'Penn' Is Mightier Than Decades of Court Precedent

By Catherine L. Fisk

Since well before the 1935 enactment of the National Labor Relations Act, most unionized workplaces had a grievance and arbitration system, paid for by the company and by union dues, for the resolution of disputes arising under the collective bargaining agreement. As Congress enacted various statutes providing additional protections for employees, beginning with the Fair Labor Standards Act in 1938 and continuing through the 1990 Americans with Disabilities Act, Congress provided for federal court resolution of statutory claims. Congress was well aware that statutory and collectively bargained protections might overlap, as many contracts require premium pay for overtime work and most prohibit discrimination on the basis of race, ethnicity, religion, sex, national origin, age and disability. Unionized employees who believed they had been paid less than required or had been discriminated against had the option of pursuing a grievance under the contract, and many would choose that option because it was faster, cheaper and did not require the employee to hire a lawyer because the union handles the grievance and hires a lawyer if necessary.

But when either union or employer intransigence or incompetence prevented the grievance and arbitration system from delivering a fair result, an employee who could find a lawyer had the option of pursuing a claim for violation of the statute in federal or state court. As early as 1931, the Supreme Court held that working conditions of railway workers covered by collective bargaining agreements were subject to state statutes and not exclusively to the dispute resolution processes established by the Railway Labor Act. Missouri Pacific Railroad Co. v. Norwood, 283 U.S. 249 (1931). Arbitration was for contract claims and litigation was there to protect individual statutory rights that were not appropriate for resolution by the contractual grievance arbitration system.

A sharply divided Supreme Court recently overthrew the system that had worked well for over 75 years. In 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (April 1, 2009), the five-justice conservative majority, in an opinion by Justice Clarence Thomas, held that a collective bargaining agreement's arbitration clause that allows arbitration of statutory claims waives the right of employees to bring a suit. It all but overruled Alexander v. Gardner-Denver, 415 U.S. 36 (1974), which had held that an arbitration award under a collective bargaining agreement does not bar an employee from filing suit asserting a statutory claim arising from the same facts. It also cast doubt on nearly a dozen of its own decisions holding that unionized employees may, without regard to collective bargaining agreements or adverse arbitral rulings, file suit under the Fair Labor Standards Act and other federal and state wage laws, Section 1983 of the Federal Employers Liability Act, and state statutory and common law claims prohibiting retaliation against whistleblowers and others who invoke state statutory rights. Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981); McDonald v. City of West Branch, 466 U.S. 284 (1984); Atchison, Topeka & Santa Fe Ry Co. v. Buell, 480 U.S. 557 (1987); Lingle v. Norge Division of Magic Chef, Inc., 486 US. 399 (1988); Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994); Livadas v. Bradshaw, 512 U.S. 107 (1994); U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971); McKinney v. Missouri-Kansas-Texas R. Co., 357 U.S. 265 (1958). All of these cases reasoned that statutory claims cannot be forced into the contractual arbitration system because arbitrators are chosen for their expertise in the customs of the workplace but not necessarily for their expertise in statutory or common law doctrine, the fact-finding process in arbitration is usually much less thorough than in a court, the rules of evidence often do not apply and discovery, compulsory process to secure the attendance of
witnesses, cross-examination and testimony under oath are either unavailable or severely limited.

The court's recent decision will create problems for both unions and employers in negotiating and administering collective bargaining agreements, and it raises troubling questions about the ability of an employer and a union to waive statutory rights belonging to individual employees. A collective bargaining agreement is not between the individual employee and the employer; it is between the union and the employer. As professor David Feller pointed out in his seminal 1973 California Law Review article, "A General Theory of the Collective Bargaining Agreement," the purpose of a collective bargaining agreement is to establish a system of rules for the entire workplace; it does not confer individual rights on employees. When the union negotiates a collective agreement, it does not represent individuals in the way that an attorney represents an individual. A union represents all the employees covered by the agreement, and it owes its duty to the collective, not to the individual. The union is selected by majority rule and, under the constitution and by-laws of many unions, individual employees cannot dictate the union's negotiating strategy. Individual employees do not control the terms of a collective bargaining agreement, and the majority decides whether to ratify the contract. There are many wonderful features of the majoritarian and collective rights regime that is federal labor law: The employees through their union decide whether to trade off retirement benefits for older workers in exchange for job security or higher wages for younger workers, they decide how much seniority as opposed to managerial determinations of merit should affect pay and job assignments. It is a regime that empowers the majority against the employer; it is not designed to protect the interests of the minority against the majority. Statutory rights are individual and are often about protecting the minority against the majority. An employee who did not vote to join the union or to ratify the contract may nevertheless find herself working under a collective bargaining agreement that waives her right to bring a suit on statutory claims.

