

Monday, May 11, 2009

Union Employers Score Big Win

On April 1, 2009, the United States Supreme Court decided Penn Plaza LLC v. Pyett (2009) 129 S. Ct. 1456, which held that a provision in a collective bargaining agreement ("CBA") that clearly and unmistakably requires union members to arbitrate discrimination claims is enforceable as a matter of federal law and, therefore, preempted by the National Labor Relations Act ("NLRA").

Penn Plaza is a significant victory for union employers in that claims for harassment, discrimination, and retaliation may be preempted and must be adjudicated through the grievance arbitration provisions of a CBA and not through civil courts. This decision can potentially save union employers thousands, if not hundreds of thousands, of dollars in litigation costs and potential damage awards.

The CBA in Penn Plaza required union members to submit all claims of employment discrimination to binding arbitration as follows:

§ 30 NO DISCRIMINATION. 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.

This provision was freely negotiated and qualified as a condition of employment subject to mandatory bargaining under the NLRA. According to the Court, unless the discrimination statute, prohibiting discrimination,

harassment, or retaliation, removes itself from the labor arbitration process, these claims may be arbitrated.

Union employees have further redress if his/her union fails to fairly represent him/her for such claims. Union members have always had a right, when his/her union takes action that is arbitrary, discriminatory, or in bad faith, to file suit for a breach of the duty of fair representation.

Therefore, union employers should review their CBAs for the following:

- Does the CBA have a provision that prohibits discrimination, harassment, and retaliation?
- Does this provision prohibit discrimination, harassment and retaliation for all protected categories, i.e., state and federal?
- Does it include a list of all legislative Acts that prohibit discrimination, harassment and retaliation under both federal and state law?
- Does the provision specifically provide that all claims for discrimination, harassment and retaliation are subject to the grievance and arbitration procedures of the CBA as the sole and exclusive remedy for such violations, that the Arbitrator will apply appropriate law, and that his/her decision is final and binding on all of the parties?

Union employers should also:

- Notify the Union when claims of discrimination, harassment and retaliation are made;
- request the Union represent its member making such claims;
- request the Union to conduct, in addition to the investigation the employer conducts, its own appropriate investigation into the claims;
- follow the grievance arbitration provisions to resolve the matter, and, if resolution cannot be achieved;
- submit the claims to final and binding arbitration before an Arbitrator.

Although numerous questions remain unanswered, Penn Plaza does much to streamline claims of discrimination, harassment and retaliation. This case offers unionized employers the opportunity to negotiate an arbitration

process that includes individual employee claims associated with civil rights. If your CBA does not have such provisions you should strongly consider negotiating these terms in successive agreements.

For more information about the topic above, contact Heather S. Candy (hcandy@pkwhlaw.com) or call (877) 442-3552.