mr. Meyer dedicates his practice to litigating and providing counsel to employers throughout the mid-Atlantic region on labor and employment issues affecting the workplace including collective bargaining, discrimination, employee handbook policies, enforcement of restrictive covenants, and trade secret protection. Mr. Meyer also trains both management and their employees on workplace harassment issues. He can be reached at (215) 575-7283 or emeyer@dilworthlaw.com.



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