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Anomalous Decisions On Private Arbitration

Law360, New York (February 05, 2009) -- In taking the case of 14 Penn Plaza LLC v. Steven Pyett and Others, Case No. 07 581 for review, the Supreme Court has determined to revisit again the place of arbitration in the employment galaxy.

While the case promises to address the question of whether a union can commit its individual members to arbitration of statutory claim through collective bargaining, examination of the briefs and the text of oral argument indicates that the case will leave in place a contradiction between the court's approach in these cases and its approach to private resolution of hostile environment claims.

On Dec. 1, 2008, the court heard argument in that case. In Pyett, an age discrimination case, the employer has asked the court to enforce a collective bargaining agreement that requires employees to submit their statutory age claims to an arbitrator for final and binding decision.

The focus of the arguments to the court is on the inherent conflict that can arise between the union's collective interests and the individual rights of a single employee.

The Pyett case illustrates that tension. Mr. Pyett and others were employees of a contractor who provided security in New York office buildings. Apparently with the consent of the union, their employer engaged another group to provide security for the same building in which the Pyett plaintiffs had worked. This displaced plaintiffs to other buildings.

Mr. Pyett claimed that the decision was motivated by age discrimination. The union initiated the grievance arbitration process on their behalf, joining the age claim with unrelated contract claims. However, while the matter was pending arbitration, the union decided not to pursue plaintiffs' age claim, apparently because it had agreed to the displacement of the plaintiffs that was at issue.

At oral argument in the Supreme Court, the employer represented that, even though the union had withdrawn the age claim, the practice under the agreement was to allow its members to pursue their individual claims in the arbitration process, even if the union disagreed.

Instead of taking that opportunity, plaintiffs filed a charge with the U.S. Equal Employment Opportunity Commission and ultimately sued.

The decision under review is the decision of the trial court, affirmed in the Second Circuit, holding that a clause in a collective bargaining agreement requiring members to pursue their statutory claims in arbitration under that agreement is not enforceable under

Supreme Court precedent, principally the decisions in Alexander v. Gardner Denver, 413 U.S. 36 (1974) and Wright v. Universal Maritime Service Corp, 525 U.S. 70 (1998) and their progeny.

Because the parties' arguments in the Supreme Court focused on that tension between collective and individual rights, the arguments did not address the anomaly in the case law that allows a plaintiff to skip the available remedies in arbitration under a collective bargaining agreement under Gardner Denver, but would preclude claims that had not been brought to the employer for resolution under a unilaterally adopted policy as approved in Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

To demonstrate this anomaly, apply the Second Circuit's Pyett decision in the context of a claim of sexual harassment discrimination.

The Supreme Court ruled in 1986 that "hostile environment discrimination" based on sex is a violation of Title VII of the Civil Rights Act of 1964. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

A claim of that kind of discrimination by an employee covered by the Pyett collective bargaining agreement currently before the Supreme Court could only be brought to the contract arbitrator for resolution according to the employer in that case.

But the Second Circuit decision under review in Pyett would not defer to the procedure negotiated by the union in such a case or give it any preclusive effect when the employee later sued in court.

The Second Circuit would allow the plaintiff to sue without exhausting that arbitration process, or, having lost at arbitration, to pursue the claim in court without limitation despite an adverse finding.

As a matter of policy, this conflicts with the harassment line of cases never mentioned in the Pyett briefs or in dialogue with the Court in oral argument.

In Faragher the Court held that an employer has an available affirmative defense that will defeat a claim of hostile environment discrimination.

All that is required is for the employer unilaterally to adopt a policy against hostile environment discrimination and a complaint procedure. If the employee does not pursue a complaint under that policy, the failure is fatal to a later claim in court.

So the anomaly: if an employee's union negotiates a procedure in which she can challenge employer decisions before an outside neutral, often with full advantage of live testimony, subpoena power and cross-examination, that employee can bypass the

purportedly binding arbitration agreement and proceed to challenge employer action in the court.

Although the award may be "admissible" under a Gardner Denver footnote, it is discretionary with the court whether to do so and what weight to assign to it. 415 U.S. at 60, n.21. (Gardner Denver was decided before jury trials were common in employment cases, and the result could be more complex today.)

But the same employee in the same circumstances, but with no collective bargaining agreement negotiated on her behalf would be precluded from recovery if the employer has unilaterally adopted an antidiscrimination policy under which the company itself would investigate and address claims, generally with limited process.

Read together, these cases allow the union-represented employee to sue without taking advantage of the arbitration before a neutral, but preclude recovery for the employee whose employer simply has a policy she fails to invoke.

Although the Pyett case is unlikely to address this anomaly, Congress is weighing in. Since the Supreme Court decided Gilmer v. Interstate Johnson Lane Corp., 500 U.S. 20 (1991), arbitration of employment disputes and many other issues in the American economy have become common and widely accepted.

In an employment dispute, where an employee has the opportunity to raise the violation of parallel contractual rights against discrimination or statutory claims (as in Pyett), it should be regarded as a failure to mitigate losses if the employee foregoes those procedures.

Moreover, since 1974, employers, unions and arbitrators have become far more sophisticated in evaluating discrimination cases and sensitive to the issues.

Particularly where the employer might concede that an employment decision, if based on discriminatory motive, lacks justification under the collective bargaining agreement, there is no longer any sound reason why such a procedure should not receive significant deference in appropriate cases.

As Congress reviews this matter, it should consider the sound reasoning of the National Labor Relations Board in its 1971 decision in Collyer Insulated Wire, 192 NLRB 837, 842.

Under that approach, the court should give substantial weight, if not deference, to decisions of arbitrators that emerge from fair and regular proceedings in which the employee has had full protection of his or her rights before a truly neutral decision maker, and where the results comport with the federal antidiscrimination laws.

In the meantime, the failure of a plaintiff to pursue opportunities for reinstatement and back wages in any forum should be considered a failure to mitigate losses unless there is evidence that the procedure was tainted in some way.

The initial policy of Title VII included an impulse to raise and dispose of discrimination claims promptly. Enabling private remedies that advance statutory aims while promptly resolving disputes is in the interest of all parties in the workplace.

It may take legislation to correct this anomaly, but parties in litigation should also be attentive to the opportunities the current case law allows for more efficient disposition of claims through these procedures.

--By Terence G. Connor, Hunton & Williams LLP

Terence Connor is a partner with Hunton & Williams in the firm's Miami office.

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