MASSACHUSETTS LAWYERS WEEKLY
www.masslawyersweekly.com
July 30, 2012
THE DOLAN COMPANY

Arbitration clause can't be enforced

Job applicant sues after denied position

By Eric T. Berkman

A mandatory arbitration clause in an employment application was unenforceable against a pregnant woman who brought suit after being denied a job, the 1st U.S. Circuit Court of Appeals has ruled in a 2-1 decision.

The employer argued that the arbitration clause unambiguously covered all disputes with job applicants.

But the 1st Circuit disagreed, holding that because the clause was ambiguous, and because the party that drafted it had all the bargaining power, it should be construed against the employer.

"[N]othing in the arbitration clause refers to 'applicants,'" Judge Kermit V. Lipez wrote for the court. "Instead every reference is to 'your employment, 'the employment process,' or 'pre-employment disputes.' Accordingly, there is a reasonable basis for [the applicant's] belief that she would only be bound by the arbitration clause if ultimately hired."

The 25-page decision is *Gove v. Career Systems Development Corporation*, Lawyers Weekly No. 01-186-12. The full text of the ruling can be found at masslawyersweekly.com.

Defined boundaries

Employment lawyer James S. Weliky of Messing, Rudavsky & Weliky in Boston said it is useful to have a 1st Circuit decision giving defined boundaries on how enforceable arbitration agreements actually are when presented during the job application phase.

"[The court required] that they at least be clear and specific as to what disputes are subject to them," he said. "In other words, if you don't make clear that what we're talking about are job applicants as well as current employees, the court won't enforce them."

And while the case arose in Maine and the court applied Maine's contract law in holding that, where there is a disparity in bargaining power, contractual ambiguities will be construed against the drafter, Weliky pointed out that Massachusetts adheres to the same principle. Thus, the ruling should be just as applicable in the commonwealth, he said.

Going forward, Weliky said, the decision "gives us an opportunity to challenge agreements that are unclear about whether or not the applicant will be bound," he said.

That echoes the Supreme Judicial Court's 2009 *Warfield v. Beth Israel Deaconess Medical Center,* in which the SJC held that a mandatory arbitration clause does not preclude a Chapter 151B discrimination claim unless the specific intent to do so is stated explicitly, he added.

Evan M. Fray-Witzer of Ciampa Fray-Witzer in Boston called *Gove* "a cautionary tale for employers."

The case underlines the principle that employers must draft their agreements carefully and precisely, he said.

"The court makes it clear that the employer *could have* required arbitration of disputes for applicants who weren't ultimately hired, but the agreement simply wasn't clear enough to require it in this case," Fray-Witzer said, adding that the case is equally instructive for employers' counsel.

"Though most probably thought the presumption in favor of enforceability of arbitration agreements was so well-established under federal law as to not merit much discussion, this decision reminds us not to assume anything when drafting legal briefs," he said.


Kevin Brusie Photography
William E. Hannum

Andover employment attorney William E. Hannum III said it is a good idea for employers to require job applicants to provide actual signatures confirming their assent to an arbitration agreement rather than just having them check a box, as was done in *Gove*.

He also reminded employers to train managers not to ask risky or inappropriate questions in interviews, such as when an applicant is due to give birth or how many other children she has.

"I suspect that these 'bad facts' did not help [this] employer's case," Hannum said.

Plaintiff's counsel Arthur J. Greif of Gilbert & Greif in Bangor, Maine, could not be reached for comment prior to deadline.

David A. Strock of Fisher & Phillips, which has offices in Portland, Maine, and Boston, represented the employer. He declined to comment.

Rejected applicant

Plaintiff Ann Gove began working for Training & Development Corp., a job training and placement organization in Maine, in May 2008.

TDC employees learned the following April that defendant Career Services Development Corp. had been awarded a contract to provide services to another company, Loring Job

CASE: *Gove v. Career Systems Development Corporation,* Lawyers Weekly No. 01-186-12

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Could a mandatory arbitration agreement in an employment application that covered disputes arising "prior to employment" as part of the "employment process" be enforced against a pregnant woman who brought a sex-discrimination suit after being denied a job?

