

Arbitration First Under New Supreme Court Decision

©2009

by Stacy A. Hickox, JD, Assistant Professor
Michigan State University, School of Labor and Industrial Relations

The U.S. Supreme Court has decided that an employee cannot proceed with a discrimination claim against an employer in court without participating in arbitration that is available under a collective bargaining agreement. In its decision issued on April 1, 2009, the Court held that an employer could require arbitration first by employees who alleged age discrimination against a hotel. 14 Penn Plaza LLC v. Pyett, No. 07-581. This decision reverses the decision of the Court of Appeals in this case (and others like it) that an employee could file a discrimination complaint in court without participating in an arbitration process that offered an alternative forum to resolve a discrimination complaint.

The Court has long held that an employee's right to be free from discrimination cannot be waived before the discrimination occurs. Under this reasoning, employees have pursued statutory discrimination claims in court even though arbitration was also available through a collective bargaining agreement.¹ Under this standard, one researcher has found that by presenting the waiver issue, employees in seven of thirty-two decisions (21.9 percent) have been allowed to avoid arbitration.²

Part of the reluctance to require arbitration rested on questions of arbitrators' competence to decide legal issues. The Supreme Court noted back in 1974 that judicial construction is

¹ See Alexander v. Gardner-Denver, 415 U.S. 36 (1974); Wilko v. Swan, 346 U.S. 427 (1953).

² Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 Ohio St. J. Dis. Res. 249, 305 (2001).

necessary to interpret Title VII of the Civil Rights Act, since its “broad language frequently can be given meaning only by reference to public law concepts.”³ The Supreme Court also worried that the fact-finding process in arbitration may not be comparable to judicial fact-finding, and that the record of the arbitration proceedings is not as complete as a judicial transcript.⁴ In addition, the Court was concerned that arbitrators typically have no obligation to give their reasons for an award in writing.⁵

Arbitration agreements entered into by an individual employee and an employer had been enforced before this week’s decision. In these cases, employees alleging discrimination have been required to arbitrate their discrimination claims before beginning litigation in federal court.⁶ In 1991, the Supreme Court upheld the enforceability of a private arbitration agreement, as long as the employee could “effectively ... vindicate” her statutory rights in the arbitration.⁷ In requiring arbitration in these situations, the Court has consistently recognized that the informality of arbitration enables it to function as an “efficient, inexpensive, and expeditious means for dispute resolution.”⁸

Despite these Supreme Court decisions, some appellate courts had refused to extend the arbitration requirement to collectively bargained arbitration programs, holding that rights under

³ Gardner-Denver, 415 U.S. at 57.

⁴ Id.

⁵ Id. at 45.

⁶ Obliv Inc. v. Winiecki, 374 F.3d 488, 450-51 (7th Cir. 2004)(agreement to arbitrate was supported by consideration of employee's salary); Butler Manufacturing Co. v. Steelworkers, 336 F.3d 629 (7th Cir. 2003)(arbitrator had authority to hear FMLA claim under contractual provision that assured equal employment opportunity “in accordance with the provisions of law”).

⁷ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-35 (1991).

⁸ Id.; Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 123 (2001).

non-discrimination and other employment laws are “public rights.”⁹ With its most recent decision, the Court has extended the reasoning in the private, individual arbitration agreement cases to arbitration clauses which are part of a collective bargaining agreement.

Recognizing the importance of respecting the bargaining relationship as sanctioned by the National Labor Relations Act, the Court found that employees’ rights would be protected since a union is bound to represent its members adequately in the arbitration process. The Court also determined that employees who were required to use arbitration to resolve discrimination claims would not be waiving those rights, but would only be attempting to resolve the issue in a different forum. Employees can still challenge the arbitrator’s decision in court, albeit under a limited standard of review.

The Court’s recent decision is limited to collective bargaining agreements where the employer and the union specifically agree to arbitrate statutory claims of discrimination. The reasoning could potentially apply to other statutory claims, such as a claim for overtime under the Fair Labor Standards Act. The Court did not go so far as to overrule its 1974 decision, which still allows employees to file a discrimination claim in court without arbitrating first, if the arbitration provision in the applicable collective bargaining agreement does not specifically include these types of statutory claims.

Given this important decision, employers with current collective bargaining agreements should reexamine the language to determine if it specifically provides for the arbitration of statutory claims such as allegations under Title VII. If so, an employee can be required to arbitrate that claim before filing that claim in court.

⁹See, e.g., Albertson's, Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 761 (9th Cir. 1998); Davis v. O'Melveny & Myers, 485 F.3d 1066, 1078-80 (9th Cir. 2007).