

UNION-REPRESENTED EMPLOYEE RIGHTS TO JUDICIAL FORUM TO BE HEARD BY SUPREME COURT

The Supreme Court agrees to decide whether a collective bargaining agreement's arbitration clause that waived the right of a union-represented employee to file a lawsuit under the Age Discrimination in Employment Act (ADEA) was enforceable. The Court of Appeals for the Second Circuit held that "mandatory arbitration clauses in collective bargaining agreements are unenforceable to the extent they waive the rights of covered workers to a judicial forum for federal statutory causes of action." Real estate firm 14 Penn Plaza LLC and a cleaning service company petitioned for Supreme Court review of the Second Circuit decision.

Employees of Temco Service Industries worked as night watchmen in a New York office building operated by 14 Penn Plaza. The employees were represented by Local 32BJ of the Service Employees International Union (SEIU) and were covered by a collective bargaining agreement between the union and a multiemployer bargaining association, the Realty Advisory Board on Labor Relations. 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."

In 2003, 14 Penn Plaza selected a new contractor to provide security services, and a number of the Temco workers were assigned to less desirable positions. Employees filed grievances with the union, but the union proceeded to arbitration only on some overtime and promotion issues. The union declined to pursue grievances alleging that the company discriminated against the employees because of their age. After the arbitrator denied the grievances, three employees filed a lawsuit against 14 Penn Plaza and Temco, alleging that they were transferred and replaced because of their age in violation of the ADEA, the New York State Human Rights Law, and the New York City administrative code. Citing the arbitration provision in the collective bargaining agreement, the companies moved to dismiss the lawsuit or to compel arbitration of the discrimination claims. The district court for the Southern District of New York denied the motion, and the Second Circuit affirmed.

In their petition for review, the companies argue that the Supreme Court has never resolved the issue of the enforceability of a collectively bargained arbitration provision as a waiver of employees' claims under the ADEA or other employment discrimination statutes. Noting that the Supreme Court acknowledged in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, (1998), that there were divergent judicial views about the enforceability of a bargaining agreement as a bar to an individual employee's discrimination lawsuit, the petitioners state that the unresolved conflict among lower courts "creates a host of public policy concerns." The petitioners point to *Austin v. Owens-Brockway Glass Container Inc.*, 78 F.3d 875, (4th Cir. 1996), in support of their argument that "the lower federal courts are in irreconcilable conflict over whether a union-negotiated arbitration clause may be enforceable." In the Second Circuit's view, the petitioners say, "it is clear that...there is no situation—however clear the language in the collective bargaining agreement—that would make such an arbitration agreement binding. But in *Austin*, the Fourth Circuit said "[s]o long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced." In addition to the "sharp split" between the Second and Fourth circuits, the petitioners say, "other circuits have expressed deep-seated confusion regarding the enforceability of these waivers," while state and federal courts sitting in the same states have adopted different approaches.

Employers and unions operating within the jurisdiction of different lower courts can be uncertain about the legal status of negotiated arbitration procedures, the petitioners note. "[F]or effective employer and union operations, for productive collective bargaining, and to protect the rights of employees who are union members, there must be a consistent rule of law for the entire country—and that rule only can come from this Court. This Court's review is needed to resolve the conflict," the petitioners urge.

(Source: *14 Penn Plaza LLC v. Pyett*, U.S., No. 07-581, February 19, 2008, as reported in BNA, *Daily Labor Report*, No. 33, February 20, 2008, pp. B1-B2.)