When Can a Collective Bargaining Agreement Waive Union Members' Rights to a Judicial Forum?

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Case at a Glance

When their union refused to take their discrimination claims to arbitration, several employees filed age discrimination lawsuits against their employers instead. The employers then sought to compel the employees to submit their discrimination claims to arbitration or to have the lawsuits dismissed. The Supreme Court is now asked to decide whether employees covered by a collective bargaining agreement’s arbitration clause must arbitrate their statutory discrimination claims even if their union has declined to take their claims to arbitration.

ISSUE

Have employees whose union agreed with their employers that arbitration was “the sole and exclusive remedy for violations” of the Age Discrimination in Employment Act (ADEA) waived the right to a judicial forum for alleged violations of the ADEA, even when the union controls access to the arbitration and refuses to submit the employees’ grievances to arbitration?

FACTS

The respondents are employees of Temco Services Industries, a building service and cleaning contractor. Before August 2003, the respondents worked as night watchmen in a commercial office building owned by Pennsylvania Building Company and 14 Penn Plaza LLC. Since that time, the respondents have been working as night porters and light-duty cleaners in the same building.

Respondents are also members of Local 32BJ of the Service Employees International Union. They are covered by the collective bargaining agreement between the union and the Realty Advisory Board on Labor Relations, Inc., the multiemployer bargaining association of the New York City real estate industry. The collective bargaining agreement contains a mandatory arbitration clause for discrimination claims, which provides as follows:

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 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, New Jersey Law Against Discrimination, New Jersey Conscientious Employee

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In August 2003, Temco contracted with Spartan Security, a security services contractor and affiliate of Temco, to provide certain security personnel, including night watchmen, for the building. Spartan brought in new employees. Respondents, who had been employed as night watchmen, were reassigned to different locations and less desirable positions as night porters and light-duty cleaners within the building.

The respondents filed grievances with the union under the collective bargaining agreement. The respondents claimed that, as the only building employees over the age of 50, they were wrongfully transferred and denied overtime in violation of various provisions of the collective bargaining agreement, including the provision that prohibited discrimination on the basis of age. The respondents’ grievances were submitted to arbitration. Shortly after the arbitration began, the union declined to pursue the respondent’s claims of wrongful transfer and age discrimination, electing to pursue only the claims regarding denial of overtime on behalf of all plaintiffs and wrongful denial of promotion on behalf of respondent Steven Pyett. According to the respondents, the union’s counsel explained to them that “since the Union had consented to Spartan Security being brought into the building,” the union could not contest their replacement as night watchmen by personnel of Spartan Security. On August 10, 2005, the arbitrator issued his award, denying respondents’ arbitrated claims in their entirety.

On May 26, 2004, while the arbitration was ongoing, but after the union declined to submit the age discrimination claims, the respondents filed charges of discrimination with the Equal Employment Opportunity Commission. The EEOC issued a Dismissal and Notice of Rights on June 29, 2004, for respondents Thomas O’Connell and Michael Phillips, and on September 14, 2004, for respondent Pyett. In each case, the EEOC determined that its “review of the evidence ... fail[ed] to indicate that a violation ha[d] occurred,” and notified each respondent of his right to sue. On September 23, 2004, respondents commenced this action against the petitioners in district court, pursuing those claims that the union did not submit to arbitration. The respondents alleged that they had been transferred from their positions and replaced by younger security officers in violation of the Age Discrimination in Employment Act, the New York State Human Rights Law, and the New York City Administrative Code.

The petitioners moved for dismissal for failure to state a claim upon which relief can be granted and, in the alternative, to compel arbitration. In an order dated May 31, 2006, the district court denied both motions. With respect to petitioners’ motion to compel arbitration, the district court referred to its decision in Granados v. Harvard Maintenance, Inc., 2006 WL 435731 (S.D.N.Y. Feb. 22, 2006). In that case, the district court “concluded based largely on binding Second Circuit precedent that even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable.” Pyett v. Pennsylvania Building Co., 2006 WL 1520517, *3 (S.D.N.Y. June 1, 2006).

