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LABOR LAW

Arbitration of Bias Claims

By Michael Starr and Christine M. Wilson

UNIONIZED EMPLOYERS have long been eager to bring their employees' statutory discrimination claims within the ambit of mandatory labor arbitration. But the U.S. Supreme Court's 30-year-old decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), has long been understood as the breakwater against any requirement that unionized employees bring their federal discrimination claims to arbitration under their labor agreements, even if those agreements themselves ban discrimination on the basis of race, sex, ethnicity or other protected classification. While the high court's jurisprudence has for almost 20 years staunchly supported arbitration of statutory discrimination complaints if so required by individual employment agreements, labor agreements have been thought by most courts to be a different kettle of fish.

As a result, unionized employers have been required to defend such claims in two forums: first, in labor arbitration as an alleged breach of the collective bargaining agreement (CBA) with the union representing the employees and then again in a court action asserting federal statutory discrimination claims arising from the same operative facts. With the Supreme Court's recent grant of certiorari in *14 Penn Plaza LLC v. Pyett*, No. 07-581, those days may be coming to an end.

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2d Circuit found judicial forum waiver unenforceable

In *Pyett*, a group of unionized employees were transferred from night watchmen to less desirable positions as night porters when the building they worked for engaged a professional security company and they were transferred to other buildings subject to the same multiemployer CBA—other buildings that, apparently, did not have night watchmen openings. Because the workers replacing them appeared to have been younger, the employees alleged illegal discrimination based on their age. The CBA governing their employment banned discrimination, expressly gave the arbitrator authority to apply statutory discrimination law and asserted that the CBA's grievance and arbitration process was the sole and exclusive remedy for resolving such claims.

The displaced employees filed grievances. While the union brought certain contract-based claims to arbitration, it initially declined to pursue the age discrimination portion of the employees' grievance. The employees filed charges with the Equal Employment Opportunity Commission, and the union shifted ground saying that they could pursue their discrimination claims in the arbitration forum on their own, with private counsel, and at their own expense. This was, it seems, too little too late. The workers filed a discrimination action in federal court, and the court denied the employer's motion to compel arbitration of those claims, ruling that even though the CBA contained a clear and unmistakable waiver of a judicial forum for statutory discrimination claims, such union-negotiated waivers in labor agreements were unenforceable as a matter of law. The 2d U.S. Circuit Court of Appeals affirmed. *Pyett v. Pennsylvania Building Co.*, 498 F.3d 88, 93-94 (2d Cir. 2007).

Judicial hostility to mandatory arbitration of statutory discrimination claims came to an end in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), when the Supreme Court held that an employee's age discrimination claim was subject to compulsory arbitration pursuant to an agreement he had signed when he had registered as a securities representative. In holding the arbitration clause enforceable, the court reiterated its then-recent position that generalized attacks on arbitration were outdated, being " 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.' " Id. at 30. The court saw no principled difference between statutory discrimination claims and other statutory claims, such as under federal antitrust and securities laws, which it had previously held were subject to arbitration if that is what the parties contractually agreed to do. The court also favorably noted particular protections in the arbitration procedures at issue in *Gilmer*, including checks to avoid biased arbitra-

tion panels, discovery devices and a written arbitration award.

The court's growing acceptance of arbitration in *Gilmer* and its progeny is in apparent tension with its 1974 decision in *Gardner-Denver*, but not quite. In *Gardner-Denver*, the court held that a discharged employee's arbitration of his contract-based wrongful discharge claim under the CBA did not foreclose litigation over his statutory race discrimination claim, even though they arose from the same employer action. While the CBA in *Gardner-Denver* prohibited race and other discrimination, the labor arbitrator, as the court saw it, had authority only to serve as "proctor of the bargain" between labor and management and to apply the industrial "law of the shop" to the individual employee's circumstance, but not to resolve his statutory rights conferred by Congress in passing Title VII of the Civil Rights Act of 1964. See 415 U.S. at 53, 57.

Because the CBA in *Gardner-Denver* did not itself apply to statutory discrimination, all the court actually held was that the pursuit of contractual rights in labor arbitration did not foreclose subsequent pursuit of statutory rights in federal court. Yet the court also made a more sweeping pronouncement: "Of necessity, the rights conferred [by Title VII] can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII" that each employee, individually, be free from invidious discrimination. Id. at 51.

The possibility that unions might, in bargaining for a group of employees, negotiate a waiver of their statutory right to a judicial forum of employment discrimination claims was considered by the Supreme Court seven years after *Gilmer* in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). There, it ruled that such waivers would not be enforced if they were not "clear and unmistakable," but it expressly left unresolved whether such waivers would, if "clear and unmistakable," be enforceable by federal courts. Because the CBA in *Pyett* expressly made labor arbitration the exclusive remedy for statutory discrimination claims, the issue left open in *Wright* is now squarely before the court.

The unresolved question is whether there is anything inherent in the relationship of a union to the workers it represents that would foreclose such waivers, when they are now fully recognized if made by such workers individually. *Gardner-Denver*, with its hostility to such union-negotiated waivers, was decided in the early years after passage of the 1964 Civil Rights Act. Unions were not then very compliant, and there was legitimate concern about union antipathy to minority interests. As the court put it trenchantly in a case that, following *Gardner-Denver*, denied preclusive effect to labor arbitration of an individual's claim of statutory right: "For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens." *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728, 750 (1981) (Burger, C.J., dissenting). Perhaps, those sentiments are outdated, as minorities and women have risen to leadership positions in many unions, and unions have had 40 years to accept the strictures of Title VII. Perhaps, courts should no longer presume every union leader is potentially a closet bigot.

With high court soon to rule in 'Pyett,' the days of unionized employers defending discrimination claims in two forums may be coming to an end.

Arbitrators weigh individual and collective concerns

While it is always possible that a union's institutional interests or its pursuit of the welfare of all bargaining-unit members may conflict with the particularized interests of individual employees, that is not a deficiency of labor arbitration but inherent in the union's role of collective representative. Contract-based claims sometimes pit individual employees' interests against those of the broader union constituency. Yet such claims are routinely submitted to arbitration, where arbitrators knowledgeable about industrial relations are perfectly situated to accommodate the conflicting concerns. That individuals perceive, in the same employment dispute, a violation of their statutory nondiscrimination rights should not prevent arbitrators from appropriately balancing individual and collective concerns.

Arbitral due process protections have also progressed since *Gardner-Denver* and, indeed, even since *Gilmer*. The American Bar Association, American Arbitration Association, American Civil Liberties Union and others have endorsed *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, www.bna.com/bnabooks/ababna/special/protocol.pdf. This protocol provides the same protections the court had favorably noted in *Gilmer*. And, under the protocol, each individual employee has the right to be represented in any arbitration by a spokesperson of his or her choosing. This provision ensures that the union's choice not to process the claim to arbitration does not foreclose individual employees' ability to pursue their statutory claims on their own, with their own counsel.

CBAs are not like other contracts, but are rather a charter for a "system of industrial self-government." *United Steelwkrs. of Am. v. Warrior & Gulf N. Co.*, 363 U.S. 574, 580 (1960). That system of workplace governance includes labor arbitration that is fair and flexible enough to encompass statutory discrimination claims, if that is what labor and management mutually agree to do. NLJ