October 5, 2022

ADR Case Update 2022 - 18

Federal Circuit Courts

- **BAKERY DISTRIBUTOR NOT "TRANSPORTATION WORKER" EXEMPT FROM FAA**

  Bissonnette v Lepage Bakeries Park St., LLC
  United States Court of Appeals, Second Circuit
  2022 WL 4457998
  September 26, 2022

  Neal Bissonnette was an independent distributor for LePage Bakery, a subsidiary of Flower Foods. Under his Distribution Agreement, Bissonnette delivered baked goods from local warehouses to restaurants and stores in his assigned territory. He was responsible for sales, soliciting new locations, stocking shelves, and hiring his own workers. He was paid by his store and restaurant customers, earning approximately the difference between the sales price and the price he paid the warehouse for product. Bissonnette filed a putative class action against Flower Foods for labor violations, and Flower moved to compel arbitration under the Distribution Agreement. Bissonnette argued that he was a "transportation worker" exempt from arbitration under FAA § 1. The court ruled that he was not and granted Flower's motion to compel. On appeal, the United States Court of Appeals, Second Circuit, affirmed, holding that Bissonnette was not a "transportation worker." Following the United States Supreme Court's decision in *Southwest Airlines Co. v Saxon*, Bissonnette moved for rehearing, which was granted.

  The United States Court of Appeals, Second Circuit, again affirmed the lower court's holding that Bissonnette was not a "transportation worker" exempt under the FAA. Although the Supreme Court has held that the FAA's § 1 exemption applies to "transportation workers," neither the FAA nor the Supreme Court has defined that term. *Saxon* indicates that the definition should be located in the context of the worker's industry. *Saxon* clarified, for example, that "seamen" constitute "a subset of workers engaged in the maritime shipping industry." Likewise, a "transportation worker" works in the "transportation industry," which, the Court concluded, is an industry that "pegs its charges chiefly to the movement of goods or passengers" and in which "the industry's predominant source of commercial revenue is generated by that movement." Here, Bissonnette's customers were not buying "the movement of baked goods." Rather, the customers paid for the baked goods themselves, and the movement of those goods was "at most a component of total price." Bissonnette, therefore, did not work in the transportation industry for purposes of the FAA's § 1 exemption, and the court below properly compelled arbitration.

- **EX PARTE COMMUNICATIONS VIOLATED TERMINATED EMPLOYEE'S DUE PROCESS RIGHTS**

  Johnson v Department of the Air Force

United States Court of Appeals, Federal Circuit
2022 WL 4456279
September 26, 2022

In a random workplace drug test, Air Force firefighter Jacob Johnson tested positive for oxycodone and oxymorphone. Johnson told his supervisor that he had accidentally mixed up his morning pills with those of his mother, with whom he lived. Johnson's supervisor proposed termination to the deciding officer, Lieutenant Colonel Fletcher, who fired Johnson, explaining that he could not risk the possibility of Johnson "coming to work again under the influence of illicit drugs." Johnson filed a grievance challenging the decision. In the resulting arbitration, Fletcher stated that he had fired Johnson, in "major part," because he didn't believe Johnson's story. Fletcher stated that he had discussed the case with his wife and brother-in-law, both nursing professionals, who told him the chances of such a mix-up were "slim to none." The arbitrator affirmed Johnson's termination, stating that Johnson's explanation was too "fantastic" to be credible. Johnson appealed.

The United States Court of Appeals, Federal Circuit reversed and remanded, holding that Johnson's due process rights were violated by Fletcher's *ex parte* communications. While not every *ex parte* communication is impermissible, due process analysis considers 1) whether the information communicated was "cumulative" or "new"; 2) whether the affected employee knew of the error and had a chance to respond; and 3) whether the communication was "of the type likely to result in undue pressure upon the deciding official to rule in a particular manner." Here, Fletcher's wife and brother-in-law did not simply "confirm" Johnson's existing thinking; they offered their own new opinions on the evidence. The standard for procedural due process is not harmless error, and it was irrelevant that Fletcher claimed the discussions did not change his understanding of the case. Johnson had no meaningful chance to respond to the new information, as he first learned about it at the hearing. Fletcher made clear that his disbelief of Johnson's explanation was central to his decision, and he spoke with his wife and brother-in-law because he valued their opinions – describing his wife as his "number one advisor" – and medical experience. It is "constitutionally impermissible" for a deciding official to receive information "that may undermine the objectivity required to protect the fairness of the process," and, once Fletcher received such information, "he had to at least afford Mr. Johnson a chance to respond." The Court directed the arbitrator to determine the proper remedy, noting that "where a serious procedural curtailment mars an adverse personnel action which deprives the employee of pay," it is usual to reinstate the employee until "proper procedural steps are taken toward removing or disciplining him."