Affirming the district court, the U.S. Court of Appeals for the Second Circuit held that the arbitration clauses in the collective bargaining agreements were unenforceable to the extent that they waived the rights of covered workers to a judicial forum for federal statutory causes of action. Pyett v. Pennsylvania Building Co., 498 F.3d 88 (2d Cir. 2007).

The Supreme Court granted petitioners’ request for request for review. 128 S.Ct. 1223 (2008).

CASE ANALYSIS

The petitioners assert that the arbitration provision in this case is an enforceable and “clear and unmistakable” waiver of the respondent union members’ right to a judicial forum. The petitioners say that the union, as the respondents’ exclusive bargaining representative, was authorized and entitled to bargain over all terms and conditions of their employment. According to the petitioners, the respondents were given an unimpeded opportunity to arbitrate their claims, which they refused in favor of filing a federal lawsuit, contrary to the requirement in the collective bargaining agreement. The petitioners claim the “Second Circuit’s judicial voiding of the arbitration provision flouts repeated decisions from [the Supreme] Court that agreements to arbitrate statutory claims are enforceable unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”

The petitioners assert that it is a fundamental premise of labor law (Continued on Page 154)
that a union has the power to negotiate agreements with the employer as to virtually every aspect of its members' employment and that those agreements are as binding on the employees as if they had negotiated them themselves. The petitioners claim that the fact that an employee has a statutory discrimination theory as well as a contract theory for seeking recovery does not alter the union's bargaining authority. They say it is appropriate for a union to bargain collectively over the method of resolving such claims in exchange for valuable concessions. According to the petitioners, the Second Circuit's categorical ban not only cuts against the national policy favoring informal resolution of workplace disputes, but also underlines the role of the union in negotiating on behalf of its members.

Asserting there is no evidence that Congress ever distinguished between promises to arbitrate statutory discrimination claims based on whether the promises were individually made or collectively bargained, the petitioners contend that the Second Circuit's distinction creates perverse results. They say that arbitral arrangements are much more likely to be advantageous to employees when they are collectively bargained. If unions cannot make such promises, petitioners argue, such a term of employment would become a nonmandatory subject of bargaining that the employer could impose on employees while simply bypassing the union.

According to the petitioners, the Second Circuit's reliance on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), cannot be sustained. The petitioners assert that, contrary to the Second Circuit's view, Gardner-Denver decided nothing about whether clear collectively bargained promises to arbitrate statutory discrimination claims are categorically unenforceable. The petitioners view Gardner-Denver as holding only that an arbitrator's resolution of a contractual claim does not preclude a statutory claim under Title VII when the parties had not expressly agreed to arbitrate the statutory claim and the arbitrator therefore had no power to decide it. Petitioners say that Gardner-Denver did not address whether Congress had intended to preclude employers from invoking the Federal Arbitration Act to compel arbitration when, as in the present case, the employees' union had clearly agreed on behalf of its members that all their statutory discrimination claims would be arbitrated with the arbitrators applying appropriate law and remedies.

The petitioners stress that collective bargaining agreements may waive individual rights if they expressly so provide. They state that speculative risks that certain statutory goals may be disserved (e.g., the risk that a union might subordinate the employee's interest in his or her own claim to the union's interests) are insufficient as a matter of law to defeat a motion to compel arbitration under the Federal Arbitration Act.

Disagreeing with the petitioners, the respondents contend the Supreme Court has repeatedly held that a union-controlled arbitration agreement does not preclude an individual employee from pursuing his or her statutory anti-discrimination claims in court. They argue that these Supreme Court decisions properly recognize that, in a union-controlled arbitration process, an employee is unable to vindicate the employee's individual, substantive statutory anti-discrimination rights.

