Arbitration: Employers – Caveat Emptor

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In the past, some employers put clauses in employment agreements – even at-will employment agreements for some lower-level employees – requiring the arbitration of all "disputes" between an employee and an employer. That gained some momentum when the United States Supreme Court, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), held that arbitration clauses, in general, are enforceable in employment contracts. In Iowa, we saw some activity in 2003-2004, when the enforceability of such a clause was challenged in litigation involving Menard, Inc. – "Menards." The Eighth Circuit Court of Appeals determined that a contract which required that "all claims and disputes between Menards" and the individual be submitted to binding arbitration was enforceable. Furthermore, the Court clarified that "all claims and disputes" included "statutory claims arising out of" the ADEA, the FLSA, Title VII, the ADA and the FMLA, as well as all contractual claims, tort claims, and any claims or causes of action." *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004), reversing *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961 (N.D. Iowa 2003).

It is critically important that employers which propose such agreements understand precisely what may be involved. Currently pending before the Wisconsin Supreme Court is an appeal – also involving Menard, Inc. – of an arbitration decision in which the remedy is being challenged. Menards recruited a female attorney to oversee the company's in-house legal department. That attorney later claimed she was paid about half as much as a male she supervised. When that male was fired, and the female attorney assumed his responsibilities as well, her pay was not adjusted. After some time, the female informed the CEO and the head of the company's human resources department that she (the company's attorney) believed she had a claim under the Equal Pay Act and Title VII of the 1964 Civil Rights Act. She alleged that company officials then threatened to fire her and that after fruitless efforts to resolve the problem, the CEO removed her from the company's premises.

The parties to the Wisconsin case had agreed to resolve their disputes through binding arbitration. The arbitration panel found that Menard, Inc. willfully violated the federal anti-discrimination laws and fired Sands in retaliation for asserting her rights. The panel awarded compensatory and punitive damages totaling approximately $1.6 million, noting "the extreme reprehensibility" of Menard, Inc.'s conduct. Further, the panel awarded Sands a reinstatement at a certain salary to be followed by a specified raise. The panel stated that failing to reinstate Sands "would, in some sense, reward the company for its mistreatment of her" and would

"send the wrong message to company employees who otherwise would be inclined to make meritorious complaints about unlawful conduct occurring within the company."

The issue pending before the Wisconsin Supreme Court is whether an arbitration panel can compel someone (in this case Menards) to "hire" an *attorney* when the client no longer has "trust or confidence" in the attorney. While that narrow question may be of interest to attorneys and to their clients, one recalls that in the abstract, reinstatement is generally viewed as the preferred remedy in "discrimination" cases. There are some situations where a strong argument can be made that reinstatement might not be in the interest of either party. But in the abstract one agrees to be bound by the judgment of the arbitrator.

Earlier this month, the New Jersey Supreme Court had occasion to consider the remedy imposed by a grievance arbitrator. The case of *Linden Board of Education v. Linden Education Association on behalf of John Mizichko* arose out of a public sector collective bargaining agreement. Mizichko was employed by the school district as a custodian. He admitted that he had been instructed by his supervisor that female students would be using certain classrooms to change clothes for a dance recital, and had been instructed what to do ("leave immediately") if he inadvertently went into one such room. He somehow got in one, and subsequently ignored the female students' pleas for him to leave. And when a teacher asked him to leave he asked, "What's the big deal?" After cleaning the windows in the room, he finally did leave.

After an investigation (during which Mizichko was suspended with pay), the school board fired him. The collective bargaining agreement, however, stated that an employee with Mizichko's length of service "shall not be disciplined, discharged or not reappointed without just cause." The CBA provided for a dispute resolution process which ends in final and binding arbitration. Mizichko's grievance was submitted to arbitration. The parties agreed they were submitting the following questions to the arbitrator: "Did the Board of Education have just cause to terminate the employment of John Mizichko? And, if not, what shall be the remedy?" For persons familiar with grievance arbitration in the private sector, those stipulated issues should come as no surprise.

