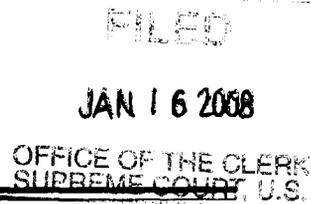


No. 07-581



IN THE
Supreme Court of the United States

14 PENN PLAZA LLC and
TEMCO SERVICE INDUSTRIES, INC.,

Petitioners,

v.

STEVEN PYETT, THOMAS O'CONNELL,
and MICHAEL PHILLIPS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JEFFREY L. KREISBERG
KREISBERG & MAITLAND, LLP
116 John Street, Suite 1120
New York, New York 10038
(212) 629-4970

Counsel for Respondents

213496



COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Court should grant the Petition herein to resolve the question of whether Respondents' union's third-party waiver of their right to sue in federal court for violation of federal, state and city anti-discrimination statutes, contained in the arbitration provision of the collective bargaining agreement by which they were covered, is enforceable, where the union did not submit their age discrimination claims to arbitration?

INTRODUCTION

This is not the appropriate case for the Court to determine whether a union negotiated waiver of its members' right to sue in federal court for alleged violation of federal, state and city anti-discrimination statutes, by requiring that such claims be submitted to arbitration, is enforceable, since, in this case, the union, after having initially submitted Respondents' age discrimination claims to arbitration, along with their other contractual claims, withdrew the age discrimination claims from arbitration. Then, after Respondents filed their Federal lawsuit herein, the union granted Respondents permission to litigate their age discrimination claims before the same arbitrator who heard their other contractual claims, but at their sole cost and expense, and with their own attorney. Since Respondents' age discrimination claims were withdrawn from arbitration by the union, the question of whether Respondents are required to pursue those claims in arbitration, rather than in a judicial forum, is not properly raised and should not be considered by this Court.

Any determination by the Court of whether it should go beyond its decision in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and hold that a clear and unequivocal union negotiated waiver of an employee's rights to litigate federal statutory age discrimination claims in a judicial forum contained in an arbitration provision of a collective bargaining agreement is enforceable against the covered employee, should be made only in a case where the union has actually submitted the discrimination claim for binding arbitration under the clause, and not, as here, where the

claim was withdrawn from arbitration by the union prior to decision by the arbitrator. The permission granted by the union to Respondents, after they had already commenced their federal court action, to pursue their claims before the same arbitrator who heard their other contractual claims, but at their own cost and expense, and with their own privately retained counsel, merely afforded Respondents an option as to whether to proceed in court or before the arbitrator, but did not constitute an exercise by the union of the collectively bargained arbitration provision, thereby triggering the claimed waiver contained therein. Under these circumstances, the Court should deny the Petition and wait to resolve the issue of the enforceability of a union negotiated waiver contained in a mandatory arbitration provision of a collective bargaining agreement for a case in which arbitration has actually been invoked by the union to resolve the discrimination claim.

STATEMENT OF THE CASE

Respondents, long term employees of Petitioners at the Pennsylvania Building, known as 14 Penn Plaza, New York, New York, on September 23, 2004, brought this claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-634 (“ADEA”), the New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.*, and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107, alleging that they were discriminated against in the terms and conditions of their employment because of their age. Respondents alleged that they were wrongfully replaced by much younger workers, transferred to less desirable positions, and suffered significant loss of income.

Petitioners moved in the district court to dismiss the complaint for failure to state a claim, or in the alternative to compel Respondents to litigate their age discrimination claims under the arbitration provision of the collective bargaining agreement between their union, Local 32BJ Service Employees International Union, and the Petitioners' employer associations.

On May 31, 2006, the district court issued its Memorandum and Order denying Petitioners' motion to dismiss or to compel arbitration. Petitioners then appealed only the denial of their motion to compel arbitration to the Court of Appeals for the Second Circuit.

On August 1, 2007, the court of appeals affirmed the district court's denial of Petitioners' motion to compel arbitration, holding that under its determination in *Rogers v. New York University*, 220 F3d 73 (2d Cir.), cert. denied, 531 U.S. 1036 (2000), the union's third-party waiver of Respondents' right to bring their claims for age discrimination under the ADEA, state and city laws in federal court, was unenforceable. *Rogers* relied upon this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for its holding.

REASONS FOR DENYING THE PETITION

Prior to commencing their federal court action, Respondents filed grievances with their union alleging that their replacement by younger employees and transfer to other positions violated several provisions of the collective bargaining agreement, including the provision which prohibited discrimination based upon age. The union initially submitted all of Respondents' grievances, including their claims of age discrimination,

to arbitration. However, shortly after the arbitration hearing began, counsel for the union notified the arbitrator and Respondents that their age discrimination claims were withdrawn. Respondents' remaining claims proceeded to decision by the arbitrator, and were denied by him.

After the union's withdrawal of their age discrimination claims from arbitration, Respondents filed this action in the district court, alleging violation by Petitioners of the ADEA, N.Y. Exec. Law and N.Y.C. Admin. Code. In support of their motion in the district court to compel arbitration, Petitioners submitted an affidavit of Larry Engelstein, counsel for the union. The affidavit confirmed that the union withdrew the contractual grievance related to Respondents' age discrimination claims before the arbitration hearing concluded. The affidavit also stated that

“[t]he Union consents to the use of the Office of the Contract Arbitrator (OCA), created under the Collective Bargaining Agreement between the Realty Advisory Board of Labor Relations, Inc. and the Union, as the forum for Plaintiffs' statutory age discrimination claims, as long as the parties to this lawsuit, and not the Union, pay the costs associated with the arbitration.”

Thus, it is clear that the union did not ultimately submit Respondents' age discrimination claims to arbitration under the union negotiated arbitration provision of the collective bargaining agreement. It is only the union which is empowered to invoke the arbitration provision of the collective bargaining

agreement, and it is only the submission of a dispute to arbitration by the union which would trigger the collective bargaining agreement waiver, even if the waiver is found to be enforceable.

Since the union never submitted Respondents' age discrimination claims to arbitration, the union negotiated collective bargaining agreement waiver of their right to sue in court for alleged violations of the ADEA, state and city anti-discrimination statutes, is clearly unenforceable herein, and may not be relied upon by Petitioners to preclude them from litigating their age discrimination claims in a judicial forum.

Under these circumstances, this is not the appropriate case in which to determine whether a union negotiated waiver of its members' right to sue under federal anti-discrimination statutes contained in an arbitration provision of a collective bargaining agreement is enforceable against them.

CONCLUSION

Petitioners have not demonstrated that it is appropriate for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

JEFFREY L. KREISBERG
KREISBERG & MAITLAND, LLP
116 John Street, Suite 1120
New York, New York 10038
(212) 629-4970

Counsel for Respondents