New Jersey Law Journal

VOL. CXCIX - NO.2 - INDEX 98 JANUARY 11, 2010 ESTABLISHED 1878

IN PRACTICE

ALTERNATIVE DISPUTE

Supreme Court Continues Expansion of Favoring Employment Arbitral Rights

Collective bargaining agreements could compel all union members to arbitrate claims of discrimination

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The Supreme Court, in *14 Penn Plaza LLC v. Pyett,* 129 S.Ct. 1456 ("*14 Penn Plaza*"), continued its expansion of favoring arbitral rights in the employment context. Almost as an immediate consequence Senator Russ Feingold (D-Wis.) introduced *S. 931*, containing a general exclusion from the Federal Arbitration Act for collective bargaining agreement provisions that have the effect of waiving employee rights with regard to antidiscrimination statutes. The split majority decision was written by Justice Clarence Thomas. The Court majority ruled that collective bargaining agreements could compel all union members to arbitrate claims of discrimination under a collective bargaining agreement.

At face value, the decision in *14 Penn Plaza* presents employers with a solution to employment litigation difficulties. All that is required are expansive and specific arbitration provisions and "explicit" waivers in the collective bargaining agreement.

However, the dilemma for employers and unions alike is how to craft explicit waivers that adequately protect all members of the union and permit the employer and labor organizations to move forward without jeopardizing individual rights and duty of fair representation ("DFR") claims at the same time.

Similarly, individuals and minorities (both political and statutory) may find their rights vanquished by union political dynamics. In other words, the decision leaves many questions unanswered and potential minefields of exposure for labor organizations on civil rights claims.

The main dilemma facing labor organizations in a post-*14 Penn Plaza* world is how to represent both individual and majority interests at the same time as well as how to protect the union and its leadership from breach of duty of fair representation claims brought on by a failure to arbitrate every single grievance through arbitration.

Also, the Supreme Court did not consider the financial implications to labor organizations of even bringing matters to arbitration. The typical collective bargaining agreement, for example, has a multistep grievance process where the fourth or fifth step is binding arbitration. Obviously, there is a cost to arbitrate even a simple claim. Thus, a question for labor organizations will be whether they are obligated to arbitrate every single claim in order to effectively represent members and to concomitantly effectively deal with potential DFR claims and satisfy the Supreme Court's analysis.

In *14 Penn Plaza*, the Supreme Court held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." Employers may have a basis to dismiss a claim on the grounds that it must be grieved and arbitrated as part of the CBA. While this result may limit individual autonomy with respect to the choice of judicial forum, labor organizations, under the authority granted by NLRA, have the ability to act as the exclusive representative of the employees with regard to the CBA. 29 U.S.C. Section159 (a) (2009). The question for resolution then becomes what are the

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practical implications of such an agreement for both employers and unions in light of the Court's current analysis in *14 Penn Plaza?*

If the holding of *14 Penn Plaza* is limited to the broad waiver clause in Section 30 of the CBA, *14 Penn Plaza* may have very little practical effect according to some commentators. Laura J. Cooper, et al., "ADR In the Workplace," 605 n.2 (2005) (2000 supplement page). Unions, and to some extent employers, very seldom demand a clause that subjects all discrimination claims to arbitration. In such a scenario, the holding of *14 Penn Plaza* may be restricted to only those cases where employers and unions agree to an arbitration provision that requires the employee to arbitrate both contractual and statutory claims.

The Supreme Court suggested in *14 Penn Plaza* that the duty of fair representation was a sufficient safeguard for individuals when their rights are not adequately protected by the union.

Instead of placing a greater burden on unions to process to completion every grievance alleging discrimination, the Court could have and should have focused on strengthening remedies for alleged failures by labor organizations to fairly represent. It is axiomatic that succeeding on duty of fair representation claims is difficult. Achieving awards for DFR claims is hard for plaintiffs. The Court could have suggested a streamlined course of action for individuals who believe representation has been less than adequate instead of green-lighting maximum movement to arbitration.

Some Solutions

Employers will need to require specific, explicit and enforceable waivers by labor organizations regarding arbitration provisions. Arbitration clauses will need to be detailed, including all of the potential claims that could have arisen in the workplace regarding discrimination and other matters to be arbitrated. Unions may consider individual sign off from members to avoid or mitigate possible DFR claims and to ensure that individual members, at least, are on notice regarding waiver. In a small shop, such an approach may be feasible. But, in a large multisite union, the practicality of that approach seems limited.

The concerns raised in Justice Stevens' dissent should also remain front and center in any discussion and resolution of this issue. Justice Stevens expressed great concern regarding the Court's "retreat" from precedent, including *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). He also acknowledged the "potential conflict between the collective interest and the interest of an individual employee seeking to assert his rights." Justice Stevens stated that moving to a system that permits resolution of all claims, particularly ADEA in this case, by arbitration should be made by Congress and not the Supreme Court. Justice Souter followed that line of reasoning and wrote that "[t]he majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it." He stated that the majority "misread" *Gardner-Denver.* Justice Souter also noted that "Congress has unsurprisingly understood *Gardner-Denver* the way we have repeatedly explained and has operated on the assumption that a CBA cannot waiver employees' rights to a judicial forum to enforce antidiscrimination statutes."

Unfortunately, Justice Souter's concerns in dissent have no precedential weight but merely signal caution. The lower courts are beginning to assess *14 Penn Plaza* now with mixed signals regarding obligatory submission to arbitration and waiver language itself. Tracking on a parallel course is curative legislation that would eviscerate the majority's deference to arbitration. In sum, it looks like 2010 will be another exciting year for employment lawyers trying to read the tea leaves from *Pyett v. 14 Penn Plaza*.■