

to supervision and management. A just cause analysis takes into account the tension between principles of employee loyalty to the employer and principles that recognize and tend to protect an employee who responsibly performs his or her duties. When discipline or other adverse actions are taken against an employee for properly and conscientiously performing his or her job, the experienced human resource manager and union representative could predict the outcome, if arbitration were an available forum for the resolution of that type of post-*Garcetti* case. The balance struck by the *Garcetti* Court recognizes the hazard of elevating workplace grievances to constitutionally protected conduct. It fails to take account of upper management's need to know and hear what may be going awry in the public workplace.

II. INDIVIDUAL RIGHTS V. COLLECTIVE INTERESTS: CAN A PUBLIC EMPLOYER AND A UNION COLLECTIVELY BARGAIN A VALID WAIVER OF PUBLIC EMPLOYEES' CONSTITUTIONAL RIGHTS?

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Background: The Subordination of Individual to Collective Interests, and the Union's Discretion in Enforcing Collectively Bargained Rights

As a general matter, rights arising under a collective bargaining agreement (CBA) may be enforced by only the union, and not by individual employees. The union has considerable discretion in determining when and how to enforce a collectively bargained right, subject only to the union's duty of fair representation. As stated by the U.S. Supreme Court in *Vaca v. Sipes*:¹

The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N.L.R.A. §1, as amended, 61 Stat. 136, 29 U.S.C. §151. The collective bargaining sys-

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¹386 U.S. 171, 181 (1967).

tem as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.

In *Stahulak v. City of Chicago*,² the Illinois Supreme Court, applying federal principles to public employees in Illinois, stated:

The general purpose of collective bargaining is to enable employees to pool their economic strength by joining together in a union to improve conditions of employment as a collective group. *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1175 (7th Cir. 1995). In exchange for the benefits provided by the collective-bargaining agreement, Stahulak gave up his individual right to bargain with the City. We agree with the Supreme Court's reasoning when it addressed this issue in *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In *Vaca*, the Supreme Court held that if individual union members could challenge their union's resolution of a grievance, "the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority, and returning the individual grievant to the vagaries of independent and unsystematic negotiation." *Vaca v. Sipes*, 386 U.S. at 191, 87 S. Ct. at 917, 17 L. Ed. 2d at 858. Therefore, we hold that individual employees represented by a union should only be allowed to seek judicial review of an arbitration award if they can show that their union breached its duty of fair representation.

In Illinois, in order to prove that a union has breached its duty of fair representation, the employee must show that the union engaged in "intentional misconduct."³

As the representative of a bargaining unit, the union makes decisions based on its best judgment as to what is in the interest of the unit as a whole—not just what might be in the interest of a particular individual. Determining what is in the interest of the collective good drives the union's decision-making with respect to which grievances to file, which cases to take to arbitration, and what the union's priorities will be in bargaining.

Employment Rights Arising Independent of the CBA—May Individual Constitutional or Other Statutory Rights Be Subordinated to the Collective Interest?

Although it is one thing to say that the enforcement of rights arising under a CBA should be left to the union's discretion, subject to its duty of fair representation, to what extent can a union

²184 Ill. 2d 176 (Ill. Sup. Ct. 1998).

³5 ILCS 315/10(b)(1).

and an employer negotiate terms in a CBA that would effectively diminish employee rights arising independent of the CBA?

Put another way, to what extent can the interest of the collective good—the majority—which is the very essence of collective bargaining, carry the day over the preservation of individual rights—which is the very essence of the Constitution, the Bill of Rights, and various statutory employment rights?

A number of federal circuit courts have decided that, where the parties to a CBA have clearly and unmistakably agreed to a waiver of individual employees' Fourth Amendment or Fourteenth Amendment rights, such a waiver is enforceable, absent a showing that the union breached its duty of fair representation.

In *Bolden v. Southeastern Pennsylvania Transportation Authority*,⁴ a custodial employee of a public agency was discharged for failing a drug test. The union and the employer settled the discharge case with an agreement requiring the employee's submission to a drug test before he is reinstated pursuant to the settlement. The employee did not sign the settlement agreement, and instead sued under section 1983, alleging unreasonable search and seizure in violation of the Fourth Amendment.