- **DEFENDANT'S RIGHT TO INVOKE ARBITRATION REVIVED WHEN AMENDED COMPLAINT ALTERED SCOPE OF LIABILITY**

Solis v Experian Information Solutions, Inc.
United States District Court, C.D. California, Southern Division
2022 WL 4376077
September 21, 2022

David Cantong and other plaintiffs filed individual FCRA claims against Experian. Litigation proceeded, including removal to the Central District of California and, approximately three years into the case, Cantong – now the sole remaining plaintiff – amended his complaint to include class allegations against Experian. Experian moved to compel arbitration under the arbitration agreement in its Terms of Use. Cantong opposed, arguing that his claims fell outside the scope of the arbitration agreement, and Experian had waived its right to compel arbitration by engaging in the previous three years of litigation.

The United States District Court, C.D. California, Southern Division granted Experian's motion to compel arbitration. Cantong's scope claim was for the arbitrator to decide, as the Terms of Use "clearly and unmistakably" delegated arbitrability to the arbitrator, stating that "all issues" were for the arbitrator to decide, "including the scope and enforceability of this arbitration provision." The delegation provision did not, however, delegate waiver issues to the arbitrator. Under prior case law, even broad language giving an arbitrator authority to resolve "all issues" or "any controversy" relating to an agreement is insufficient to overcome the presumption that the court, rather than the arbitrator, must decide waiver issues. Here, the Court declined to determine whether Experian's previous actions waived its right to invoke arbitration, as it found that Cantong's

amended complaint revived that right. Although an amended complaint does not "automatically" revive waived defenses or objections, waiver may be rescinded if an amended complaint "unexpectedly changes the scope or theory of the plaintiff's claims." Cantong's original complaint set forth only individual claims, while his amended complaint added class allegations. This "alteration in the scope of potential liability" was sufficient to justify the revival of Experian's right to arbitration. Experian had "made it clear" when Cantong sought to amend that Experian would invoke its right to arbitration, and, when Cantong filed his amended complaint, Experian "did not dillydally" in doing so. Accordingly, even if Experian had waived its right to compel arbitration, "its right was subsequently revived."

California

- **DECISION ABOUT CONTENT OF COURSES AND CURRICULUM NOT AN ARBITRABLE ISSUE**

  Los Angeles College Faculty Guild Local 1521 v Los Angeles Community College District
  Court of Appeal, Second District, Division 8, California
  2022 WL 4363578
  September 21, 2022

  After California passed legislation to prevent community colleges from requiring extensive remedial coursework, the Los Angeles Community College District canceled all remedial courses more than one level below transfer level. The Faculty Guild filed grievances and, when the grievances were denied, submitted them to arbitration. The District refused to arbitrate, and the Guild filed a motion to compel arbitration, which the court denied. In the absence of a delegation clause, the court concluded that arbitrability was for the court to decide and held that the Guild's claims were outside the scope of representation. The Guild appealed.

  The Court of Appeal, Second District, Division 8, California, affirmed. Arbitrability was properly decided by the court in the absence of "clear and unmistakable evidence" that the parties had agreed to arbitrate arbitrability. The CBA contained no delegation clause, and Ninth Circuit case law specifically rejects the proposition that a broad arbitration clause, on its own, is sufficient to delegate arbitrability to the arbitrator. The court below properly found that the Guild's claims fell outside the scope of representation. Recognizing the intersection between public school employment issues and "educational goals affecting society as a whole," the Educational Employment Relations Act (EERA) limits public school employee representation to wages, hours, and other "terms and conditions of employment" such as benefits, safety, and working conditions. The EERA explicitly distinguishes decisions about educational objectives, determination of course content and curriculum, and textbook selection as "exclusively managerial prerogatives" outside the scope of representation. Here, the decision to cancel remedial classes constituted a decision about course content and curriculum and therefore was a non-arbitrable managerial decision outside the scope of representation.