It should also come as no surprise to persons familiar with grievance arbitration in the private sector that the arbitrator determined there was "just cause" for some discipline, but that the actual termination was not for "just cause." The arbitrator concluded that a 10-day disciplinary suspension would be "just," thus ordering as a "remedy" Mizichko's reinstatement with back pay, less the pay for the 10-day suspension.

This outcome apparently did come as a surprise, however, to the Linden Board of Education. It appealed, contending that the arbitrator exceeded his authority in substituting his judgment for that of the district after determining there was "just cause" for some discipline. Once again, it will come as no surprise to persons familiar with both grievance arbitration in the private sector and the attitude of courts to arbitration generally that the New Jersey Supreme Court enforced the arbitration award as written. In the view of the New Jersey court, the arbitrator answered the first question by finding there was no just cause to terminate the employment, and once that decision was made, the arbitrator answered the second question by fashioning a remedy – what the Court called a "fair sanction." The Court noted that:

The Agreement did not define just cause, nor was there anything in the questions submitted that limited the power of the arbitrator to fill in the gap and give meaning to that term.

This approach of enforcing what an arbitrator has awarded, and of the necessity for limiting the power of an arbitrator if that is indeed intended, has been a mainstay of Iowa law. For example, the Iowa Supreme Court in *Ales v. Anderson, Gabelmann, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 842 (Iowa 2007) noted:

A party's disagreement with the arbitrator's conclusion is not grounds for vacating the award. *Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Ass'*n, 343 N.W.2d 139, 144 (Iowa 1983). In discussing the arbitrator's authority, we have said: "Unless the parties specifically limit the powers of the arbitrator in deciding various aspects of the issue submitted to him, it is often presumed that they intend to make him the final judge on any questions which arise in the disposition of the issue, including not only questions of fact but also questions of contract interpretation, rules of interpretation, and questions, if any, with respect to substantive law." *Id.* at 143. at 143 (citation omitted).

Iowa employers which have entered into arbitration agreements for the resolution of "employment disputes" should review the provisions carefully to make sure they understand what is and what is not authorized under the provisions. And those Iowa employers which are considering requiring such agreements as a condition of employment should understand precisely what they are agreeing to.

While courts have generally enforced arbitration agreements as a "preferred" method for dispute resolution, that preference may not be true for Congress. On May 19, 2010, the Department of Defense issued an interim rule to implement Section 8116 of the Defense Appropriations Act of 2010 – the so-called "Franken Amendment." That provision, named after Senator Al Franken of Minnesota, prohibits the awarding of any contracts in excess of $1 million

appropriated or made available from the Defense Appropriations Act of 2010 unless the contractor agrees not to enter into or enforce mandatory arbitration agreements against its employees or independent contractors for claims related to Title VII and various tort claims. The "Franken Amendment" also provides that no funds may be paid out after June 17, 2010, on covered contracts unless the prime contractor certifies that it requires any *subcontractors* not to enter into or enforce arbitration agreements against employees or independent contractors performing work under the subcontract. The interim rule clearly states that this prohibition extends only to subcontractor employees and independent contractors actually working on the subcontract. Under the language of the statute, beginning on June 17, 2010, contractors will need to be able to certify upon signing any covered contracts that any subcontractors working on the contracts are being "required" to abide by the Franken Amendment for their employees and contractors who work on the subcontract.

On April 26, 2010, the United States Supreme Court heard arguments in *Rent-A-Center v. Jackson*. In that case, the plaintiff Jackson sued his employer for race discrimination and retaliation. The trial court granted the employer's motion to dismiss and to compel arbitration according to an agreement in Jackson's employment contract. Jackson appealed, arguing the arbitration agreement was procedurally and substantively unconscionable and that the issue of unconscionability must be decided by a court, not the arbitrator. The Ninth Circuit Court of Appeals agreed that the threshold issue of unconscionability is for a court to decide even if the agreement assigns that issue to the arbitrator.

While the decision of the Supreme Court has not yet been issued, there are some who contend that depending on the outcome, there may be impetus in Congress to breathe life into the "Arbitration Fairness Act of 2009" – legislation which would ban pre-dispute arbitration agreements in employment, consumer and franchise contracts. Employers, therefore, should be mindful that agreements in employment contracts to arbitrate future disputes may have a short life.