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Court: No fuzzy worker arbitration clauses

Key issue of 'voluntary' signings not addressed

By Robert G. Seidenstein

If an employer wants workers' anti-discrimination claims handled by arbitration and kept out of court, it better make sure its employment contracts are crystal-clear on that point, the New Jersey Supreme Court ruled last week.

The unanimous decision effectively voids what has become standard arbitration language in most contracts employees increasingly have been asked to sign before being hired.

Still, employment law experts noted the high court did not specifically address the more towering issue involving arbitration clauses — whether decisions by workers to sign them are truly voluntary and should be honored in the first place.

Those experts cite the growing use of arbitration clauses to keep employee discrimination complaints away from potentially sympathetic juries.

In last week's decision, the justices did not have to face the question of voluntariness — and they didn't reach out for it.

> The ruling requires precise language to prevent discrimination victims from taking their workplace complaints to courts.

Instead, they examined the particular mandatory arbitration clause before them and found it inadequate to its task, thereby giving the plaintiff his day in court.

But on that score alone, the decision was a big victory for employees claiming discrimination. The clause deemed not strong enough is the "most common arbitration language in the world," said the winning lawyer, Andrew W. Dwyer of Newark. He estimated the wording now is in "tens of thousands of contracts."

In *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, the court, in an opinion by Justice Peter Verniero, described the language that should be used if an employer wants to require arbitration of Law Against Discrimination (LAD) claims.

The contracts, Verniero wrote, do not explicitly have to say arbitration covers LAD claims, but they should make it clear they apply to "all statutory claims arising out of the employment relationship or its termination."

The arbitration clause also should reflect that the employee knows that court and administrative agency remedies exist for workplace discrimination and that by signing the contract, those avenues cannot be pursued.

The trial court and the Appellate Division had ruled that a doctor's sex discrimination claim was covered by an arbitration clause in his employment agreement. The high court disagreed, saying the clause was not clear enough on that point.

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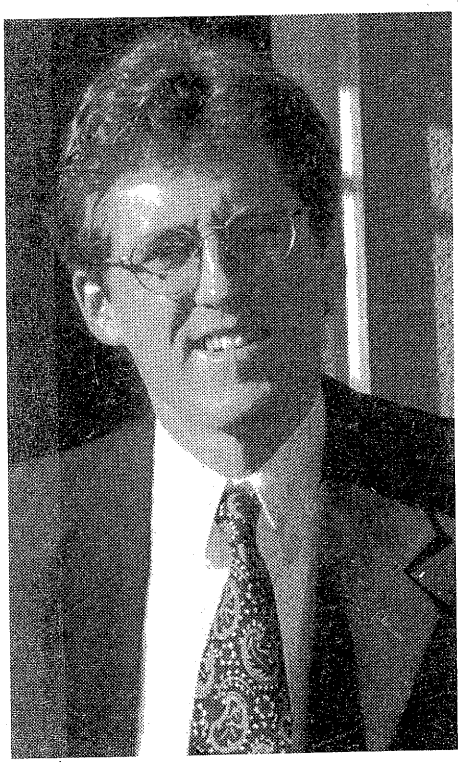
The language at issue provided that "any controversy arising out of, or relating to, this agreement or the breach thereof, shall be settled by arbitration."

Verniero wrote, "That language suggests that the parties intended to arbitrate only those disputes involving a contract term, a condition of employment, or some other element of the contract itself. ... The parties intended disputes over the terms and conditions of the contract, not statutory claims, to be the subject of arbitration."



Andrew W. Dwyer

David A. Garfinkel had sued Morristown Obstetrics & Gynecology Associates and its two shareholders, David E. Jacobwitz and Joseph Ramieri, on the grounds he was discharged from that practice because of his gender. He allegedly was told he was "born the wrong sex" and that he "did not attract patients well because he was male."

Morristown Obstetrics countered Garfinkel misrepresented the number of patients he had when he joined the practice at a higher salary than he otherwise would have received. Its lawyer, Glenn A. Montgomery of Bedminster, said Garfinkel's discharge was an economic decision, not based on his sex.

Garfinkel now does not have to enter arbitration on his LAD claim. The court also said "judicial economy" requires related claims to be handled in the same lawsuit.

The court rejected the contention that Garfinkel's status as a doctor who had legal representation in negotiating the employment agreement meant he knew he was accepting arbitration of a LAD claim.

