New Jersey

Sex Bias Claims Under New Jersey Law Held Not Barred by 'Ambiguous' Arbitration Clause

A male physician who claimed that he was forced out by his medical partners because of his sex did not waive his right to sue under the New Jersey Law Against Discrimination despite having signed a written agreement to submit employment disputes to arbitration, the New Jersey Supreme Court has decided (*Garfinkel v. Morristown Obstetrics & Gynecology Associates*, N.J., No. A-52-00, 6/13/01).

In a unanimous opinion, the state supreme court reinstated David A. Garfinkel's statutory sex discrimination and common-law claims against Morristown Obstetrics & Gynecology Associates, the medical group from which Garfinkel contended he was fired because of his sex.

Writing for the court, Justice Peter G. Verniero said the written arbitration agreement Garfinkel signed in 1996 was ambiguous, and therefore did not waive the plaintiff's right to seek judicial resolution of his employment discrimination claims. The New Jersey Law Against Discrimination (LAD) gives employees alleging discrimination a choice between filing charges with the New Jersey Division on Civil Rights or bypassing the agency and filing a court complaint.

"[T]he 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 that employees intend to waive those rights unless their agreements so provide in unambiguous terms," Verniero wrote. "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 or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., employment discrimination claims."

In this case, the court decided, Garfinkel's "purported waiver of his statutory remedies" is not reflected in the language of the arbitration clause. "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 that intention has been clearly and unmistakably established," Verniero wrote. "The arbitration clause in plaintiff's agreement does not satisfy that test."

Alleged Sex Bias by Partners. Garfinkel joined Morristown Obstetrics & Gynecology Associates (MOGA) in August 1996, signing a written employment agreement that described his salary, work obligations, eligibility for stock ownership in the association, and other conditions of employment. Paragraph 18 of the agreement provided that "[e]xcept as set forth in Paragraphs 14 or 15 hereof, any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration."

The two exceptions to arbitration were paragraphs dealing with post-termination employment restrictions and pension benefits. The court, however, noted that Paragraph 13 mentions severance pay and contemplates action by a "court of competent jurisdiction" in the event of an employee's discharge. It therefore assumed that the drafters of the arbitration clause inadvertently referred to Paragraph 15 as an exception when they meant to refer to Paragraph 13.

Garfinkel alleged that in January 1998, his partners told him that he would not be permitted to exercise his option to become a shareholder in MOGA because of his gender. Garfinkel continued to work for the practice until March 6, 1998, when one of the shareholder-physicians of MOGA told him he was being terminated. According to Garfinkel, this shareholder informed the plaintiff that he was being fired because he was not successful at attracting patients because of his sex.

When Garfinkel sued MOGA and various individuals under the state's anti-discrimination law, the defendants argued that the lawsuit should be dismissed because Garfinkel's claims were subject to arbitration. The plaintiff replied that his agreement to arbitrate had not been voluntary, that the clause was unenforceable with respect to discrimination claims under the LAD, and that the defendants had waived arbitration by filing an answer to his court complaint.

A state trial court ruled in favor of the medical group, finding that the parties had made a knowing and voluntary choice to arbitrate their disputes and that public policy favored arbitration, even of the LAD claims. The New Jersey Superior Court, Appellate Division, affirmed that Garfinkel was compelled to arbitrate his employment discrimination and common-law claims arising out of his employment. Garfinkel appealed to the New Jersey Supreme Court, which granted the state's Division on Civil Rights' request to participate as an amicus.

No Enforceable Waiver of Rights. The LAD expresses a "clear public policy" to abolish discrimination in the workplace and the "choice of forum" provision allowing aggrieved employees either to file administrative charges or a court complaint is "an integral feature of the statute," the supreme court said. Meanwhile, New Jersey courts have also recognized arbitration "as a favored method of resolving disputes" and have held that "an agreement to arbitrate should be read liberally in favor of arbitration," the court noted.

The supreme court cited with approval a pair of Appellate Division decisions—*Quigley v. KPMG Peat Marwick*, 330 N.J. Super. 252 (2000) and *Alamo Rent A Car v. Galarza*, 306 N.J. Super. 384 (1997)—in which the lower court allowed employees to sue under the LAD despite having signed arbitration agreements. In each case, the Appellate Division reasoned that the arbitration clause, which did not specifically mention discrimination claims, was ambiguous, and therefore did not establish a clear waiver of the employee's remedies under the LAD.

"We reason similarly and conclude that paragraph [18] of the parties' agreement is insufficient to constitute a waiver of [Garfinkel's] remedies under the LAD," the supreme court decided. "The clause states that any controversy or claim that arises from the agreement or its breach shall be settled by arbitration. 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 it-

self. Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD."

Absent specific contract language stating that statutory discrimination claims are subject to arbitration, the court declined to infer that Garfinkel agreed to a waiver of remedies under the LAD. The court rejected the defendants' suggestion that as a highly trained professional with access to an attorney, Garfinkel cannot assert that he signed the arbitration agreement involuntarily or without realizing its significance.

"Irrespective of plaintiff's status or the quality of his counsel, the Court must be convinced that he actually intended to waive his statutory rights," Verniero wrote. "An unambiguous writing is essential to such a determination."

Andrew Dwyer of The Dwyer Law Firm in Newark, N.J., argued for Garfinkel on appeal.

Glenn A. Montgomery in Bedminster, N.J., and James E. Shepard of Fein, Such, Kahn & Shepard in Parsippany, N.J., argued for the medical group and individual defendants.

Jeffrey C. Burstein, senior deputy attorney general, argued for the state Division on Civil Rights.