MB&J | MORGAN BROWN&JOY

www.morganbrown.com

CLIENT ALERT: Supreme Court Upholds Clause in Collective Bargaining Agreement Mandating Arbitration of Discrimination Claim

On April 1, 2009, the Supreme Court issued its decision in *14 Penn Plaza v. Pyett,* a case that involves the question of whether an arbitration provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims under the Age Discrimination in Employment Act ("ADEA") is enforceable. The Supreme Court, in a 5-4 decision, reversed the Second Circuit and held that such a clause was enforceable. Justice Clarence Thomas wrote the majority opinion in which Chief Justice Roberts and Justices Scalia, Alito and Kennedy joined.

I. Background and Decision

The particular clause in the union contract in *Penn Plaza* stated:

"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." (emphasis added).

Justice Thomas observed that the employer and union had freely negotiated this clause and, under the National Labor Relations Act, the clause was clearly a bargainable topic. Nothing in the ADEA precludes arbitration of claims brought under the statute. Further, the Court cited its own precedent, *Gilmer v. Interstate/Johnson Lane Corp.,* for the proposition that an individual employee may agree to waive his right to a judicial forum in favor of arbitration. Thus, there was no statutory impediment to the parties agreeing on such a clause.

The Court distinguished its earlier decision in *Alexander v. Gardner-Denver*, where a unionized employee who was discharged allegedly based on race, and who lost his case in grievance arbitration, was nonetheless allowed to proceed with his judicial remedies under Title VII. Justice Thomas observed that *Gardner-Denver* and its progeny only addressed the issue of "whether arbitration of *contract-based claims* precluded subsequent judicial resolution of statutory claims." (emphasis added). In contrast, the case before the Court now involved an arbitration provision that expressly covered *both* statutory *and* contractual discrimination claims. Although it reasserted its view that the "federal antidiscrimination rights may not be prospectively waived," the Court held that the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace discrimination," but only defines the forum in which those rights can be

asserted. In other words, by agreeing to arbitrate a statutory claim, a party does not relinquish a "substantive right afforded by the statute."The majority also noted that the previous skepticism about the use of arbitration to vindicate statutory antidiscrimination claims, noted in *Gardner-Denver*, rested on a "misconceived view of arbitration that the Court has since abandoned." The Court said that "these misconceptions have been corrected," citing with approval the use of arbitration to deal with complex litigation matters, and noting that "an arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA."

Finally, the majority was untroubled by the view, mentioned in *Gardner-Denver* as *dicta* and asserted by the respondents, that the union has exclusive control over the manner and extent to which an individual grievance is presented in arbitration and may pursue some grievances more vigorously than others. The Court said "we cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text… Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." The Court also noted that the nature of labor unions is premised on majority rule, which may work on occasion to the disadvantage of an individual. Moreover, Justice Thomas reasoned that there are other checks on unions, such as the fact that they cannot breach their duty of fair representation or that they themselves can be subject to lawsuits from members claiming that they discriminated against them.

In a dissenting opinion, Justice Souter (joined in by Justices Stevens, Breyer and Ginsburg) interpreted *Gardner-Denver* more expansively than the majority and argued under the principles of *stare decisis* that its essential holdings should be affirmed again. The dissent argued that *Gardner-Denver* held that "the rights conferred" by Title VII (with no exception for the right to a judicial forum) cannot be waived as "part of the collective bargaining process." One of the key issues separating the majority from the dissent is that the dissent saw the right to a judicial forum as a *substantive right* that cannot be bargained away by a union, while the majority does not hold to the same view.

II. Impact

The Court has validated the use of arbitration as an appropriate means to resolve workplace disputes. This victory for employers, however, may be short-lived. Various bills have been proposed in Congress to limit pre-dispute mandatory arbitration agreements. While none has yet gathered the support necessary for passage, this decision may spur action similar to the legislative response to the *Ledbetter* decision, when Congress reversed the Court's decision which limited the time-period in which an employee could bring a pay discrimination claim under Title VII.

With respect to the collective bargaining process, the impact of this decision will vary depending on what parties choose to do at the bargaining table. While unions and companies are comfortable with the arbitrable forum, some unions may balk at any management demand that arbitration be the exclusive method by which their individual members can assert their statutory rights. Moreover, if arbitration is the exclusive route, unions may feel pressure to take every discrimination claim to arbitration, lest they open themselves up to criticism and possible litigation by their members for

breaching the duty of fair representation. On the other hand, as a bargaining issue like any other, it might be traded for something of more value to the union, and these clauses may become more commonplace in future collective bargaining agreements.

Nicholas DiGiovanni is a partner at Morgan Brown & Joy, LLP and may be reached at (617) 523-6666, or at ndigiovanni@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.