According to the respondents, the Supreme Court's holding in Gardner-Denver, that a union cannot waive an employee's right to a judicial forum under the federal anti-discrimination statutes, applies directly to this case. Respondents also say that in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Court reiterated the concern expressed in Gardner-Denver that allowing the union to waive this right would substitute the union's interests for the employee's anti-discrimination rights.

The respondents claim that those decisions are consistent with the limited legal powers conferred on unions by federal statute. Although a union is authorized to waive employees' collective rights in order to further self-governance between the employer and the union, the respondents explain that the union's waiver authority does not extend to employees' individual, noneconomic rights under the federal anti-discrimination statutes. They reason that a union is obligated to further the collective interest of its bargaining unit, and this obligation necessarily takes precedence over, and often conflicts with, the individual interests and rights of its employees. Because the federal anti-discrimination statutes protect, not majoritarian processes, but an individual's right to equal employment opportunities, the respondents say that the vindication of that right can only be committed to arbitration by the aggrieved individual and not by the union in a collective bargaining agreement. Moreover, the respondents contend that labor arbitration's focus on the "law of the shop" is ill-suited to resolve statutory discrimination claims. (The law of the shop, sometimes referred to as industrial common law, is found in the practices of an industry or a work site.)

Noting that the ADEA expressly requires that any waiver of an employee's right to litigate be made
by that affected individual, the respondents argue that the union is precluded from waiving an employee's ADEA rights. Because the rights afforded under the ADEA and other anti-discrimination statutes are important public rights that devolve on employees as individuals and not as members of a collective bargaining unit, the respondents assert that the union cannot through a collective bargaining agreement deprive employees of their ability to vindicate those rights individually and in court with the right to a jury trial. It is the respondents' position that allowing union waiver would subjugate employees' anti-discrimination rights to the collective interest of the union. They state that the potential for the employee to establish a duty-of-fair-representation claim is a poor substitute for the rights and remedies available to that employee under federal anti-discrimination law.

Assuming it were somehow legally possible for a union to waive an individual's right to pursue a judicial forum for his or her ADEA claims, the respondents contend that arbitration could not be compelled in this case because the respondents cannot "effectively … vindicate" their rights in arbitration under the collective bargaining agreement. While the petitioners seek to compel the respondents to arbitrate with them, the respondents say that under the collective bargaining agreement, they have no right to invoke its arbitration provision over the union's objection. Thus, the respondents conclude there is no arbitral forum to which the petitioners can compel them to arbitrate.

**SIGNIFICANCE**

This case focuses on the tension between two lines of Supreme Court case law: *Gardner-Denver* (involving arbitration of statutory discrimination claims under the arbitration clause in a collective bargaining agreement), and *Gilmer v. Interstate/Johnson* (involving arbitration of statutory discrimination claims under the arbitration clause in an individual's employment agreement). Compare *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998) (holding that, in order for a union to waive employees' rights to a judicial forum for statutory discrimination claims, the agreement to arbitrate such claims must be clear and unmistakable); with *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that an agreement between employer and employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief in an Americans with Disabilities Act enforcement action).

In *Gardner-Denver*, the Supreme Court addressed how statutes prohibiting employment discrimination related to the system of collective bargaining and grievance arbitration. Under *Gardner-Denver*, if a union chooses not to pursue a discrimination claim to arbitration, the employee-grievant is free to pursue the employee's statutory discrimination claim in court. *Gardner-Denver* also held that, if the union takes a statutory discrimination claim to arbitration and does not prevail, the individual employee may avail himself or herself of legal relief de novo, though the arbitration decision can be given weight as evidence in the later civil proceeding.

In *Gilmer v. Interstate/Johnson*, the Supreme Court concluded that Congress did not intend to preclude arbitration of age discrimination claims where an individual's employment agreement provided for arbitration of discrimination claims. The Supreme Court did not, however, determine whether an employer and a union could agree that labor arbitration could be the sole and exclusive procedure for resolving statutory age discrimination claims.