In an opinion written by current Supreme Court Justice Samuel Alito, the Third Circuit held that, even though suspicionless testing of the employee in this case would otherwise violate the Fourth Amendment, the settlement agreement between the union and the employer was binding on the employee, absent a showing that, in reaching the agreement, the union breached its duty of fair representation.

[W]e believe that a union such as Bolden's may validly consent to terms and conditions of employment, such as submission to drug testing, that implicate employees' Fourth Amendment rights.⁵

Through collective bargaining, a public employer and union can reach agreement on detailed factual questions (such as whether particular jobs are safety-sensitive) that may have important implications under the Fourth Amendment. If individual public employees may litigate such questions despite the resolution reached through collective bargaining, the utility of collective bargaining with respect to drug testing in the public sector would be greatly diminished.⁶

⁴953 F.2d 807 (3d Cir. 1991).

⁵*Id.* at 826.

⁶*Id.* at 828.

In *Dykes v. Southeastern Pennsylvania Transportation Authority*,⁷ a bus driver was fired for refusing to submit to a drug/alcohol test, claiming no reasonable suspicion. During the grievance procedure, the employer claimed that there was reasonable suspicion to test, as required by the negotiated testing policy. The union did not take the grievance to arbitration. The employee sued under section 1983, alleging a violation of Fourth Amendment and Fourteenth Amendment due process rights. The court dismissed both claims.

Our holding in *Bolden* establishes that, even where a drug testing policy has been held to be constitutionally infirm, a public employee may not pursue a civil rights suit based upon that infirmity where his union and his employer agree to operate under that policy.

...

[W]hether reasonable suspicion exists in a give case is an issue involving interpretation of the CBA and... we “must defer to this interpretation of the agreement unless the employee can show that the union has breached its duty of fair representation.” [citing *Bolden*.] There has been no such allegation here. Because the question of reasonable suspicion was not resolved in Dykes’ favor in any step of the grievance process, we find that the proposed search was reasonable.⁸

The CBA waiver question was addressed by the Seventh Circuit in *Krieg, AFSCME v. Seybold, Marion, Ind.*⁹ In that case, the court rejected a CBA/waiver defense by the city of Marion, Indiana, finding that the CBA did not clearly, unmistakably, and explicitly reflect AFSCME’s agreement to suspicionless testing of non-CDL drivers such as the plaintiff. However, in its opinion, the court was clearly comfortable with the general notion that such a defense is available to employers, holding that “[w]aiver of a constitutional right must be clear and unmistakable, and it is not under these facts.”¹⁰

*Chaney v. Suburban Bus Division of Regional Transportation Authority*¹¹ involved a Fourteenth Amendment due process challenge to the termination of a bus driver, claiming that both pre-termination and post-termination procedures were constitutionally inadequate (even though the arbitrator eventually ordered the employee to be reinstated). “A union might bargain away its

⁷68 F.3d 1564 (3d Cir. 1995).

⁸*Id.* at 1570.

⁹481 F.3d 512 (7th Cir. 2007).

¹⁰*Id.* at 517.

¹¹52 F.3d 623 (7th Cir. 1995).

members' pre-deprivation rights for something else or waive them for some reason, . . . but we shall not assume a waiver unless it is more explicit."¹²

And some federal district courts have followed the federal circuits' lead.

In *Ware v. City of Buffalo*,¹³ a firefighter tested positive pursuant to a random drug screen conducted in accordance with the testing policy negotiated by the city and the union. The employee was suspended and placed in a "last chance" treatment program.

Noting that "[t]he Supreme Court has not spoken directly on the issue of whether a union may waive its members' constitutional rights,"¹⁴ the court, relying heavily on *Bolden* and *Dykes*, found that the firefighter did not have standing to challenge the terms of the policy negotiated by the employer and the union.

If the union acted as its employees' exclusive bargaining agent and, in so doing, waived certain of its members' rights, the members would have no standing to challenge the policy agreed to by the union as their representative.¹⁵

In *Geffre v. Metropolitan Council*,¹⁶ wastewater treatment plant employees filed a Fourth Amendment challenge to a random drug testing policy negotiated by the union and the employer. Relying on *Bolden* and *Dykes*, the court found that the employees were bound by the union's consent to random drug testing—in fact, "as much bound by the contract executed in their behalf . . . as if they had executed it themselves."¹⁷

These cases therefore suggest that, even though a government employer could not enact a statute or regulation infringing on individual employees' constitutional rights, that same government employer could enact such an infringement by way of collective bargaining. But not all quarters agree with this result.

