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Expert Analysis

'Pyett' Clears the Way for Agreements To Arbitrate Employee Statutory Claims

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The Supreme Court held in *14 Penn Plaza LLC v. Pyett (*No. 07-581, 129 S. Ct. 1456, issued on April 1, 2009) that a collective bargaining agreement (CBA) that clearly and unmistakably requires union members to arbitrate their claims under the Age Discrimination in Employment Act (ADEA) is enforceable as a matter of federal law. This decision opens up an area for collective bargaining—by removing an important obstacle, stemming from *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which has hindered use of arbitration for the individual statutory claims of union-represented employees. In doing so, the Court also raises several new questions for development by the lower courts.

Justice Clarence Thomas' opinion for the Court (5-4) reasons broadly that unions have the authority as the collective bargaining agent under the National Labor Relations Act (NLRA), to negotiate final, binding dispute resolution procedures for the employees they represent, even if the disputes in question arise under federal anti-discrimination statutes. Like any other provision negotiated by the exclusive representative, "the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep."[1]

Finding that the ADEA does not exclude such claims from the labor arbitration process, the Court concluded that, "there is no legal basis…to strike down an arbitration clause in this CBA, which was freely negotiated by the Union and the [employer], and which clearly and unmistakably requires [the union-represented employees who filed suit] to arbitrate the age-discrimination claims at issue in this appeal."[2]

In *Gardner-Denver*, the Court held that an arbitration agreement in a CBA empowering the arbitrator to deal only with contractual claims did not prevent a discharged employee from bringing his Title VII race discrimination claim in court. In *Pyett*, the employees, as well as the dissenting opinions, argued that *Gardner-Denver* stood for the proposition that union-negotiated agreements to arbitrate individual employee's statutory claims were never enforceable against the represented employee. The majority in *Pyett* rejected this reading of *Gardner-Denver*, reasoning that the latter decision instead rested "on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims."[3] Because the arbitrator in *Gardner-Denver* simply lacked the authority to resolve statutory claims, arbitration could not preclude a lawsuit on those claims. In *Pyett*, by contrast, the arbitrator did have such authority.

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While *Gardner-Denver* contained broad language suspicious of the arbitrator's competence to resolve disputes falling outside the narrow frame of labor agreements, the Court explained, subsequent case law had rejected this judicial mistrust of arbitration, and upheld arbitration agreements covering individual statutory as well as contractual claims when signed by individual employees outside of the union context. Indeed, if the dissents' "broad view of its holding…were correct," explained the Court, "*Gardner-Denver* would appear to be a strong candidate for overruling."[4]

The Court examined the language of the ADEA and concluded that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[5] The Court rejected the employees' argument that individual employees must agree to arbitration in order to satisfy the ADEA's requirement that a "waiver" of any right or claim under the statute be "knowing and voluntary."[6]

The "agreement to arbitrate ADEA claims is not the waiver of a 'substantive right'" under the ADEA at all, the majority reasoned, or else agreements to arbitrate future ADEA claims signed by individual employees would also be precluded by the Act's prohibition against "waiv[ing] rights or claims that may arise after the date the waiver is executed."[7] Therefore, unions could validly sign agreements to arbitrate individual statutory claims on behalf of the employees they represent.

The Court refused to assume that the Union would not fairly represent unit employees in arbitration, noting that the Union could be sued for breach of their duty of fair representation should it act arbitrarily, discriminatorily, or in bad faith. Indeed, the respondents in *Pyett* brought just such a claim against the Union after it withdrew their original age discrimination claims. The Court suggested that a discriminatory motive on the part of the Union based on age would subject

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the Union to liability under the duty of fair representation, as well as under the anti-discrimination statutes themselves.

Issues Left Open

The Court's decision, while clearing the way for employers and unions to negotiate agreements to arbitrate the statutory anti-discrimination claims of employees, leaves a number of issues for development by the lower courts.

One such issue is the contours of CBA language that will trigger an obligation to arbitrate individual statutory claims. In an earlier decision, the Court ruled that the CBA must contain a "clear and unmistakable" waiver in order for the arbitration provision to cover an individual's statutory claims.[8] The CBA in that case, which contained a general reference to arbitration of disputes between the union and employer but did not expressly empower the arbitrator to resolve discrimination claims under external law, did not meet this standard.

Although the respondents in *Pyett* made a number of arguments about the clarity of the CBA on this score, the Court refused to consider the issue because such arguments had not been properly preserved. One question is whether the "clear and unmistakable" waiver standard also requires the CBA to provide expressly that the individual employee has the right to take the case to arbitration where the union declines to do so.