District of Columbia

- **AGENCY APPROVAL OF ARBITRATION AWARD FAILED TO PROVIDE SUFFICIENT EXPLANATION TO ALLOW FOR MEANINGFUL JUDICIAL REVIEW**

  District of Columbia Metropolitan Police Department v District of Columbia Public Employee Relations Board
  District of Columbia Court of Appeals
  2022 WL 4241972
  September 15, 2022

  While off duty one morning in Maryland, D.C., police officer Michael Thomas twice shot an unarmed civilian whom he believed was acting suspiciously near Thomas's car. Thomas failed to follow police protocol, which requires an officer outside jurisdiction to call 911 before taking any

police action in response to a non-violent property crime. Thomas was not prosecuted for the shooting, but the D.C. Metropolitan Police Department (MPD) sought to terminate Thomas for 1) creating a substantial risk of death or serious injury, and 2) violating the MPD's use-of-force policy. An MPD adverse-action panel found Thomas guilty of both charges and determined that his actions warranted termination. Thomas appealed to the chief of police, who accepted the termination recommendation. Thomas's union, the Fraternal Order of Police (FOP), intervened and took the matter to arbitration. The arbitrator found Thomas guilty of both charges but held that termination was not "within tolerable limits of reasonableness" and instead imposed a 45-day suspension. The MPD challenged the decision before the Public Employee Relations Board (PERB), arguing that it was "contrary to law and public policy" to reinstate an officer who had committed a crime of deadly force. PERB upheld the arbitrator's decision, noting its limited authority to overturn arbitral awards. PERB held that the arbitrator was not required to defer to the MPD but could "permissibly reach his own decision about the appropriate sanction" and that the MPD had not identified a clear violation of public policy. The D.C. Superior Court affirmed the award, and the MPD appealed.

The District of Columbia Court of Appeals vacated and remanded. The standard for reviewing a PERB decision is not "unusually deferential" but requires a court to defer to PERB's "reasonable interpretation of what it means for an arbitral award to be on its face contrary to law and public policy." An agency decision, however, must state the basis of its ruling in "sufficient detail and be fully and clearly explained" to allow for meaningful judicial review. Here, PERB's decision stated only that "mere disagreement with the Arbitrator's interpretation does not make an award contrary to law and public policy." The Court rejected arguments by FOP and PERB that the court lacked power to overturn an arbitral award no matter how egregious the officer's violation. In "sufficiently extreme circumstances," an award could be "so arbitrary and capricious as to be on its face contrary to law." Because PERB failed to "adequately explain" its decision that the award was not contrary to law or violative of public policy, the Court remanded the case for further proceedings.

Texas

- **COURT STATUTORILY REQUIRED TO DECIDE VALIDITY AND ENFORCEMENT ISSUES BEFORE ORDERING DIVORCE CASE TO ARBITRATION**

  In re Mariam Ayad
  Supreme Court of Texas
  2022 WL 4393012
  September 23, 2022

  Salma Mariam Ayad sued her husband, Ayad Hashim Latif, for divorce and to be appointed joint managing conservator of their six-year-old son. Latif countersued and moved to compel arbitration under an Islamic Pre-Nuptial Agreement (Prenup) signed by both parties. Ayad claimed that she had no knowledge of the Agreement, alleging that, before getting married, she had signed what she believed to be two copies of a Marriage Contract and that the Prenup must have been fraudulently substituted for the second copy. Ayad additionally argued that the Prenup's requirement of arbitration under "Islamic Law" was too indefinite and that the Prenup violated public policy and was unconscionable. In the hearing, the court allowed an imam to give expert testimony on Latif's behalf regarding the ambiguity of the term "Islamic law" but did not allow Ayad to testify on the issue. The court ordered the parties to arbitration. On Ayad's motion to vacate or reconsider, the court granted each party twenty minutes to address whether the Prenup was entered into voluntarily but concluded that, under the Texas Arbitration Act, it held "no discretion" to rule on enforcement issues. The court stated that, following arbitration, it would have authority under Texas Rule of Civil Procedure Rule 308b to review an arbitration award based on foreign law for violation of constitutional rights or public policy and that, acting under Family Code § 153.0071, it would hold a post-arbitration hearing to determine whether the award was in the best interests of the child. The court denied Ayad's request for mandamus relief, and Ayad appealed.

  The Supreme Court of Texas conditionally granted mandamus relief. Although enforcement issues are generally decided by the arbitrator, Family Code §§ 6.6015 and 153.00715 expressly

provide that a court may order arbitration of cases for dissolution of marriage or affecting parent-child relationships “only if” the court has determined that the contract containing the arbitration agreement is valid and enforceable. These provisions were “expressly designed” to avoid subjecting divorcing parties to arbitration under an invalid or unenforceable contract. To comply with these provisions, a trial court must 1) “try the issue,” allowing each party “to be heard on all validity or enforceability challenges” and to “offer evidence concerning any factual disputes or questions of foreign law”; and 2) decide all validity and enforceability challenges before ordering arbitration. Here, the trial court recognized the relevance of Family Code § 153.0071 and Civil Procedure Rule 308b but abused its discretion in limiting that relevance to post-arbitration. The Court directed the lower court to withdraw its arbitration order and conduct further proceedings in accordance with statutory requirements.

Case research and summaries by Deirdre McCarthy Gallagher and Rene Todd Maddox.

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