

## High Court Holds Age Discrimination Claims May be Subject to Binding Arbitration

By: Leann M. Harrier, Esquire  
Campbell Durrant Beatty Palombo & Miller, P.C.  
(As published in the PELRAS Update for the  
Pennsylvania League of Cities and Municipalities)

On April 1, 2009, the U.S. Supreme Court issued its decision in 14 Penn Plaza LLC, et al. v. Pyett, et al., 129 S.Ct. 1456 (2009), ultimately holding that a clearly and unequivocally drafted arbitration clause in a collective bargaining agreement may mandate binding arbitration of discrimination claims pursuant to the Age Discrimination in Employment Act (ADEA). Although the Supreme Court's opinion did not address other discrimination claims (*e.g.*, disability, gender, race or national origin discrimination), the logic discussed below would not necessarily preclude their inclusion in a properly drafted arbitration clause.

In 14 Penn, the parties who filed suit (the "Respondents") were members of the Service Employees International Union (the "Union"), employed as night lobby watchmen. The Respondents were subsequently informed that their night watchmen jobs would be changed to those of night porters and light duty cleaners, which Respondents claimed resulted in a loss of income and emotional distress. Alleging age discrimination as the basis for the change in their job duties, the Respondents filed suit in federal court, suing, among others, their employer and the building owner (the "Petitioners") for violating the ADEA.

In response to the Respondents' suit filed in federal court, the Petitioners attempted to compel arbitration pursuant to the following language in their Collective Bargaining Agreement (CBA):

§ 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.

The Supreme Court found it persuasive that the Union freely and in good faith negotiated the above provision requiring that employment-related discrimination claims be resolved in binding arbitration, instead of being brought in federal or state court. Furthermore, the Court found that the contractual provision put all union members on notice of the requirement to utilize a binding arbitration process for such claims.

The Supreme Court stated that nothing in the ADEA or its legislative history precluded the binding arbitration of such claims. As a result, contractual provisions mandating the binding arbitration of claims under the ADEA must be honored unless and until the Legislature removes the ability to arbitrate grievances filed pursuant to the ADEA. Such a determination, according to the Supreme Court, is one that is not within the realm of the judiciary's power.

Employers should carefully consider the positive and negative aspects of amending their arbitration clauses to require binding arbitration of discrimination claims. The obvious benefit is to preclude employees from filing law suits, which seek various forms of damages (in excess of back pay) including but are not limited to attorney's fees. On the other hand, an employer would likely experience an increase in the number of arbitrations because a union, which has a duty to fairly represent its members, would be remiss to not pursue arbitration and expose itself to increased liability. More importantly, subjecting discrimination claims to an arbitrator not familiar with current discrimination law may boil down to nothing more than a crap shoot.