Wrote Verniero, "Irrespective of [his] status or the quality of his counsel, the court must be convinced that he actually intended to waive his statutory rights."

Verniero also noted LAD allows employees to either file a suit in Superior Court or a complaint with the state Division on Civil Rights. "Because the choice of forum permitted by the LAD is an integral component of the statute, we will not assume that an employee intends to surrender that choice in favor of arbitration" unless he has clearly done so.

Dwyer, Garfinkel's attorney, said waivers of rights have to be "knowing and voluntary." The court, he said, simply focused on the "knowing" part of the equation rather than "gratuitously" deciding the issue of whether the agreement was entered into voluntarily.

He praised the court for rejecting the idea that as a sophisticated plaintiff, Garfinkel somehow knowingly made a waiver of his rights.

Montgomery, the lawyer for Morristown Obstetrics, said under the ruling, there is "still latitude" for someone complaining of discrimination to say an arbitration clause "was imposed on him."

But, he said, that would be harder to accomplish if employers follow the court's advice on how such clauses should be written.

Jeffrey C. Burstein, a senior deputy attorney general, argued on behalf of the Division on Civil Rights, an *amicus* in the case. He said, "The court didn't get into some of the potentially thornier issues" surrounding such clauses, such as the issue of their voluntariness and the effect of the Federal Arbitration Act.

In March, the U.S. Supreme Court, in *Circuit City Stores v. Adams*, said that law generally required enforcement of employment contracts containing arbitration clauses.

Burstein said the *Garfinkel* ruling is "important so far as arbitration clauses are being increasingly utilized."

Nancy Erika Smith of Montclair, who represents plaintiffs in anti-discrimination actions, said mandatory arbitration clauses are "going to eviscerate employment and civil rights laws."

She said arbitration "prevents employment law from developing" because there are no court opinions, just decisions by arbitrators. She said, for example, a consumer buying a car can't be forced into arbitration but a person seeking a job can. Smith further noted many of the clauses make the worker pay part of the costs of arbitration, which can be a severe hardship.

Somerset attorney Cynthia M. Jacob, who represents employers, saw last week's decision from a different perspective.

"Given the Supreme Court's penchant for always finding a way to rule in favor of plaintiffs in LAD claims, will they next rule that such a comprehensive arbitration inclusion paragraph is either not understandable and therefore unenforceable, or will they rule it has to be written in plain English and thus is unenforceable?"

She advised management attorneys to be extremely careful in writing comprehensive arbitration clauses, which, she said, "should include the exact name of the law in question with the citation."

Unquestionably, such clauses are going to be much longer, she said.

A bill, S-1423, has been pending in the Legislature to clarify the circumstances under which a worker may waive rights to pursue a LAD claim. The measure, though, was introduced a year ago and has yet to be taken up by a committee. An identical bill, A-3281, was introduced in the Assembly two months ago and it, too, has yet to be reviewed by a committee.

The measures specify that no one may waive the right to sue over employment discrimination "unless the waiver is knowing and voluntary." It spells out the "minimum" standards for making that evaluation, including the employee being advised to consult with an attorney prior to signing such an agreement. Further, the bills place the burden of proving the validity of a waiver on the employer.

In his decision, Verniero said, "That parties to an agreement may waive statutory remedies in favor of arbitration is a settled principle of law in this state. ... The court affirms that principle both as a general rule and as applied specifically to claims arising under the LAD."

But, he said, there are limits to the application.

"The policies that support the LAD and the rights it confers on aggrieved employees are essential to eradicating discrimination in the workplace. The court will not assume the employees intend to waive those rights unless their agreements so provide in unambiguous terms. That said, we do not suggest that a party need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should reflect the employee's general understanding of the types of claims included in the waiver."

To further illustrate, Verniero quoted from a 1997 Appellate Division decision in *Alamo Rent A Car v. Galarza*, a ruling rejecting arbitration in a discrimination dispute.

A full text of *Garfinkel*, Order No. 9800, is available from the NJL Facts-on-Call Service, 800-670-3370. See digest, Page 30.

He noted the judges in *Alamo* advocated the use of "language reflecting that the employee, in fact, knows that other options such as federal and state administrative remedies and judicial remedies exist; that the employee also knows by signing the contract, those remedies are forever precluded; and that, regardless of the nature of the employee's complaint, he or she knows that it can only be resolved by arbitration."

Reporter Robert G. Seidenstein can be reached at rseidenstein@njlnews.com.