Fenwick Employment Brief

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In A Major Reversal, Supreme Court Rules That Collective Bargaining Arbitration Procedures Can Trump Age Discrimination Lawsuits

In *14 Penn Plaza v. Pyett*, the Supreme Court ruled (5-4) that provisions in collective bargaining agreements requiring union members to arbitrate claims arising under the Age Discrimination in Employment Act can bar private lawsuits by aggrieved employees. In this case, the employer reassigned lobby services employees to positions as night porters and light duty cleaners in other building locations. The employees claimed these reassignments violated the union contract, led to loss of income and caused emotional distress. The union eventually filed a suit on behalf of the employees in district court claiming age discrimination. Penn Plaza sought to compel arbitration of the claims under the collective bargaining agreement.

The Supreme Court ruled that when an arbitration clause is freely negotiated, and clearly and unmistakably requires employees to arbitrate discrimination claims, as existed in the collective bargaining agreement between Penn Plaza and its employees, arbitration can be compelled. The Court found no language in the ADEA which forbid the arbitration of claims brought under the statute. The Court added that previous cases rested on a negative view of arbitration and departed from the long-standing decisions (*Gardner-Denver, Gilmore*) which allowed employees to have two bites at the apple – once through arbitration and then again in court. This ruling is a significant win for employers and adds to the growing support for arbitration by the Supreme Court. The results may extend to other anti-discrimination laws as well.

NEWS BITES

Employee's Termination After Failing To Take English Lessons Did Not Amount To Retaliation

In *Zokari v. Gates,* a Nigerian immigrant was terminated from his position after refusing to take English lessons in order to overcome his accent. Zokari claimed that his supervisors at the Department of Defense retaliated against him by disciplining him for poor performance, and terminating him for failure to take the class. The Tenth Circuit (Denver) held that Zokari had not engaged in protected activity under Title VII when he refused to take English classes. While Zokari refused to take the class because he felt the request was discriminatory, he did not show that he had made the basis of his refusal known to his supervisors. Because Zokari's employer was unaware of the basis for Zokari's refusal, the employer was not liable for retaliation.

Company's Assignment Of Manager To Another State Did Not Breach Employment Contract

Ronald Vendetti was the controller for a Georgia company, and resided there. When the company was acquired, Vendetti negotiated a location provision that stated he would remain in his current location or another office within 45 miles of that location. After a new chief financial officer was hired, Vendetti was assigned to assist with year-end audits and preparing monthly closing statements in Chicago. Vendetti was told to plan on working in Chicago the last two weeks of each month "for the indefinite future." Vendetti refused and claimed that the request to work in Chicago two-weeks a month violated the location provision in his employment contract. The Seventh Circuit (Chicago) ruled that the provision barred relocation, not travel, and that to rule otherwise would mean that Vendetti could not be required to travel beyond the 45-mile radius. As Vendetti was able to keep his home, the travel request was not a violation of the location provision.

Department Of Labor Publishes Model COBRA Subsidy Notices

As mentioned in last month's Employment Brief, the government has implemented a subsidy for the cost of health care continuation coverage under COBRA. The Department of Labor has now issued four model subsidy notices for employers to use. These notices can be located at: http://www.dol.gov/ebsa/COBRAmodelnotice.html. They include: (1) an expanded COBRA General Notice about election rights and the subsidy which can be provided to any individual who becomes eligible for COBRA; (2) an abbreviated General Notice for those individuals who have already elected COBRA to inform them of the new reduced premium rate; (3) a notice for individuals eligible for continuation coverage under state law and (4) an "Extended Election Period" notice for individuals terminated between September 1, 2008 and February 16, 2009 who did not elect COBRA or elected COBRA but terminated coverage.

Department Of Labor Issues Significant Opinion Letters On Cutting Hours

For those with employees subject to federal wage/hour laws, it is worth noting that the Department of Labor has issued three opinion letters on the impact of cutting hours. In the first letter, the DOL stated that exempt employees who are required to take PTO when work is unavailable cannot be considered to be paid on a salary basis if deductions from guaranteed salary are made due to employer-mandated absences. Additionally, if an employee has run out of PTO and is required to take a day off, deductions cannot be made from the guaranteed salary. In the second letter, the DOL stated that if an employer requires an employee to take unpaid time off, which leads to an overall salary deduction, then the employee is no longer exempt. The DOL said, "[i]f the employee is ready, willing and able to work, deductions may not be made for time when work is not available." In a third letter, the DOL confirmed that employers need not compensate on call employees if the employee is not required to remain on the employer's premises but merely required to leave word where he may be reached.

EEOC Discrimination Charges Reach Record Numbers In 2008

In 2008 the Equal Employment Opportunity Commission received a record-high 95,402 private sector discrimination charges. This is an increase of over 15% from the previous fiscal year. The EEOC reported that it resolved 81,081 charges in 2008 and obtained approximately $274.4 million in remedies for the charging parties. An additional 290 "merits" lawsuits were filed by the EEOC and 339 suits were resolved for approximately $102.1 million. The report indicates that the pursuit of systematic investigations and lawsuits were a top priority in 2008.

Discrimination Irony: Employee Pursues Pregnancy Discrimination Claims Against Maternity Clothier

Nicole Myers was a district manager for Mothers Work Inc., a maternity clothing chain store. After Myers told her supervisors she was pregnant, she received a lower performance rating and was placed on an individual development plan to improve her performance. A month later, Myers was offered a severance package in exchange for her resignation and release of all claims. Myers was additionally placed on two weeks unpaid leave to consider the offer. Myers rejected the offer. A month later she was placed on full unpaid leave. After her child was born, Myers informed Mother's Work of her return date, but was told that she could not return to her same job. A Texas district court ruled that Myers had presented enough evidence to proceed with her claims for pregnancy discrimination, retaliation and violation of the Family and Medical Leave Act.

Only In Texas–A "Bring Your Gun to Work" Bill

A Texas State Senator has proposed a bill that would allow employees to store firearms in their vehicles in employer operated parking lots, garages or parking areas. The proposed legislation would restrict an employer's right to prohibit those employees licensed to carry concealed firearms from keeping legal firearms in locked vehicles in employer-controlled parking areas. The bill contains exceptions that allow employers to retain some control over the presence of firearms and shields employers from liability for damages resulting from the use of a firearm.

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