

CAN A UNION CONTRACT INSULATE EMPLOYERS AGAINST TITLE VII LAWSUITS?

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In a unionized workplace, terms and conditions of employment are governed by the collective bargaining agreement (CBA) negotiated between labor and management. As both employers and labor organizations are subject to Title VII's prohibition of workplace discrimination, it is common for CBA's to contain an "anti-discrimination" clause, by which both labor and management agree to apply the principles of equal employment opportunity. It is also standard for CBAs to include a dispute resolution mechanism, usually in the form of a grievance procedure with the final step of binding arbitration. These grievance procedures are designed to resolve all disputes arising under the CBA. The U.S. Supreme Court has long held that where employees have access to a contractual grievance/arbitration process, the courts should defer to that process and require employees to seek recourse for their grievances through arbitration. Presumably, this deference to arbitration would include alleged incidents of discrimination or harassment, which would constitute violations of the CBA's anti-discrimination provision.

However, in its 1974 decision in *Alexander v. Gardner-Denver Co.*, the Supreme Court held, in part, that the presence of an EEO clause and a grievance/arbitration process in a CBA did not prevent an employer from filing a Title VII claim with the EEOC. The Court held:

[i]n no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII.

Since 1974, it has been generally understood that unionized employees, regardless of the wording of the CBA, retain the right to pursue EEOC claims. However, in its April 1, 2009 decision in *14 Penn Plaza LLC v. Pyett*, a sharply divided Supreme Court suggested that its *Gardner-Denver* decision had been

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misinterpreted and that the Court never intended to say that Title VII rights could never be subordinated to a CBA's grievance procedure. In *Penn Plaza*, the plaintiffs, a group of unionized night watchmen, filed a grievance alleging a violation of the CBA's anti-discrimination provision. The employees also filed an age discrimination complaint with the EEOC. After the plaintiffs' were issued a right to sue letter, the defendant employer filed a motion to compel arbitration of the discrimination claim under the CBA's grievance procedure. Both the trial and appellate court denied this motion, both citing to the *Gardner-Denver* decision as the basis for concluding that the plaintiffs had not individually waived their rights to proceed with their discrimination case in the courts.

The Supreme Court reversed. The Court held that the intent of the *Gardner-Denver* decision was to make clear that the fact that an employee could arbitrate an alleged violation of a contractual EEO clause did not preclude him from pursuing a statutory EEO claim. However, the CBA at issue in *Penn Plaza* allowed the employees to arbitrate both contractual and statutory EEO claims. The Court concluded that where the plaintiffs, through their Union, had agreed to arbitrate statutory EEO claims, the lower courts should have required that they proceed with arbitration rather than pursue remedies in the courts.

Some labor organizations have suggested that *Penn Plaza* provides an incentive for employers to embrace union representation of their employees. They argue that by entering into a properly worded CBA, an employer could avoid many of the costs, inconvenience and unpredictability of jury trials on discrimination claims in favor of the less cumbersome grievance/arbitration process. There is certainly some attraction to this argument, in that it is reasonable to expect that labor arbitrators would be more measured in their decision-making and awarding of damages than would a jury.

It is unlikely that this argument will cause many employers to change their mindset regarding employee unionization. Accordingly, it should be anticipated that organized labor, together with plaintiffs' lawyers, will support legislation that preserves the rights of unionized employees to pursue discrimination claims in the courts such as the Arbitration Fairness Act, currently pending in Congress. Until that legislative correction occurs, employers that are currently parties to a CBA should consider whether they would benefit by empowering arbitrators to decide statutory discrimination claims.

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