In *Ciambriello v. County of Nassau*,¹⁸ a case involving a Fourteenth Amendment claim that the employee was improperly denied due process before he was demoted, the Second Circuit hedged its bets on the question of whether a CBA may effectively waive a public employee's constitutional rights.

¹²*Id.* at 630.

¹³186 F. Supp. 2d 324 (W.D.N.Y. 2001).

¹⁴*Id.* at 336–37.

¹⁵*Id.* at 336.

¹⁶174 F. Supp. 2d 962 (D. Minn. 2001).

¹⁷*Id.* (quoting *McLean Distrib. Co. v. Brewery & Beverage Drivers*, 254 Minn. 204, 94 N.W.2d 514, 525 (1959)).

¹⁸292 F.3d 307 (2d Cir. 2002).

While *Romano v. Canuteson*, 11 F.3d 1140 (2d Cir. 1993), suggests that unions may waive their members' Fourteenth Amendment rights in collective bargaining agreements, it is not clear that *Romano* in fact requires that conclusion, and we need not determine if it does. Rather, we hold only that, even if unions are permitted to waive their members' Fourteenth Amendment rights, the CBA at issue here fails to do so.¹⁹

And how would a union waiver of employees' constitutional rights square with the Supreme Court's decision in *Abood v. Detroit Board of Education*?²⁰ (The First Amendment protects public employees from being compelled to contribute union dues toward political causes with which the employee does not agree.) In particular, see Justice Powell's concurring opinion:

The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals.²¹

[T]he Board's collective-bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive government regulation.²²

In other words, how can a public employer achieve through collective bargaining an infringement on constitutional rights that it is prohibited from enacting through legislation?

Author Richard Wallace argues that unions and employers should not be able to waive public employees' due process rights through collective bargaining.²³ "[A] union presumably acts for a majority of the workers it represents when it waives their rights. However, group waiver is antithetical to the precepts of constitutional protections. The Constitution insulates the inalienable rights of individuals from the tyranny of the majority."²⁴

Constitutional rights potentially implicated by waivers collectively bargained between public employers and unions include:

¹⁹*Id.* at 321–22.

²⁰431 U.S. 209 (1977).

²¹*Id.* at 252–253.

²²*Id.* at 253.

²³*Union Waiver of Public Employees' Due Process Rights*, 8 *Indus. Rel. L.J.* 583 (1986).

²⁴*Id.* at 599. For a more general, sweeping indictment of the subordination of individual rights in the American workplace, including the subordination of individual to collective interests in a represented work force, see Clyde W. Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 *Employee Rts. & Employment Pol'y J.* 453 (2001).

- Fourth Amendment (random drug testing; access to information on computers and mobile phones and in employee work spaces; tracking and surveillance of employees)
- Fifth Amendment due process (pre- and post-deprivation hearings; discipline)
- Fifth Amendment right against self-incrimination (investigations of employees that may lead to criminal charges)
- First Amendment (freedom of association and religion; freedom of speech)

***14 Penn Plaza v. Pyett*—To What Extent Has the Supreme Court Resolved the Conflict Between Collective Interests and the Individual Rights of Represented Employees?**

Looking for clues as to how the Supreme Court might resolve the conflict between the “majority rules” concept that is at the heart of collective bargaining and the preservation of individual rights guaranteed in the Constitution and various employment statutes, we now have *14 Penn Plaza v. Pyett*,²⁵ which involved a collectively bargained waiver of employees’ rights to pursue Age Discrimination in Employment Act (ADEA) claims in court.

The Factual Setting

The union agreed to allow the employer to contract out maintenance and cleaning services. Based on this agreement, the employer reassigned night lobby watchmen to less desirable jobs as night porters and light duty cleaners. The union grieved the reassignments, alleging violations of (1) age discrimination, (2) seniority, and (3) overtime rotation provisions of the CBA. There was no dispute in this case that the CBA included a clear agreement that all discrimination claims be resolved exclusively through the CBA’s grievance/arbitration procedures:

All [statutory discrimination] claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.²⁶

Prior to the arbitration hearing, the union dropped all claims with respect to age discrimination, because the union had agreed

²⁵129 S. Ct. 1456, 77 USLW 4260 (Apr. 1, 2009).