In *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), and *Circuit City v. Adams*, 530 U.S. 105 (2001), the Supreme Court held that an individual employment contract containing an arbitration clause waived an employee's right to sue in court. The court's ruling rested on its belief that the individual would be able to hire a lawyer and process her claim in arbitration with the benefit of as many procedural protections in arbitration as would be necessary to vindicate the individual's substantive rights. The grievance arbitration system, however, is not designed to provide the same sort of procedural protections. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), recognized that the union has exclusive control over the manner and extent to which an individual grievance is presented. Just as the vast majority of the cases filed in court are settled without trial, the vast majority of grievances are settled without arbitration. But, unlike in the context of litigation where the individual decides, in consultation with her lawyer, whether or when to settle a case, the union decides whether and when to settle a grievance. As the Supreme Court recognized in *Vaca v. Sipes*, 386 U.S. 171 (1967), in ruling that a union did not breach the duty of fair representation by settling a grievance, the collectively bargained grievance and arbitration system would collapse if every grievance were processed all the way through arbitration.

The union's prosecution of claims through the grievance arbitration system is financed by its collection of dues or fees from all members of the bargaining unit. When the union takes a case all the way to arbitration, it often hires a lawyer to present the case. If a union is obligated to arbitrate every claim in which an employee claims a statutory right was violated, will all the other members of the bargaining unit have to pay increased dues or fees to handle the increased caseload? If a union believes that a grievance presenting a statutory claim is unmeritorious and declines to spend the money to hire a lawyer to investigate or present the case, but the individual employee insists on pressing the case, will the employee have the right to retain counsel? If so, who will pay for the arbitration? What about the cases in which the union may have a conflict of interest, as in a sexual harassment case in which one union member is the alleged harasser and may face individual liability under state tort or fair employment laws? Must the union hire two lawyers to arbitrate such statutory or common law claims - one for the victim and one for the alleged harasser?

Grievance arbitration under collective bargaining agreements rarely involves claims in which the
remedies would be more than reinstatement to a job with back pay. It's in the interest of the union, the grievant and the employer to keep the costs of the case low because the amount at issue is small. Under Title VII, by contrast, employees can recover compensatory and punitive damages, subject to a statutory cap of $300,000, and under some state tort or fair employment laws, there is no cap on compensatory and punitive damages. As the amount of statutory damages rises, the incentive for the employer to litigate the case hard will rise too. If the union handles the arbitration of statutory claims for the employee, will it be entitled to recover attorney fees as it would as a prevailing plaintiff under the statute? Will arbitrators be bound to follow the usual rules for awarding fees to prevailing plaintiffs?

Judicial review of arbitration awards under collective agreements has been extremely deferential for nearly 50 years. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). As the Supreme Court recently said, "courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors," and even when the "court is convinced [the arbitrator] committed serious error" the court cannot overturn the award. Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001). Unless courts are prepared to let arbitral error of fact or law compromise statutory claims, they will have to come up with a bifurcated standard of review that allows arbitrators to make "serious" errors with respect to claims arising under the contract but that overturns awards where the statutory claim is compromised by the same errors.

The most pernicious immediate effect of Penn Plaza v. Pyett will be the impossible situation in which it places unions negotiating collective bargaining agreements. Employer counsel typically believe it is in their clients' interest to have employees sign arbitration agreements for statutory claims, thus they may be expected to negotiate for them. While unions want contracts protecting their members against discrimination, they may not find it in their interest to have to manage statutory claims that are expensive to investigate and litigate and often do not prevail. The union may think it is also in its members' best interests to retain the right to file suit and to get the procedural protections and higher damages that a jury may award. But imagine the new anti-union strategy at the organizing phase: An employer says to employees, "If you form a union, did you know that you will lose the right to file a suit under all the various state and federal laws that provide you individual rights?" Or, after a majority of employees vote to unionize and the employer continues to campaign against the union, hoping to persuade a majority of the employees to vote to decertify it: "We want an agreement that protects you against discrimination, and we're negotiating for that. Did you know that your union is negotiating to prevent you from arbitrating a claim alleging that someone sexually harassed you?"

Much was said in the confirmation hearings of Justice Sonia Sotomayor about whether courts make or apply the law and about judicial activism. Penn Plaza v. Pyett is a stark example of law-making, and it is about as activist as judicial decisions get. The majority tossed aside half a century of law and upended the established practice in the negotiation and administration of collective bargaining agreements.

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