

WHAT DOES THE SUPREME COURT'S DECISION

Many LELS labor agreements contain a standard "non-discrimination" clause stating that the terms of the agreement will be applied equally to all employees without regard to race, gender, religion, disability, political affiliation, et cetera. Does this mean that an employer can require that employment discrimination claims be submitted to binding arbitration, instead of going through the courts?

Since the U.S. Supreme Court's 1974 ruling in *Alexander v. Gardner-Denver Co.*, it has been understood that the answer is no: a union may not bargain away an employee's individual right to assert claims for violations of anti-discrimination laws and to seek relief for those violations in court. Similarly, in a 2004 grievance arbitration, *Minnesota State Colleges and Universities and Inter Faculty Organization*, Arbitrator Gerald Wallin held that despite the "non-discrimination" language in the contract between the parties, an individual discrimination claim was non-arbitrable because the courts have exclusive jurisdiction over such statutory claims.

All of that may change based on the U.S. Supreme Court's decision earlier this year in *14 Penn Plaza, LLC v. Pyett*. The last several decades have seen a steady trend toward increased enforcement of mandatory arbitration clauses in union contracts. The *14 Penn Plaza* ruling suggests that, depending on how a contract is worded, employment discrimination claims may be also be subject to binding arbitration, and arbitrators may be authorized to rule on the merits of such claims.

14 Penn Plaza involved interpretation of a collective bargaining agreement between the owner of a New York City office building and the Service Employees International Union (SEIU). The agreement prohibited unlawful discrimination and cited to various federal and state anti-discrimination statutes. The agreement further stated that "all such claims shall be subject to the grievance-arbitration procedure as the sole and exclusive remedy for such violations." When certain union members brought a lawsuit under the federal Age Discrimination in Employment Act (ADEA), the employer sought to have the court case dismissed and to compel the employees to submit their claims to binding arbitration.

The trial court denied the employer's motion based on *Gardner-Denver*, and the Court of Appeals agreed. The Supreme Court, however, reversed and held that when an employer and a union bargain in good faith and agree that all discrimination claims must be subject to the grievance-arbitration process, that agreement must be honored by the courts. The Court did not directly overturn *Gardner-Denver*, but disavowed the principle stated in that opinion that arbitration is not a suitable forum for resolving employment discrimination claims.

One of the reasons cited by the Supreme Court for its decision in *14 Penn Plaza* is that the ADEA does not itself remove age discrimination claims from the grievance-arbitration process. It is expected that Congress may respond by amending the ADEA and other federal statutes to ensure that claims arising under those statutes are within the exclusive purview of the courts and may not be made subject to binding arbitration. State legislatures, including Minnesota's, may do the same with respect to state employment laws.

that employers across the country, including public employers in Minnesota, will attempt to invoke the *14 Penn Plaza* decision to funnel employment discrimination claims into arbitration. (In addition to being faster and cheaper than a jury trial, an arbitration hearing is generally considered to be a friendlier forum for the employers in a discrimination case.) Because *14 Penn Plaza* was a private-sector case arising under the National Labor Relations Act (NLRA), the decision would not be directly controlling in a Minnesota Public Employees Labor Relations Act (PELRA) case. Still, the statutes are similar enough that the reasoning in *14 Penn Plaza* would probably be strongly persuasive in a Minnesota public-sector case. Any such case would have a direct bearing on the individual rights of LELS members.

In a case involving a typical LELS contract, the clearest way to distinguish *14 Penn Plaza* would be by comparing the language in the labor agreements themselves. As stated above, the agreement at issue in *14 Penn Plaza* stated explicitly that arbitration was the sole and exclusive remedy for discrimination claims. The Supreme Court held that a contract provision like this, which clearly and unmistakably requires union members to arbitrate employment discrimination claims, is enforceable. Arguably, then, an agreement whose non-discrimination clause does not contain such clear and unmistakable mandatory-arbitration language (which an LELS contract typically does not) would be unaffected by *14 Penn Plaza*.

Of course, employers' representatives are likely to recognize this and may soon try to negotiate for clearer mandatory-arbitration language in the non-discrimination provisions of our labor agreements. LELS' business agents and stewards should be wary of this and resistant to any such changes.