Another issue left open for development is the scope of judicial review of arbitration awards issued under collectively-bargained agreements to arbitrate statutory discrimination claims. The court in a footnote indicated that such awards would be subject to review under the Federal Arbitration Act (FAA).[9] The Court did not explain how such review would interplay with the body of case law allowing only limited review of labor arbitration awards. Moreover, just last year, the Court ruled that, as a matter of federal law, the grounds for review of an arbitral award could not be expanded beyond the statutory grounds listed under the FAA.[10]

One question seemingly answered by the Court is whether arbitration clauses covering individual statutory claims would be considered a mandatory versus permissive subject of bargaining under the NLRA. It stated that the parties' agreement to arbitrate "employment-related discrimination claims, including claims brought under the ADEA…easily qualifies as a 'condition of employment' that is subject to mandatory bargaining."[11]

Previously, the D.C. Circuit had ruled that statutory arbitration clauses were not mandatory subjects, but this ruling was based on the assumption that such clauses were not enforceable under *Gardner-Denver*.[12] As a mandatory subject of bargaining, the parties would be required to bargain over *Pyett*-type clauses. Even if such clauses are a mandatory subject, the further question would be whether the employer could implement its final-offer position after a good-faith bargaining impasse.[13]

Variables

Two variables threaten to limit the practical impact of *Pyett:* one, an unanswered question left open in the case, and two, a recent legislative initiative.

Perhaps the most important issue left open by the decision is how the Court would rule if a union exercised its contractual authority "to block arbitration of these claims."[14] Here, the record evidence was disputed—evidence was offered that the Union had permitted the respondents to continue with the arbitration after the Union had withdrawn—and the issue had not been fully briefed or encompassed within the question presented. Therefore, the Court was "not positioned to resolve in the first instance whether the CBA allows the Union to prevent respondents from 'effectively vindicating' their 'federal statutory rights in the arbitral forum.'"[15] Justice Souter, in his dissent, opined that "the majority opinion may have little effect" given that it is "usually the case" that the union controls access to the arbitral forum. Unions could theoretically attempt to undermine the effectiveness of the *Pyett*-type arbitration clause by refusing to take employees' statutory discrimination claims to arbitration, thus opening up access to litigation. To avoid such outcomes, the CBA should expressly authorize arbitration of statutory claims at the employee's behest even where the union declines to take the case to arbitration.

Second, proposed legislation currently being considered in both the House and Senate would amend the FAA to prohibit mandatory pre-dispute arbitration agreements for employment and other disputes.[16] However, the bills would specifically exclude arbitration provisions contained in a CBA from the coverage of the FAA. The House bill, which was introduced before the Court's decision in *Pyett*, contains no limitation on this exclusion and so by its own terms would not prohibit enforcement of agreements under *Pyett*.

In contrast, the Senate bill introduced after *Pyett*, while also containing a general exclusion from the FAA for CBA arbitration provisions, adds that "no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the U.S. Constitution, a state constitution, or a federal or state statute, or public policy arising therefrom." In introducing the Senate bill, Senator Russ Feingold (D-Wis.) specifically noted his intent to reverse the holding in *Pyett*.[17]

Finally, employers and unions who wish to include such clauses in their CBAs should pay close attention to the language used in drafting in order to come within the rule of *Pyett*. The agreement should make it "clear and unmistakable" that individual employees' statutory claims are covered by the arbitration clause. In addition, the parties should consider the scope of the union's authority to control the proceeding, the authority of the arbitrator, and who bears the costs of the proceeding.

1. 129 S. Ct. at 1445.
2. Id. at 1446.
3. 129 S. Ct. at 1447.
4. 129 S. Ct. at 1448 n.8.
5. 129 S. Ct. at 1445.
6. 29 U.S.C. §626(f)(1).
7. 129 S. Ct. at 1446-47, quoting 29 U.S.C. §626(f)(1).
8. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).
9. 129 S. Ct. at 1450 n.10.
10. *Hall St. Assocs., L.L.C. v. Mattel Inc.*, 128 S. Ct. 1396 (2008); see also Samuel Estreicher & Steven C. Bennett, "Parties Can't Modify FAA Standards for Judicial Review," NYLJ, April 15, 2008, p. 3.
11. 129 S. Ct. at 1444.
12. *Air Line Pilots Ass'n, Int'l v. Northwest Airlines*, 199 F.3d 477 (D.C. Cir. 1999), 211 F.3d 1312 (D.C. Cir. 2000) (en banc).
13. Cf. *McClatchy Newspapers v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997) (noting that the NLRB recognizes certain exceptions—including for arbitration clauses—to the general rule that an employer may implement its final offer after reaching a good-faith impasse).
14. 29 S. Ct. at 1452.
15. Id., quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).
16. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).
17. 111 CONG. REC. S4897-98 (daily ed. April 29, 2009).