

FAIR ARBITRATION

Employer's Exclusive Control Over Selection of Arbitrators Held Invalid

By ADAM EPSTEIN

While alternative forms of dispute resolution such as arbitration and mediation are now commonplace and are effectively utilized to avoid litigation and resolve disputes in a more efficient manner, particularly between employers and employees, a vital aspect of arbitration procedures is that the arbitration process must be fair. Upon the hire, employers often provide their employees with an employment handbook that specifically discusses procedures involving termination. If, however, the employment relationship breaks down to the point

that an action is instituted by the employee against the employer, often the employee handbook (if one exists) is viewed as a contract and is often a first step in determining the proper method(s) of dispute resolution and procedure. Employee handbooks that require mandatory arbitration procedures, as opposed to litigation, have consistently been held to be valid though courts turn a keen eye toward ensuring that arbitration procedures and hearings are fair.

The Facts

In 1989, employee Wendy McMullen was hired as a store detective for Meijer, Inc., in Flint. In 1998, almost ten years after her hiring, McMullen was involved in an incident involving her pursuit and ultimate confrontation of a shoplifter in the store parking lot. Meijer subsequently offered McMullen a choice: either be demoted with a major reduction in salary, or be fired. McMullen chose the latter, but decided to challenge the disciplinary action in accordance with Meijer's termination appeal procedure (TAP).



FAST FACTS

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The TAP involved a two-step process and required binding arbitration of all disputes that arose out of the termination of employment in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association (AAA). As is the case with many arbitration provisions in employment contracts, the arbitration would serve as the sole and exclusive remedy for issues surrounding the termination. Thus, an arbitrator's decision would be final and binding. McMullen had agreed to this procedure upon her initial hiring and she duly signed a standard form acknowledging receipt of the company handbook that provided for such TAP proceeding.

The Claim and Decision

McMullen brought an action in state court against Meijer claiming that her termination was evidence of the attempt by Meijer to discriminate against her on the basis of gender. As such, she sought a declaratory judgment that her Title VII claims were not subject to this mandatory pre-dispute arbitration agreement with Meijer due to the fact that she had no say in the selection of the pool of arbitrators. The case was removed to federal court and the United States District Court for the Eastern District of Michigan originally granted summary judgment in favor of Meijer. The decision was appealed to the Sixth Circuit Court of Appeals in Cincinnati and that court in *McMullen v Meijer, Inc.*¹ held that where Meijer, the defendant, had exclusive control over the entire panel of potential arbitrators, such control was fundamentally unfair and, therefore, any arbitral forum would not serve as an effective substitute for a traditional judicial forum. The court of appeals held that McMullen's lack of control over the arbitration pool prevented her from effectively vindicating her statutory rights.

The Arbitration Policy

On its face, Meijer's policy on termination seemed quite fair. Though Meijer rejected her internal appeal (step one), Meijer politely informed McMullen that she had to sign and file the necessary paperwork to begin the arbitral process, which she then did (step two). McMullen signed the Termination Appeal Form, which stated, "I request that my case be submitted to arbitration in accordance with the Company's Termination Appeal Procedure."

Once the hearing was requested, Meijer's TAP policy granted Meijer the right to select a pool of at least five potential arbitrators who must be (1) an attorney, (2) unemployed by and unaffiliated with Meijer, (3) generally recognized as a neutral and experienced labor and employment arbitrator, and (4) listed on the rosters of the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA). Meijer and McMullen would then select together the arbitrator by striking names until only one was left.

Procedural Issues

On August 28, 1998, arbitrator William Daniel was selected to hear McMullen's appeal. Of note, Daniel had served as the arbitrator in seven arbitrations involving Meijer prior to the beginning of McMullen's TAP request. Daniel never heard this case, however, because one day prior to the date of the arbitration hearing McMullen filed the declaratory judgment action in Michigan state court challenging the fairness of the arbitrator selection process.

Meijer, asserting that the case involved a federal question, removed the case to federal court and on March 23, 2000, the United States District Court for the Eastern District of Michigan ruled that the arbitrator selection procedures used by Meijer were unfair based upon the extent of control Meijer had in the selection process. On September 21, 2000, McMullen then moved for summary judgment. A few days later, Meijer moved for reconsideration due to the fact that the case *Haskins v Prudential Ins Co of Am*² had been decided in the meantime and provided controlling authority apparently requiring the compelling of arbitration. The district court granted Meijer's motions for summary judgment and compelled arbitration. That decision was then appealed to the Sixth Circuit Court of Appeals who reviewed the district court's decision for denial of summary judgment by McMullen based upon legal grounds and, therefore, de novo.

The Analysis

The sixth circuit emphasized that arbitration agreements in employment contracts are favorable and enforceable under the Federal Arbitration Act.³ This court also noted that recent cases such as *Circuit City Stores, Inc v Adams*⁴ and *Gilmer v Interstate/Johnson Lane Corp*⁵ (among others) have upheld the validity of mandatory arbitration agreements including those that involve Title VII and other statutory employment discrimination claims. The court of appeals quoted *Gilmer*⁶ that arbitration of statutory claims is acceptable as long as a party does not forgo the substantive rights afforded by the statute.