DECISION: No, because the provision was ambiguous as to whether it applied to job applicants who are not ultimately hired and, as such, must be construed against the party that drafted it

Corps, which had been a TDC account up to that point.

During the transition period, CSD offered all TDC employees who had been working on the Loring account an opportunity to apply for jobs with CSD. Gove was one of the employees and chose to pursue the opportunity.

On April 8, 2009, Gove completed an online application for a position with CSD similar to the one she held with TDC.

The application included a mandatory arbitration clause stating that "any dispute between you and CSD with respect to any issue prior to your employment, which arises out of the employment process" would be resolved through arbitration.

Gove placed a checkmark in a box that indicated her assent to the agreement and submitted the application.

On April 21, Gove interviewed for a position with CSD. She was visibly pregnant at the time. During the interview, a CSD representative asked when she was due to deliver. She responded that she was due in five weeks. Gove was also asked if she had other children, and she answered that she had a 7-year-old son.

CSD did not hire Gove. When the defendant continued to advertise for the position, Gove filed a complaint with the Main Human Rights Commission, which found reasonable grounds to conclude that she had been denied the position because of her pregnancy.

When the parties could not reach a conciliation agreement, Gove sued CSD in U.S. District Court, alleging discrimination on account of her gender and her pregnancy.

CSD moved to compel arbitration, citing the arbitration clause in the application. But Judge George Z. Singal denied the motion, finding the clause invalid due to ambiguity as to whether it covered an applicant who was not hired and concluding under Maine contract law that such an ambiguity must be construed against the party that drafted the agreement.

CSD appealed.

Unenforceable provision

The 1st Circuit determined, in contrast to the trial court, that the provision itself was not invalid.

As the court noted, there was no dispute that had Gove been hired, she would have been required to arbitrate disputes stemming from events occurring prior to employment.

"Thus, she is arguing that her employment by CSD is a condition precedent to her obligation to arbitrate," Lipez said. "However, the nonoccurrence of a condition precedent does not render an agreement invalid. It simply means that the duty to perform does not arise."

Because Gove conceded that the agreement was enforceable in certain circumstances, the judge continued, it was a dispute over the provision's *scope*, not its *validity*.

Turning to the issue of scope, Lipez noted that in normal circumstances the 1st Circuit would give significant weight to the federal policy of presuming arbitrability.

But since CDS did not argue that policy on appeal, arguing exclusively that the agreement itself unambiguously applied to job applicants who were not ultimately hired, the federal policy would not be considered.

Instead, the 1st Circuit applied Maine contract law construing a contractual provision against the party that drafted it.

"Gove argues that the clause's references to the 'employment process' and 'pre-employment disputes' should be read literally," Lipez said. "Under her reading, if one is never employed by CSD, then a dispute cannot be 'pre-employment' or related to the 'employment process' and the arbitration clause is inapplicable."

WELIKY
Lawyer welcomes decision

The court found that it was indeed reasonable for Gove to believe that she would only be bound by the arbitration clause if she was hired, and then — if she had post-hire claims arising from promises made during the hiring process, such as being paid less than she was led to believe — the arbitration clause would apply.

Accordingly, Lipez said, the provision was indeed ambiguous.

Additionally, the court found, Gove was in no position to bargain over the terms of the application. Instead, she was required to accept the arbitration clause as part of the online application with no meaningful way to clarify its meaning.

While the court conceded that Maine law — like federal law — has a broad presumption in favor of arbitration, it emphasized that where there is a significant disparity of bargaining power, as there was here, the equitable rule construing the contract against the drafter trumps that presumption.

"Because of [this] obligation under Maine law, we conclude that Gove is not required to arbitrate her claims," Lipez wrote.

Judge Juan R. Torruella dissented, disagreeing with the majority's determination that CSD had waived arguments based on the federal policy favoring arbitration. MLW

Eric T. Berkman, an attorney and formerly a reporter for Massachusetts Lawyers Weekly, is a freelance writer.