

MANDATORY ARBITRATION CASES BEFORE COURT MAY RESULT IN FAR-REACHING RULING

A Supreme Court case raising the issue of whether unions can waive individual members' rights to pursue employment discrimination claims in court is the most potentially far-reaching of the labor and employment cases on the justices' current docket, according to Georgetown University law professor Michael H. Gottesman at a briefing sponsored by the Federalist Society. Discussing *14 Penn Plaza LLC v. Pyett*, in which the Court granted review in February and will hear argument next term, Gottesman says "30 years of Supreme Court jurisprudence are hanging in the balance" in the Court's review of the Second Circuit's ruling in *14 Penn Plaza* that unions may not agree with employers to make arbitration the exclusive means for bargaining unit employees to vindicate their statutory rights under federal employment discrimination laws.

Gottesman, who has represented unions in private practice, says the case will test whether the Supreme Court's seminal decision in *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974), is still good law after almost 20 years in which the court has shown increased willingness to have arbitrators rather than courts decide statutory claims. Gottesman says *Gardner-Denver* "clearly stands" for the proposition that a union does not "own" its members' statutory claims. The Supreme Court also reasoned that unions "really can't be trusted" to protect their members' individual rights but rather might be tempted to trade such rights in contract negotiations for other benefits. In *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), the Supreme Court deferred ruling on the conflict between *Gardner-Denver* and its subsequent decisions that enforce individual employment agreements to arbitrate statutory discrimination claims, finding the contract in *Wright* did not clearly present the issue, Gottesman says.

If the Supreme Court rules that unions and employers may agree to make arbitration the exclusive means to handle statutory discrimination claims, Gottesman says some consequences could be that such clauses would become a mandatory subject of bargaining and unions would feel pressure to take almost every bias claim to arbitration for fear of liability for breach of duty of fair representation. He predicts that although the Supreme Court recently has looked favorably on mandatory arbitration of statutory claims, the Court ultimately would rule against the employer in *Penn Plaza*. He suggests that even for the current court, it would be "too big a stretch" to overturn *Gardner-Denver*.

Willis J. Goldsmith, a management attorney with Jones Day in New York, concurs that the *Penn Plaza* case is "hugely important." He says the case directly addresses "the tension between how the Supreme Court viewed arbitration" in *Gardner-Denver* and its more receptive stance in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, (1991), which upheld an individual contract provision requiring mandatory arbitration of statutory employment discrimination claims. Goldsmith says that unions "have as much if not more" of a stake in the Supreme Court's handling of *Penn Plaza* and suggests that employers and organized labor might find common legal ground before the Court. Gottesman, however, says that while some individual unions might be tempted to urge a ruling that permits them to waive employee rights and perhaps gain leverage in collective bargaining, he thinks the AFL-CIO would support reaffirmation of *Gardner-Denver*. "It's going to be a fairly close call," he says, as the Supreme Court must "reconcile *Gilmer* and *Gardner-Denver*."

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