



Arbitration Trend for Statutory Claims Grows: Supreme Court Gives the Green Light for Employers and Unions to Arbitrate Statutory Discrimination Claims

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Since the early 1990's, arbitration has been viewed by the courts as an option available to the parties in lieu of civil litigation for statutory discrimination claims. However, a major exception existed. Due to the longstanding precedent of the landmark "*Gardner-Denver*" case, this option was specifically precluded for the most common form of American workplace arbitration – the grievance/arbitration process found in the typical collective bargaining agreement ("CBA"). This absolute *Gardner-Denver* barrier has now been overturned. On April 1, 2009, a divided U.S. Supreme Court upheld a CBA provision that required union members to arbitrate claims arising under the federal Age Discrimination in Employment Act ("ADEA"). Due to the case facts, the Court's ruling in *14 Penn Plaza L.L.C. v. Pyett* only addressed federal age discrimination claims. However its analysis reinforces the clear trend that allows employers to require employees – union and non-union alike – to arbitrate discrimination and other statutory claims. This decision will help employers avoid costly and time-consuming litigation in trial courts if appropriate waivers are created.

The History of Statutory Discrimination Claims and Arbitration. Under state and federal labor relations law, unions serve as the employees' exclusive bargaining representative regarding terms and conditions of employment. For decades this has included the right to negotiate broad CBA's including grievance procedures with binding arbitration. However, if a CBA had a "nondiscrimination clause," employees always had the possibility of "two bites of the apple" in pursuing a discrimination claim: the CBA procedure *and* the statutory procedure. Such dual forums offered the possibility of conflicting decisions, as well as discovery from one forum being used adversely in the other. The potential risk this posed to employers has long bothered the employer community. Early attempts to argue waiver by the arbitration clause and preclusion of the statutory claim procedure were directly defeated by the *Gardner-Denver* ruling in the 1970's.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court reviewed whether an arbitrator's just cause discharge ruling prevented the employee from pursuing a Title VII race discrimination claim. The CBA had an anti-discrimination clause and a clause requiring arbitration of any claim arising under the CBA or involving "any trouble aris[ing] in the plant." The Court held that the employee could still pursue his statutory claim in court. It expressed concern about arbitration of discrimination claims in general and over the possibility that a union could substitute its interests for the employees' anti-discrimination rights. The decision was generally interpreted as not permitting a CBA to require arbitration of an individual's statutory discrimination claims.

Since the *Gardner-Denver* decision, the Court's attitude toward arbitration of discrimination claims has evolved. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court held that an arbitration agreement between an employer and an individual employee was enforceable even though it required the employee to arbitrate an ADEA claim rather than pursue it in federal court. However, in *Wright v. Universal Maritime Svc. Corp.*, 525 U.S. 70 (1998), the Court noted the tension between its earlier cases, but avoided the issue as it held it did not need to decide whether parties to a CBA could waive an employee's right to a judicial forum for a statutory discrimination claim in favor of mandatory arbitration because there was *no clear and unmistakable waiver in that CBA*. Now, in *14 Penn Plaza*, the Court picked up on the emerging trend and directly addressed the conflict between these principles: why it was acceptable to require individual employees to arbitrate statutory rights, but not for unions to agree to the same requirement on behalf of their members.

14 Penn Plaza: Basic Facts. The plaintiffs were night watchmen and members of the Service Employees International Union ("SEIU"). Since the 1930's, SEIU engaged in industry-wide collective bargaining for the members, who worked in New York's building services industry. During the most recent round of bargaining, SEIU had agreed to language in the CBA that required union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and arbitration procedures. The language provided, in relevant part:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall 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.

The company that owned the 14 Penn Plaza office building had contracted with a service company that employed the union members as night watchmen. The owner subsequently contracted with a security company to provide security guards, whose presence made the night watchmen unnecessary. As a result, the service company reassigned the night watchmen to other jobs. SEIU subsequently grieved the reassignments on various grounds including alleged age discrimination, but during the arbitration the union withdrew the age claims. The employees then filed a separate ADEA lawsuit in federal court. The employers moved to dismiss the lawsuit and compel the members to arbitrate their claims under the CBA. Citing *Gardner-Denver*, the lower court denied the motion and the Court of Appeals affirmed. *14 Penn Plaza* appealed to the U.S. Supreme Court.

The Holding: The Court sided with *14 Penn Plaza* and held the ADEA did not prevent a union from agreeing to a clear and unmistakable waiver of the employees' rights to litigate statutory claims in court when it preserved their substantive rights to pursue the discrimination claim in arbitration. The Court reasoned that the *Gardner-Denver* line of cases held that an arbitrator's ruling on a contractual claim did not preclude statutory claims, but distinguished those cases because they did not involve arbitration clauses empowering the arbitrator to resolve statutory claims. The decision strongly suggests that the same result would apply in the case of a Title VII or other statutory discrimination claim. The trend supporting arbitration grows.

I. How This Impacts Employers. *14 Penn Plaza* builds on the wave of increasing judicial acceptance of arbitration as an alternative to court litigation, including for statutory discrimination claims. Although *14 Penn Plaza* is limited to ADEA claims, the reasoning is equally applicable to claims under Title VII, the ADA, and the Washington Law Against Discrimination. An employer that wishes to require arbitration, either for union or non-union employees, must remember that any arbitration agreement needs to have a clear and unmistakable waiver. Certainly, obtaining such a specific clause in a CBA requires direct agreement with a union, and unions may not readily agree to such waivers. However, the case also supports the principle that alternative dispute resolution clauses that build on the clear and unmistakable waiver concept will also be defensible. For example, if a full waiver is not obtainable at the bargaining table, a simple compromise position might include a waiver of the arbitration process by a union if the grievant employee refuses to waive statutory claim rights. Such provisions are now clearly fair game. Due to *14 Penn Plaza*, CBA's will provide fertile ground for experiments for us all to watch in the next few years.

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