²⁶129 S. Ct. at 1461.

to the contracting out. The union proceeded on other alleged CBA violations. In his award, the arbitrator denied all of the union's grievances.

Before the arbitrator's award was issued, and after the union told them it wouldn't proceed on their discrimination claims, the employees filed age discrimination charges with the Equal Employment Opportunity Commission (EEOC). The employees then filed an ADEA suit after receiving right-to-sue letters. The employer moved to dismiss on the ground that the CBA language worked a waiver of the employees' right to bring an age discrimination claim to court.

The Court's Decision

Question presented: Is a provision in a CBA that clearly and unmistakably requires covered employees to arbitrate claims arising under the ADEA, to the exclusion of any other forum, enforceable?

Short answer: Yes, unless and until the ADEA is amended by Congress to preclude any waiver of a judicial forum.

The 5-4 majority held that, because the National Labor Relations Act declares a congressional policy favoring collective bargaining of employment issues, an employer and a union should be allowed to negotiate with respect to the forum in which a statutory employment claim is heard, as the collectively bargained waiver of the right to a judicial forum does not involve the waiver of an individual's *substantive* statutory rights.

In reaching this decision, the Court distinguished its 1974 decision in *Alexander v. Gardner-Denver Co.*²⁷ In *Gardner-Denver*, the Court held that a represented employee was not precluded from proceeding with a Title VII discrimination claim in federal court, even though an arbitrator had issued an award finding that the employer had just cause to discharge the employee, and therefore did not violate the CBA. Although the employee testified at the arbitration hearing that he believed he was the victim of discrimination, the arbitrator did not address any discrimination claims in his decision. Nor did the CBA contain any clear waiver of the right to a judicial forum.

²⁷415 U.S. 36 (1974).

The Real Issue: Union Control Over the Exercise of Individual Statutory Rights

Given that, in the typical CBA, the union has final say over what matters may be grieved and pursued to arbitration, the real issue presented by a negotiated agreement designating grievance/arbitration as the exclusive means for resolving discrimination claims is that, in effect, the employer and the union have thereby negotiated away the employee's control over his claim, and left it in the hands of the union.

As noted at the beginning of this article, the only check on the union's unfettered discretion to determine whether, when, and how to bring an employee's statutory claim to arbitration is the union's duty of fair representation. And this duty affords the union considerable latitude in deciding which cases to pursue (e.g., in Illinois, the union can make determinations as it deems fit, only so long as the union's decision-making does not amount to "intentional misconduct" with respect to any individual bargaining unit employee).

Therefore, doesn't a clause making arbitration the exclusive forum for the vindication of statutory discrimination claims, subject to the exclusive control of the union, amount to a collectively bargained waiver of a substantive right guaranteed by statute—the individual employee's right to decide whether, when, and how to bring a statutory claim?

The *Pyett* majority expressly declined to answer this question, because it involved disputed issues of fact (the union said it allowed the employees to proceed to arbitration on their own), and because it was not fully briefed or encompassed within the scope of the question presented:

Thus, although a substantive waiver of federally protected civil rights will not be upheld, we are not positioned to resolve in the first instance whether the CBA allows the Union to prevent Respondents from "effectively vindicating" their "federal statutory rights in the arbitral forum." Resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation.²⁸

Elsewhere in the opinion, however, the Court does seem to suggest that it would be perfectly content to entrust the enforcement of statutory rights to the union's discretion, subject only to

²⁸*Pyett*, 129 S. Ct. at 1474.

the union's duty of fair representation and the union's obligation under federal law to refrain from discrimination:

In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA.²⁹

In fact, however, it is difficult to conceive of a scenario under which a union would be found to have breached its duty of fair representation, or to have illegally discriminated against an employee, merely on a showing that the union had been "less than vigorous" in representing the employee. For all intents and purposes, an employee would have little legal recourse against a union that was "less than vigorous," or even downright negligent, with respect to its handling of the employee's discrimination claim.

The Practical Effects of Pyett

At least for the time being, until Congress may act to preclude the waiver of a judicial forum for statutory employment rights, there is little room left for any argument that arbitration is not an appropriate forum for resolving statutory claims.

