Effectively Responding To The Buyer's Remorse Of Employers In The Arbitral Forum

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Introduction

The conventional wisdom, especially concerning employment and consumer cases, asserts that the arbitral arena is more slanted in favor of defendants than is the judicial setting. In particular, according to this view, corporations are repeat players in the arbitral context while plaintiff employees and consumers are not. Putting it bluntly, according to this position, a pro-defendant bias emerges because arbitrators and arbitration bodies want future case referrals. Indeed, Minnesota Attorney General Lori Swanson successfully prosecuted claims against the National Arbitration Forum along these lines beginning in 2009.

Whatever the merits of the conventional wisdom, courts' application of the summary judgment procedure compels serious consideration of the arbitral forum in any event. Significant statistical analysis and scholarship by legal commentators, including a prominent Federal judge, confirm that courts are granting summary judgment for employers at rates far higher than authorized by the plain meaning of the express language of Fed. R. Civ. P. 56 and the Supreme Court precedent interpreting the governing Rule.[1]

By contrast, the arbitral arena does not lend itself to summary judgment. In other words, plaintiffs have a better chance of their cases being decided on the merits after a contested hearing in the arbitral forum than plaintiffs do in court. Indeed, growing numbers of employers, which initially had imposed mandatory arbitration provisions on their employees with great enthusiasm, are now seeking to back away from those provisions. This development has been prompted by how successful plaintiff counsel have been at obtaining key discovery more cost effectively in the arbitral setting than in the judicial context and, moreover, at ultimately prevailing on the merits in arbitrations.

Accordingly, plaintiff counsel should be well versed in the legal mechanisms and standards applicable to enforcing an arbitral award in favor of plaintiffs and to defeating an employer's effort to vacate an award in favor of plaintiffs. The discussion below outlines precisely these matters.

I. Binding Precedent Limits Judicial Review Of Arbitral Awards To The Legal Question About Whether The Award Draws Its Essence From The Contract At Issue

The Supreme Court has consistently ruled that courts cannot review the merits of an arbitral award and, instead, must defer to the arbitral process. For obvious reasons, this body of law first developed in the labor world; however, the settled point of law has been adopted in the employment area as employers have increasingly imposed arbitration provisions on their non-union employees.

In reversing the vacatur of an arbitral award, the Supreme Court described the extremely narrow scope of review as follows:

> *The **courts are not authorized to reconsider the merits** of an award even though the parties may allege that **the award rests on errors of fact or on misinterpretation of the contract.***[2]

More recently, and while reversing the appellate court, the Supreme Court reaffirmed that courts cannot review the merits of an arbitral award despite the award being based on "improvident, even silly factfinding. . . ."[3]

The Eighth Circuit has similarly ruled when enforcing the arbitral award in question:

> *[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, **that a court is convinced [the arbitrator] committed serious error does not suffice to overturn [the arbitrator's] decision.***[4]

In other words, "the resulting arbitration award is ordinarily entitled to ***extreme judicial deference.***"[5] In that regard, the contract at issue "must be broadly construed with ***all doubts resolved in favor of the arbitrator's award.***"[6]

Consequently, clearly established law restricts judicial review of an arbitral award to determining whether the award "draws its essence" from the contract in question.[7] As a practical matter, this means that courts consider – from a highly

deferential standpoint – whether the contract at issue includes any language to support the arbitral award:

> [T]he ***arbitrator need only explain his reasoning "in terms that offer even a barely colorable justification*** for the outcome reached." "[I]f a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed."[8]

II. Courts Routinely Grant Motions For Judgment On The Pleadings To Enforce Arbitral Awards Against Employers

Needless to say, employers do not react well to arbitral awards in favor of plaintiffs. In fact, an employer may simply refuse to comply with an arbitral award – requiring an action to enforce – or may even sue to vacate the award. A plaintiff may enforce a favorable arbitral award via a motion for judgment on the pleadings concerning either that plaintiff's action to enforce the award or the employer's action to vacate the award.

