

## ARBITRATION OF BIAS CLAIMS ENFORCEABLE, SUPREME COURT HOLDS; AFL-CIO LAWYER WARNS UNIONS ON ADVERSE CONSEQUENCES

Resolving a long-standing controversy about the arbitration of employment discrimination claims of union-represented employees, the Supreme Court, in a 5-4 decision, rules that a collective bargaining agreement that “clearly and unmistakably” requires employees to arbitrate claims under the Age Discrimination in Employment Act (ADEA) is enforceable as a matter of federal law.

Night watchmen in a New York office building owned and operated by 14 Penn Plaza were provided to the owner by Temco Service Industries. The employees were represented by Local 32BJ of the Service Employees International Union and covered by a multiemployer bargaining association agreement in which 14 Penn Plaza held membership.

The collective bargaining agreement prohibited discrimination against employees, citing a number of federal and state laws including the ADEA, and provided that “[a]ll such claims” were subject to arbitration under the bargaining agreement “as the sole and exclusive remedy for violations.” The agreement provides that “[a]rbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.”

Following a change in contractor, Temco reassigned some of its employees to porter positions and cleaning jobs that the employees claimed were less lucrative and less desirable. The affected workers filed grievances with the union but the union proceeded to arbitration only on overtime and promotion issues and declined to pursue grievances alleging discrimination based on age. The workers filed an ADEA charge with the Equal Employment Opportunity Commission (EEOC), but the EEOC dismissed the charge, and the employees filed a lawsuit in the district court for the Southern District of New York, alleging that their reassignments violated the ADEA and local laws prohibiting age discrimination. Both 14 Penn Plaza and Temco filed a motion to compel arbitration of the age bias claims under the Local 32BJ collective bargaining agreement, but the trial court denied the motion, and the Second Circuit affirmed, holding that “a union-mandated arbitration agreement purporting to waive a covered worker’s rights to a federal forum with respect to statutory rights is unenforceable.”

Writing for the majority, Justice Clarence Thomas states that the Second Circuit’s decision was based on a view that enforcement of the collective bargaining agreement at issue was prohibited by *Alexander v. Gardner-Denver*, but the appeals court ruling was incorrect. The majority says the employees had designated Local 32BJ as their exclusive bargaining representative as permitted by the National Labor Relations Act (NLRA), and the union entered into 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,” Thomas writes 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.”

The majority recognizes that a line of cases after *Gardner-Denver* were critical of the use of arbitration to protect employees’ statutory right to be free from discrimination, but that view was based on a “misconceived view of arbitration that this Court has since abandoned.” In *Gardner-Denver*, Thomas says, the Court “confused an agreement to arbitrate those statutory claims with prospective waiver of the substantive right.” The ADEA limits employee’s prospective waivers of statutory rights, but the Court has been very clear that under the Federal Arbitration Act arbitration agreements can be enforced without contravening employee protections against discrimination.

James Coppess, AFL-CIO associate general counsel, says the *14 Penn Plaza* ruling could skew the traditional arbitration process and dilute the deference courts historically have granted unions under the duty of fair representation. The decision makes clear that arbitration of a statutory discrimination claim is “a mandatory subject of bargaining” and in order for individual bargaining unit members to be bound, the arbitration clause must expressly refer to the statutory claims, Coppess says.

The decision left undecided, however, “everything of any consequence.” In particular, the Court refused to address what happens to individual ADEA claims after the union withdraws or refuse to take such statutory claims to arbitration, Coppess states. While courts currently interpret the duty of fair representation to give union’s broad discretion on whether to arbitrate individual grievances, Coppess believes that will change regarding statutory discrimination claims. Unions will take more discrimination claims to arbitration than they have in the past and arbitration will lose its traditional advantage as a quick, relatively informal way to resolve contractual disputes. The decision also could give “more impetus” to current congressional efforts to curtail mandatory arbitration of statutory discrimination claims through federal legislation, Coppess concludes.

The decision is available at <http://op.bna.com/dlrcases.nsf/r?Open=ldue-7qplqc>.

(Source: *14 Penn Plaza LLC v. Pyett*, U.S. No. 07-581, April 1, 2009, as reported in BNA, *Daily Labor Report*, No. 61, April 2, 2009, pp. AA1-AA3, E1- E12; No. 62, April 3, 2009, pp. AA1-AA2.)