In addition, the decision will put unions in a difficult position in collective bargaining:

- Unions really have no interest in mandatory arbitration of statutory claims, primarily because of:
 - potential conflicts with bargaining unit employees (e.g., if, as in *Pyett*, the union agreed to the change the employee challenges as discriminatory, or if the employee otherwise believes that the union has also discriminated against the employee);
 - increased costs, as the union will likely be left in the position of having to bring many more cases to arbitration than it would have otherwise, and having to expend additional fees for attorneys to handle discrimination arbitrations.
- Motivated employers willing to pay for a "*Pyett* waiver" (and willing to gamble that Congress won't act to invalidate such waivers) may aggressively pursue waivers in bargaining, to gain the benefits of:

²⁹*Id.* at 1473.

- cheaper, quicker resolution of discrimination claims, instead of prolonged, expensive agency investigation, court litigation and discovery, and appeals;
- a decision by a professional arbitrator, instead of (even more) unpredictable juries;
- the finality of an arbitration award, which can only be vacated by a court on extremely narrow grounds.
- Employers will offer tangible, meaningful financial inducements to the bargaining unit, which the union will be hard-pressed to recommend that the membership reject—even though the union knows that mandatory arbitration of discrimination claims will significantly increase its costs.
- The *Pyett* decision suggests that a proposal to make arbitration the exclusive forum for statutory claims is a mandatory subject of bargaining, meaning that an employer could insist to impose on such a proposal.
- Given the nature of these statutory claims, unions may be compelled to challenge certain adverse awards in court, on the ground that the arbitrator’s denial of a discrimination or harassment grievance (e.g., because the grievance was untimely) violated a clearly defined and dominant public policy.

Conclusion

In a broad sense, the Supreme Court’s decision in *14 Penn Plaza v. Pyett* appears to be a resounding endorsement of collective bargaining over matters covered by individual employment rights statutes. As such, the *Pyett* decision would, at first glance, seem to generally validate the approach taken by the Third Circuit, beginning with *Bolden*,³⁰ with respect to negotiated waivers of employees’ Fourth Amendment rights. At the very least, public employers defending suits by individual employees based on alleged constitutional deprivations will certainly be citing *Pyett* for the proposition that a collectively bargained compromise of employees’ constitutional rights must be upheld.

However, the *Pyett* majority never squarely addressed the real issue involved in this discussion: At what point does a collectively bargained waiver improperly impinge on a “substantive” individual employment right guaranteed by statute, or by the Constitution? We know from *Pyett* that an employer and a union may not

³⁰*Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807 (1991).

bargain away substantive statutory employment rights. We also know that the majority in *Pyett* does not consider the negotiated waiver of a judicial forum for discrimination claims to, per se, involve an infringement on such a substantive right. Beyond that, the *Pyett* decision does not really tell us much.

We still do not know how the Court will rule when a union, exercising its allowable discretion within the parameters of its duty of fair representation, declines to bring an arguably meritorious discrimination claim to arbitration, even though arbitration is the only forum available to the employee by virtue of a negotiated *Pyett* clause. The union may decline to arbitrate the claim for any number of valid reasons that would not violate its duty of fair representation, including, for instance, because the union simply deems it to be in the best interests of the bargaining unit as a whole to allocate its financial resources elsewhere. Under these circumstances, the employer and the union have, in effect, bargained away the employee's statutory right to have his or her discrimination claim heard. Would that not be the infringement of a substantive right guaranteed by statute? If it is, then does that mean that, to be enforceable, a *Pyett* clause would have to guarantee each covered employee the absolute right to proceed to arbitration on his own, irrespective of the union's wishes? The *Pyett* majority expressly declined to tackle these questions.

Nor do we really know from *Pyett* how the Court would treat the Third Circuit's reasoning in *Bolden*, and the later cases, with respect to negotiated agreements that compromise public employees' constitutional rights (although we do have a pretty good idea of Justice Alito's take on the issue). Although it would seem that, for example, a collectively bargained policy allowing for random drug testing of non-"safety sensitive" employees does, indeed, undermine those employees' substantive Fourth Amendment rights, we will have to wait and see where the Supreme Court will strike the balance between protecting those individual rights and its general endorsement in *Pyett* of collective bargaining as a means for regulating the workplace.