May 19, 2021

ADR Case Update 2021 - 10

Federal Circuit Courts

- **CBA DID NOT CLEARLY AND UNMISTAKABLY REQUIRE FMLA ARBITRATION**

  Cloutier v. GoJet Airlines
  2021 WL 1686493
  United States Court of Appeals, Seventh Circuit
  April 29, 2021

  After learning that he had Type II diabetes, Cloutier, a pilot with GoJet, took FMLA leave while waiting for FAA confirmation that he could resume flying. At the end of Cloutier's leave, GoJet terminated his employment. Cloutier and his Union initiated the grievance and arbitration process described in the parties' CBA, asserting that GoJet had violated Section 15-F of the CBA, which provided that the Company shall grant family and medical leave per applicable law. GoJet argued that the grievance had not been properly filed and it need not arbitrate. After the arbitrator ruled that the grievance had been properly filed, GoJet still refused to enter arbitration, and Cloutier brought his dispute to court. GoJet lodged several challenges throughout litigation, including a motion to dismiss the FMLA claims on the grounds that the CBA required the parties to arbitrate those claims. The court denied the motion. After a jury verdict in Cloutier's favor, the court awarded back and front pay and liquidated damages, denied Cloutier's motion to alter or amend the judgment, and denied GoJet's motion for judgment as a matter of law or a new trial. The parties filed cross appeals.

  The United States Court of Appeals for the Seventh Circuit affirmed in part, reversed in part, and remanded. Generally, arbitration decisions do not have a preclusive effect in later litigation based on anti-discrimination statutes. The Supreme Court crafted an exception to this rule, however, "where a clause in a collective bargaining agreement has explicitly mandated that 'employment-related discrimination claims […] would be resolved in arbitration'" and alternatively described the "explicitly stated" requirement as demanding a "clear and unmistakable" review. GoJet argued that read together, Sections 15, 24, and 25 of the CBA required any FMLA claims to be arbitrated. The Court disagreed, finding that the CBA was insufficiently "clear and unmistakable" to require Cloutier to bring his FMLA claims in arbitration. The Court also found that the questions of whether the pilot's failure to receive approval to return to work within the FMLA protected

period was attributable to GoJet and whether GoJet interfered with Cloutier's FMLA rights were for the jury; GoJet failed to provide Cloutier with sufficient notice of the FMLA requirement for prompt notice; Cloutier provided sufficient notice of his intent to take FMLA leave; the court did not abuse its discretion by basing calculation of back and front pay on minimums guaranteed under the CBA: and the court abused its discretion when calculating front pay damages.

- **NO MANIFEST DISREGARD OF THE LAW**

  Torres-Burgos v. Crowley Liner Service, Inc.
  2021 WL 1685901
  United States Court of Appeals, First Circuit
  April 29, 2021

  In 2015, Crowley Liner Service summarily dismissed Torres from his job on the grounds that he violated the CBA by "offering false information with the purpose of defrauding the Company or the customers of the Company." Torres challenged the dismissal through the Union by filing a complaint, asserting that he had not offered false information to defraud, and thus the dismissal violated the CBA and the Puerto Rico Wrongful Discharge Law. At the arbitration hearing, Torres's direct supervisor testified that Torres had lied to him about whether his work was up to date, assuring that it was though the supervisor discovered three days' worth of unprocessed documents in Torres's desk. Torres did not dispute his supervisor's testimony but claimed that he had been the victim of a conspiracy and denied that he hid the documents at issue. The arbitrator, finding that the supervisor's testimony was credible and Torres's was not, issued an award dismissing Torres's complaint and finding that the summary dismissal comported with the CBA.

  The United States Court of Appeals for the First Circuit affirmed, finding no merit to Torres's contention that the arbitrator's ruling was in manifest disregard of the law. The arbitrator quoted the relevant provision of the CBA in its entirety and reiterated the link to defrauding the Company before concluding the provision was satisfied because Torres lied to his supervisor. The evidence sufficed to support the arbitrator's finding that Torres had made an intentional misrepresentation about the state of his work.

California

- **PAGA PLAINTIFF NOT COMPLELLED TO ARBITRATE EMPLOYMENT STATUS**

  Rosales v. Uber
  2021 WL 1711585
  Court of Appeal, Second District, Division 8, California
  April 30, 2021

  Uber driver Rosales had a written agreement with the company providing that: she was an independent contractor, all disputes would be resolved by arbitration under the FAA, and the arbitrator would render decisions on the enforceability or validity of the arbitration provision. Rosales also agreed, to the extent permitted by law, not to bring a representative action on behalf of others under PAGA in any court or in arbitration and that any claim brought as a private attorney general would be resolved in arbitration on an individual basis only. When Rosales alleged wage violations under PAGA, Uber moved to compel arbitration. The court denied the motion, and Uber appealed, contending that Rosales could not bring a PAGA claim in court unless an arbitrator first decided whether she had standing to bring a PAGA claim.

  The Court of Appeal, Second District, Division 8, California affirmed. The threshold question of whether Rosales was an employee or independent contractor could not be delegated to the arbitrator. An employee suing under PAGA does so as the proxy or agent of the state's labor law enforcement agencies. Without the state's consent, a pre-dispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative

PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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