Labor arbitration (sometimes called grievance arbitration) is an outgrowth of collective bargaining. Labor arbitration grew to maturity in the post–World War II era. During the war, employers and unions had resolved many disputes through arbitration. Because of their wartime successes, labor unions and employers continued to employ labor arbitration after the war. In labor arbitration—arbitration that is the product of a collective bargaining agreement—access to and conduct of the arbitration is controlled by the union, and not by the individual employee. The enforceability of the agreement is governed by federal common law under § 301 of the Taft-Hartley Act, not by the Federal Arbitration Act or state law. See *Wright v. Universal Maritime Service*. Labor arbitration claims (referred to as grievances) are heard by persons normally selected from a panel of labor arbitrators. Almost 40 percent of labor arbitrators are trained in industrial relations—not the law. The procedures are based on industrial relations principles and do not include prehearing discovery of evidence. Moreover, the advocate's obligation is to the union and not to the individual employee.

Unlike *labor* arbitration (or grievance arbitration), *employment* arbitration is conducted under an individual employment contract covered, in most cases, by the Federal Arbitration Act. The enforceability of an employment arbitration clause is determined by state law. Employment arbitration is generally subject to legal procedures such as prehearing discovery, representation of the individual employee by legal counsel, and the same burdens of proof as would be applicable in a judicial forum.

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In Textile Workers Union v. Lincoln Mills, 533 U.S. 448 (1957), the Supreme Court held that a collective bargaining agreement's provision for grievance arbitration was enforceable—not by reference to the Federal Arbitration Act—but under § 301 of the Taft-Hartley Act. The Court found that § 301 provided for a uniform federal common law of collective bargaining agreement fashioned by the judiciary out of national labor policy and limited only by judicial “inventiveness.”

Three years later, the Supreme Court found labor arbitration to be an integral element of the autonomous system of self-government created by the collective bargaining agreement fashioned by the judiciary out of national labor policy and limited only by judicial “inventiveness.”

The Supreme Court has recognized that individuals have limited rights to enforce their individual rights under collective bargaining. An employee must first attempt to exhaust the grievance-arbitration procedure. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). After exhausting the grievance-arbitration procedure, an employee can sue the employer for an alleged breach of contract only if the employee could prove that the union had breached its duty of fair representation, either in declining to take the case to arbitration, or in its inadequate presentation of the claim in arbitration. See Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

A breach of a union's duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit it represents is arbitrary, discriminatory, or in bad faith. A union may not arbitrarily ignore a meritorious grievance nor may it process the grievance in a perfunctory manner. A union's refusal to take an employee's grievance to arbitration is wrongful only if it can be fairly characterized as far outside a wide range of reasonableness, or else wholly irrational or arbitrary. Where a union breaches the duty of fair representation in not arbitrating a claim, the union bears a significant share of any resulting liability should it be found that the employer discriminated against the employee. See Boxen v. U.S. Postal Service, 451 U.S. 212 (1983). If statutory discrimination claims are deemed covered by a grievance-arbitration procedure, an employer would bear no liability for wrongful discriminatory conduct if the union has not breached the duty of fair representation in declining to take an employee's discrimination claim to arbitration.

In Wright v. Universal Maritime, the Supreme Court held that the general arbitration clause in a collective bargaining agreement did not require an employee to use the arbitration procedure for a claim that the employer had violated the Americans with Disabilities Act. The Court said that, in order for a union to waive employees' rights to a judicial forum for statutory discrimination claims, the agreement to arbitrate such claims must be clear and unmistakable. Although finding there was no clear and unmistakable waiver in the collective bargaining agreement, the Court did not reach the question of whether such a waiver would be enforceable.

In EEOC v. Waffle House, Inc., the Supreme Court held that an agree-
In Support of Respondents Steven Pyett, et al.

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