Still, the court reminded the litigants that even though courts should enforce pre-dispute mandatory arbitration agreements, that there are some circumstances in which the agreements will not be enforced. Citing its own decision only three years earlier in *Floss v Ryan's Family Steak Houses, Inc.*⁷ an arbitration agreement must still allow for the "effective vindication of that claim." Turning back to McMullen and Meijer, the court then opined that the central issue in this particular case was whether or not Meijer's "exclusive control" over the pool of arbitrators made any possible arbitral forum fundamentally unfair and precluded McMullen from effectively vindicating her statutory rights.

Important Note:

The Sixth Circuit Court of Appeals decision in this case was subsequently withdrawn and later substituted and amended by a new opinion in *McMullen v Meijer, Inc*, 355 F3d 485 (CA 6, 2004). Though still consistent in its holding that McMullen was prevented from effectively vindicating her statutory rights, the court remanded the case back to the district court to determine whether the arbitrator selection provision can be severed from the rest of the arbitration agreement (based upon the parties' intent). If the district court subsequently decides that the remainder of the agreement can be enforced, it will then also have to determine how an arbitrator should be selected.

Discussion

The court addressed Meijer's assertions that McMullen waived her right to sue by signing the TAP form. Not only did the court disagree, but the court noted that the TAP form did not even constitute an enforceable contract citing the fundamental Michigan contract law principle that past consideration may not serve as legal consideration for a subsequent promise. Not only had there been no new consideration in exchange for signing the form by McMullen, but Meijer did not even sign the form itself.

The court then addressed Meijer's additional concern that absent the showing of "fraud, duress, mistake or some other ground upon which a contract may be voided,"⁸ that a court must enforce an agreement to arbitrate. The court of appeals noted that *Haskins* dealt more with whether the plaintiff knew *at all* of the existence of the mandatory arbitration agreement, and emphasized that "some other legal ground" sufficiently encompassed whether or not, as in *Floss* and here, the arbitration agreement effectively vindicated the claim.

While the court noted that Meijer's TAP was "commendably fair," the granting of complete control over the pool of potential arbitrators was unacceptable. Referencing *Hooters of America v Phillips*,⁹ the court noted that arbitration agreements that undermine the neutrality of an arbitration proceeding or are patently one-sided are not acceptable. In *Hooters*, a list of arbitrators was created exclusively by Hooters and gave Hooters dominion and control over whom Hooters could place on the list of arbitrators and this was "crafted to ensure a biased decision maker."¹⁰

The court also referenced *Floss* wherein the sixth circuit invalidated an arbitration that gave EDSI, a third-party arbitration service, complete discretion over the rules and procedures that would be used during arbitration hearings.¹¹ Having had serious reservations about whether a EDSI might be a for-profit venture with financial ties with the employer in that case, the sixth circuit was uneasy about the potential bias in favor of the employer.¹² To this court, any bias would create an unfair forum and thereby render no substantive protections for statutory rights.

Finally, the court complimented Meijer's TAP as being plain and more even-handed than the agreement in *Hooters*, but was less fair than the arbitrator selection as discussed in *Floss* (i.e., at least a third-party had control rather than the employer itself). The court also noted that Meijer did have a strong argument that there was no bias at all since there was no arbitration hearing yet. Citing *Gilmer*, the court noted that there should not be a presumption that any arbitration hearing will not be able to "retain competent, conscientious and

impartial arbitrators,"¹³ but this court turned its eye toward the selection process being fundamentally unfair rather than the ultimate decision being potentially unfair.

Implications

The case of *McMullen v Meijer, Inc*,¹⁴ held that when the process used to select an arbitrator is fundamentally unfair, that the arbitral forum could not then serve as an effective alternative for a judicial forum even if there is no evidence of a bias or corrupt arbitrator. The district court decision in favor of Meijer was reversed and the case was remanded to the district court for a judgment in favor of McMullen. By establishing that Meijer's arbitrator selection process was flawed, employers and employment lawyers must be put on notice that unilateral selection process of arbitrators will not work in the sixth circuit.

Still, the Sixth Circuit Court of Appeals complimented Meijer on several occasions as having an otherwise decent and reasonable internal process for resolving disputes. The court provided no bright-line test and virtually no guidelines for fairness in the arbitrator selection process. The court only focused on what was clearly not fair in *Floss*, *Hooters*, and in this case. This case should certainly give practitioners pause as to ensuring that the selection of an arbitrator is overtly fair. Still, one can only hope that the sixth circuit's concerns over whether there is an "effective vindication" in an arbitration hearing process does not turn into an unfair bias toward the employee. ♦

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Footnotes

1. 337 F3d 697 (CA 6, 2003).
2. 230 F3d 231 (CA 6, 2000).
3. 9 USC 1 et seq.
4. 532 US 105 (2001).
5. 500 US 20 (1991).
6. At 26, quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).
7. 211 F3d 306, 313 (CA 6, 2000).
8. *Haskins* (at 239).
9. 173 F3d 933, 938 (CA 4, 1999).
10. *Hooters* at 938.
11. *Floss* at 310.
12. *Id.* at 314.
13. *Gilmer* at 30.
14. 337 F3d 697 (CA 6, 2003).