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LABOR AND EMPLOYMENT ALERT

May 2009

Veering Off the "Gardner" Path: Supreme Court Allows Arbitration of Statutory Claims Under Union Contract

By Lawrence A. Michaels and Jennifer Vanse

For many years there has been an unresolved legal question as to whether a union may agree that its members must arbitrate statutory claims (such as discrimination claims) rather than bring those claims in court. The United States Supreme Court, in *14 Penn Plaza LLC, et al. v. Pyet, et al.*, 556 US ___ (2009), has now lent support to the conclusion that a union may waive its members' right to litigate, rather than arbitrate, such claims. Continuing the Court's recent trend of vigorously enforcing arbitration agreements, a five-to-four majority of the Court has held that a "clear and unmistakable" provision in a union contract requiring union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable as a matter of federal law.

How The Case Arose

Plaintiff Steven Pyett and two other employees were watchmen represented by the Service Employees International Union. They were reassigned when their employer subcontracted their duties. Initially, they grieved their reassignment under various provisions of their union contract, including a provision prohibiting age discrimination. After the initial arbitration hearing, the union dropped the age discrimination claims. The plaintiffs then brought individual lawsuits under the ADEA and various state anti-discrimination laws.

The employer petitioned the Court to order the plaintiffs to arbitrate these claims on the grounds that the collective bargaining agreement ("CBA") required them to do so. The trial court and the Court of Appeals both held "that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." These Courts relied on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), which held that a union employee, who had already arbitrated his discharge under the "just cause" provisions of his collective bargaining agreement, was still entitled to bring a race discrimination lawsuit under Title VII.

Historical Background

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Gardner-Denver was decided in 1974 - at a time when Courts were often hostile to arbitration as an alternative to litigation. The *Gardner-Denver* decision reflects that attitude - expressing skepticism that an arbitrator could be trusted to enforce important statutory rights. By the time of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that attitude had changed. In *Gilmer*, the Court compelled arbitration of an ADEA claim where an individual employee had signed an agreement which required arbitration of all disputes that arose out of employment. In marked contrast to *Gardner-Denver*, the Gilmer Court praised arbitration as a favored method of dispute resolution: "Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.' In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. . . . Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'"

Gilmer enforced an agreement to arbitrate signed by an **individual** employee on his own behalf. It did not address the question of whether a **union** could enter into such an agreement on behalf of its members. Ordinarily, the National Labor Relations Act ("NLRA") authorizes a union to negotiate all "wages, benefits, and other terms and conditions of employment" on behalf of its members, but many courts continued to rely on *Gardner-Denver* for the proposition that unions could never waive an employee's right to litigate a statutory claim in court. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 82 (1998), the Supreme Court itself expressly declined to decide the issue in the context of an ADA claim, holding instead that the arbitration provision in that case did not clearly cover ADA claims and therefore was not a "clear and unmistakable" waiver of the right to litigate such claims in court.

The Court's Decision in *Penn Plaza*

Over the dissent of four Justices who concluded that *Gardner-Denver* controlled the instant dispute, the Supreme Court in *Penn Plaza* held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal labor law." In reaching this conclusion, the Court assumed (without deciding) that the applicable CBA contained such a clear and unmistakable waiver of the right to a judicial forum for ADEA claims, and held that such a waiver by a union is enforceable:

> As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. Courts generally may not interfere in this bargained-for exchange. . . . As a result, the CBA's

Q: ARE THERE REASONS WHY UNIONS MAY BE RELUCTANT TO NEGOTIATE A "CLEAR AND UNMISTAKABLE WAIVER" OF EMPLOYEE STATUTORY RIGHTS?

A: YES, THERE ARE A NUMBER OF REASONS WHY UNIONS MAY BE VERY RELUCTANT TO WAIVE THEIR MEMBERS' RIGHT TO LITIGATE INDIVIDUAL STATUTORY CLAIMS IN COURT. FIRST, A UNION THAT WAIVES SUCH RIGHTS MAY CREATE BAD FEELINGS AMONG ITS MEMBERS - THE MEMBERS MAY RESENT BEING DEPRIVED OF THEIR "DAY IN COURT." SECOND, BRINGING STATUTORY CLAIMS INTO THE GRIEVANCE AND ARBITRATION PROCESS WOULD FORCE THE UNION TO BECOME INVOLVED IN PRESENTING SUCH CLAIMS TO THE ARBITRATOR, WHICH IS EXPENSIVE AND INCONVENIENT FOR THE UNION. THIRD, BY WAIVING ITS MEMBERS' RIGHT TO A JUDICIAL FORUM, OR BY MISHANDLING ITS MEMBERS' CLAIMS IN ARBITRATION, THE UNION MAY OPEN ITSELF TO LAWSUITS ALLEGING THAT IT HAS NOT FAIRLY REPRESENTED ITS MEMBERS' INTERESTS.

Q: IS *PENN PLAZA* THE FINAL WORD ON THIS ISSUE?

A: UNFORTUNATELY, NO. THE *PENN PLAZA* CASE LEAVES A NUMBER OF QUESTIONS UNANSWERED: AMONG THEM: WHAT CONTRACT LANGUAGE

> arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep. It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer* ..." (Citations omitted.)

The *Penn Plaza* decision is legally important because it sheds light on an issue that has been much discussed but never resolved. The practical importance of the case, however, is less clear, both because unions may be reluctant to waive members' statutory rights and because the decision leaves many questions unresolved.

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OR OTHER EVIDENCE IS NEEDED TO DEMONSTRATE A "CLEAR AND UNMISTAKABLE" WAIVER? WHAT FEDERAL AND/OR STATE STATUTES (BEYOND THE ADEA) ARE COVERED BY THE RULING? (EMPLOYERS MAY FIND STATE WAGE AND HOUR LAWS TO BE A PARTICULARLY TEMPTING TARGET FOR A POTENTIAL WAIVER OF A JUDICIAL FORUM, BUT THE APPLICATION OF THE *PENN PLAZA* RULING IN THE WAGE/HOUR CONTEXT IS FAR FROM ASSURED.) CAN A UNION WAIVE ITS MEMBERS' RIGHT TO BRING A CLAIM ON A CLASS ACTION BASIS? WHAT HAPPENS IF THE UNION REFUSES TO TAKE A STATUTORY CLAIM TO ARBITRATION ON BEHALF OF A MEMBER? TO WHAT EXTENT WILL AN ARBITRATOR'S DECISION BE SUBJECT TO JUDICIAL REVIEW? THESE AND OTHER QUESTIONS ARE CERTAIN TO KEEP THE COURTS BUSY FOR MANY YEARS TO COME, AND UNTIL THESE ISSUES ARE RESOLVED, EMPLOYERS WOULD BE WELL-ADVISED TO TREAD WITH CAUTION IN THIS AREA.

FINALLY, WE SHOULD NOTE THAT CONGRESS MAY RESPOND TO THIS DECISION WITH LEGISLATION PROHIBITING ANY WAIVERS OF THE RIGHT TO LITIGATE INDIVIDUAL STATUTORY CLAIMS IN COURT. AS NOTED ABOVE, UNIONS WILL NOT BE PLEASED TO FIND THEMSELVES NEGOTIATING ABOUT WAIVERS OF THEIR MEMBERS' RIGHT TO A JUDICIAL FORUM, AND BIG LABOR MAY FIND A SYMPATHETIC EAR FOR LEGISLATION ON THIS SUBJECT IN THE CURRENT CONGRESS.

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