New Jersey Goes Its Own Way on Mandatory Arbitration Clauses in Employment Agreements

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On June 13, 2000, the Supreme Court of New Jersey in *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.* A-52-00, handed down a decision that will negatively impact New Jersey employers that seek to use arbitration to resolve any disputes arising out of the employment relationship. The court struck down language that is commonly used in many arbitration clauses, deeming it to be unenforceable because of its inherent ambiguity. Consequently, the holding in *Circuit City Stores v. Saint Clair Adams*, 121 S.Ct. 1302 (2001), will have little meaning for New Jersey practitioners. The *Garfinkel* decision will undoubtedly affect the manner in which management attorneys and employers draft arbitration clauses in employment agreements.

In *Garfinkel*, plaintiff was a physician formerly associated with an obstetrics and gynecology practice in Morris County, New Jersey. At time of his employment, Dr. David A. Garfinkel entered into an employment agreement that contained an arbitration provision providing that Dr. Garfinkel would arbitrate any and all disputes arising out of the employment relationship. Allegedly in March 1998, plaintiff was told by defendants that that he could not exercise his rights to be a shareholder in the practice because "he was born the wrong sex." Plaintiff was subsequently terminated in March 1998 and allegedly was told that the reason for his termination was that "he did not attract patients because he was male." A few months later, Dr. Garfinkel filed suit alleging, among other things, violation of the employment contract and gender discrimination under the New Jersey Law Against Discrimination ("LAD").

Defendants subsequently moved for summary judgment based upon the arbitration clause in the employment agreement. The trial court granted defendants' motion, reasoning that the arbitration clause was binding in respect to all claims, including those raised under the LAD. The appellate division affirmed the trial court's decision in *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 333 N.J. Super. 291 (App. Div. 2000). In its opinion, the appellate division stated that the general rule that parties' agreements to arbitrate statutory claims as contained in plaintiff's employment agreement were enforceable. Plaintiff appealed to the Supreme Court of New Jersey, the state's highest court.

The language that the court voided in the Garfinkel decision states in short that "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration..." One will note that this language is very similar to the language that was used in the arbitration clause that was found to be valid and enforceable in the *Circuit City* decision.

The opinion, which was written by Justice Peter Verniero for a unanimous court, only addressed the issue before it, namely, whether the language used in the agreement's arbitration clause was enforceable. Notably, the court declined to consider the even larger issue about whether decisions by employees to sign arbitration clauses are truly voluntary in the first place. In an *amicus curiae* appearance, the New Jersey Division on Civil Rights (the "Division"), the agency charged with the enforcement of the LAD, stated that it did not object to the use of arbitration to resolve discrimination complaints *per se*, but it opposed "compulsory and binding arbitration in settings where it is based on a vaguely worded clause or where the waiver was not voluntary." The Division further stated that the issue of voluntariness need not be addressed in the case because the employment agreement signed by Dr. Garfinkel was ambiguous on its face.

Justice Verniero began the court's analysis by emphasizing the general proposition that the LAD was enacted to eradicate discrimination in the workplace and that the statute provides for a choice of forum in which plaintiffs can prosecute their claims. However, Justice Verniero recognized the jurisprudence that supports arbitration as a preferred method for resolving disputes. Nonetheless, the analysis then noted that a party's waiver of statutory rights must be clearly and unmistakably established.

The court cited two earlier cases in support of its ruling. *Quigley v. KPMG Peat Marwick, LLP*, 330 N.J. Super. 252 (App. Div. 2000), and *Alamo Rent A Car Inc. v. Galarza*, 306 N.J. Super. 384 (App. Div. 1997). These cases upheld the rights of employees to pursue LAD claims despite the fact that the employees had signed arbitration clauses similar to the one at issue in *Garfinkel*. Defendants countered, stating that the arbitration clause in *Garfinkel* should be deemed enforceable because Dr. Garfinkel was a highly trained and educated professional, in contrast with the plaintiff in *Quigley*, who had limited bargaining power and knowledge. The court ignored defendants' argument, emphasizing that the focus in deciding whether an arbitration clause was enforceable was predicated on whether the language was unambiguous and not on the plaintiff's level of sophistication.

The ruling essentially holds that the court will not assume that employees intend to waive rights, such as LAD statutory claims, unless the arbitration clause provides so in clear and unambiguous terms. Although not specifically providing the exact language that would pass muster with the court, Justice Verniero opined,

> 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 also reflect the employee's general understanding of the type of claims included in the waiver, *e.g.*, workplace discrimination claims.

On a related note, the New Jersey legislature has also been attempting to articulate the circumstances under which an employee may waive his or her statutory rights to pursue a LAD claim. The bills, S-1423 and A-3281, have yet to be reviewed by a committee.

In the meantime, New Jersey management employers and attorneys need to be extremely careful when drafting arbitration clauses. Such comprehensive clauses should, at a minimum, include the type of claims the employee is agreeing to arbitrate (*e.g.*, anti-discrimination law claims). In fact, it is advisable to draft more comprehensive arbitration clauses that affirmatively state the specific names and citations of the laws that constitute the waiver of remedies.