The legal standard for a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings is the same as that for a Fed. R. Civ. P. 12(b)(6) motion to dismiss.[9] In other words, a successful plaintiff's motion for judgment on the pleadings should be granted if the plaintiff establishes that, when viewing the pleadings in favor of the employer, there are no unresolved issues of material fact and a plaintiff is entitled to judgment as a matter of law.[10]

Minnesota's Federal District Court recently granted a motion for judgment on the pleadings to enforce an arbitral award against an employer.[11] Other Federal courts have ruled similarly because the scope of judicial review concerning an arbitral award is extremely limited.[12]

Conclusion

Given how difficult it is for plaintiffs to survive summary judgment in court these days, particularly before the Federal judiciary, the arbitral arena appears increasingly attractive for pursuing employment claims. The standard of review concerning arbitral awards in favor of plaintiffs is exceptionally lenient, so plaintiff counsel should be prepared to move quickly for judgment on the pleadings if an employer refuses to comply in full with a given award in favor of plaintiffs. Courts regularly grant such motions with little or no discovery conducted.

[1] *See generally* Mark W. Bennett, "From the 'No Spittin', No Cussin' and No Summary Judgment' Days of Employment Discrimination Litigation to the 'Defendant's Summary Judgment Affirmed Without Comment' Days: One Judge's Four-Decade Perspective," 57 *N.Y.L. Sch. L. Rev.* 685 (2012-2013); Clermont & Steward J. Schwab, "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?," 3 Harvard Law & Pol'y Rev. 1 (2008).

[2] *United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987) (quoting Supreme Court precedent (emphasis added).

[3] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting Supreme Court precedent).

[4] *Bureau of Engraving, Inc. v. Graphic Communication Intern. Union Local 1B*, 284 F.3d 821, 824 (8th Cir. 2002) (quoting Supreme Court precedent) (emphasis added).

[5] *Local Union 257, Intern. Broth. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180, 1184 (8th Cir. 1997) (citing Eighth Circuit precedent and affirming enforcement of the arbitral award) (emphasis added).

[6] *International Broth. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084, 1100 (8th Cir. 2004) (quoting Eighth Circuit precedent and affirming enforcement of the arbitral award) (emphasis added); *see also Walsh v. Union Pacific Railroad Co.*, 803 F.2d 412, 414 (8th Cir. 1986), *cert. denied* 482 U.S. 928 (1987) (reversing the district court and ordering enforcement of the arbitral award).

[7] *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (reversing the appellate court and ordering enforcement of the arbitral award); *International Brotherhood of Electrical Workers, Local Union No. 53 v. Sho-Me Power Corp.*, 715 F.2d 1322, 1325 (8th Cir. 1983), *cert. denied* 465 U.S. 1023 (1984) (quoting Supreme Court precedent, reversing the district court, and enforcing the arbitral award because "[a] reviewing court must uphold an arbitrator's award so long as it 'draws its essence' from the collective bargaining agreement.").

[8] *Burns Intern. Sec. Services, Inc. v. International Union, United Plant Guard Workers of America*, 47 F.3d 14, 17 (2d. Cir. 1995) (upholding enforcement of the arbitral award) (citations omitted) (emphasis added).

[9] *Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1096 (8th Cir. 2008) (affirming judgment on the pleadings); *see also Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

[10] *Id.*

[11] *Hammerlund Construction, Inc. v. Int'l Union of Operating Engineers, Local 49*, 2012 WL 87794, *2-*5 (D. Minn. 2012) (enforcing the arbitral award).

[12] *Lippert Tile Co., Inc. v. International Union of Bricklayers & Allied Craftsmen, District Council of Wisconsin and Local 5*, 724 F.3d 939, 944 (7th Cir. 2013) (quoting Supreme Court precedent, affirming enforcement of the arbitral award, and reiterating that "a court is not to rule on the potential merits of the underlying claims[,] . . . even if it appears to the court to be frivolous."); *International Union of Dist. 50, United Mine Workers of America v. Bowman Transp., Inc.*, 421 F.2d 934, 936 (5th Cir. 1970) (affirming enforcement of the arbitral award based on the reasoning that "the courts have no business overruling [an arbitrator] because their interpretation of the contract is different from [that arbitrator's interpretation]."); Artco-Bell Corp. v. Local Lodge 2427, Intern. Ass'n of Machinists & Aerospace Workers, District Lodge 776, 218 F. Supp. 2d 827, 830-32 (N.D. Tex. 2002) (enforcing the arbitral award); *International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union No. 6 v. Thermo-Guard Corp.*, 880 F. Supp. 42, 46 (D. Mass. 1995) (enforcing the arbitral award and ordering the payment of attorney's fees to the prevailing party); *Swinerton & Walberg Co. v. United Ass'n of Journeyman & Apprentices of Plumbing & Pipefitting Industry of the United States & Canada Local No. 3*, 806 F. Supp. 913, 917 (D. Colo. 1992) (enforcing the arbitral award).