BUTZEL LONG
ATTORNEYS AND COUNSELORS

Labor and Employment E-news

April 3, 2009

Supreme Court Enforces Mandatory Arbitration of ADEA Claims Under Collective Bargaining Agreement

In an opinion issued this week, the United States Supreme Court in *14 Penn Plaza LLC v. Pyett* definitively held that a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims pursuant to the Age Discrimination in Employment Act ("ADEA") is enforceable under federal law. This decision for the first time makes clear that collective bargaining agreements can include enforceable provisions requiring arbitration not only of claims for breach of the contract, but also requiring arbitration of statutory discrimination claims. While this decision could impact how employers negotiate with unions, it also leaves some unanswered questions.

The Case

In *14 Penn Plaza*, plaintiffs were a group of night watchmen employed by Temco Service Industries in a New York office building owned by 14 Penn Plaza. The employees were represented by Local 32BJ of the Service Employees International Union and were covered by a collective bargaining agreement. The CBA prohibited discrimination against employees, pursuant to a number of federal and state laws including the ADEA, and provided that claims of employment discrimination were subject to binding arbitration under the CBA" as the sole and exclusive remedy for violations."

In August 2003, with the union's consent, 14 Penn Plaza engaged another contractor, Spartan Security, to provide licensed security guards for the building. This led Temco to reassign some of its employees to jobs as porters and cleaners, which the employees claimed were less lucrative and less desirable. As a result of these job reassignments, the union filed grievances alleging, among other things, that the employer engaged in age discrimination when it implemented the job reassignments. After failing to obtain relief on any of these claims through the grievance process, the union requested arbitration under the CBA. Ultimately, however, while the union did pursue arbitration on the promotion and overtime issues, it decided not to arbitrate the age discrimination claims. Because of this, and while the arbitration was pending, the employees filed a charge with the EEOC alleging age discrimination. The EEOC issued a right-to-sue letter and plaintiffs filed suit in the Southern District of New York. The employer, relying upon a provision of the collective bargaining agreement that explicitly required covered employees to submit ADEA claims to arbitration, immediately filed a motion to compel arbitration.

Both the district court and the Second Circuit Court of Appeals refused to require the plaintiffs to submit their age claims to arbitration because, according to the Supreme Court's decision in *Alexander v. Gardner-Denver*, "a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created by Congress." Despite reaching this decision, the appellate court acknowledged that *Gardner-Denver* was at odds with the Supreme Court's proclamation in *Gilmer v. Interstate/Johnson Lane Corp.* 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." Finally, the Court of Appeals also noted that the United States Supreme Court previously declined to resolve the tension in *Wright v. Universal Maritime Service Corp.*, where the waiver issues were not "clear and unmistakable." The employer appealed to the United States Supreme Court.

Justice Thomas, writing for the majority, indicated that the employees had designated Local 32BJ as their exclusive bargaining representative as permitted by the National Labor Relations Act, and that the union had entered a collective bargaining agreement that provided for arbitration of specified disputes. Stating that "[t]he decision to fashion a CBA to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery," Justice Thomas wrote that a negotiated arbitration provision, like other contractual terms and conditions of employment, "must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep."

Additionally, the majority opinion limited *Gardner-Denver* to situations in which the arbitration provision did not explicitly reference the statutory right in question. Ultimately, the Court determined that the ADEA did not prevent arbitration of age claims (primarily because the ADEA's text and its legislative history did not reveal a Congressional intent otherwise) and held that a clear and unmistakable provision in a collective bargaining agreement that compels covered employees to arbitrate ADEA claims is enforceable.

Justices Stevens, Breyer, Ginsburg and Souter filed a dissent challenging the majority's limitation of *Gardner-Denver*, and also accused the majority of manipulating precedent to promote arbitration.

The Questions

14 Penn Plaza has the potential to have an impact on how employers negotiate with unions, as well as how employers respond to discrimination claims brought by union employees covered by a CBA. However, questions remain.

First, will *14 Penn Plaza* apply with equal force to other federal or state statutory claims? According to *14 Penn Plaza*, this seems to depend on whether the legislative body evinced an intent not to submit claims to arbitration when passing the statute in question. As such, answering this question requires a thorough review of specific statutes.

Second, does *14 Penn Plaza* prohibit employees from filing EEOC charges? Given the EEOC's independent requirement to enforce discrimination laws, and not to simply redress private grievances, the answer to this question is most likely "No." There are advantages and disadvantages

to arbitration, not litigation, of statutory discrimination claims. Whether arbitration advances the employer's interests depends on a number of factors and needs to be considered carefully on a case-by-case basis.

In light of this decision (but mindful of these open issues), employers of union-represented employees, to the extent they wish to arbitrate claims of discrimination, should review their arbitration provisions to ensure that they explicitly provide that statutory claims of employment discrimination are subject to binding arbitration as the sole and exclusive remedy for such violations.

If you have any questions regarding the information contained in this E-Alert, or wish to discuss advantages and disadvantages of arbitration as opposed to litigation of discrimination claims, and/or your arbitration provisions, please contact your Butzel Long attorney, or the author of this E-Alert.

Bethany Steffke Sweeny
sweeny@butzel.com
734 213 3429

Benjamin K. Steffans
steffans@butzel.com
313 225 7046