May 13, 2020

ADR Case Update 2020 - 9

Federal Circuit Courts

- **CBA CLEARLY AND UNMISTAKABLY WAIVED RIGHT TO VINDICATE STATUTORY ANTI-DISCRIMINATION RIGHTS IN COURT**

  Darrington v. Milton Hershey School
  2020 WL 2177584
  United States Court of Appeals, Third Circuit
  May 6, 2020

  Brad and Val Darrington were house parents at the Milton Hershey School and members of the Union. The arbitration provision in the CBA covered any dispute arising out of its terms and conditions; a grievance included any dispute alleging discrimination against any Union members based upon membership in any protected categories. The Union, on behalf of itself and its members, waived any right to institute a private lawsuit alleging employment discrimination regarding matters encompassed within the grievance procedure. The Darringtons sued MHS, alleging discrimination and retaliation in violation of Title VII and the PA Human Relations Act. The court denied the motion of MHS to compel arbitration, finding that the CBA did not clearly and unmistakably waive the Darrington's right to bring their statutory claims in federal court. MHS appealed.

  The United States Court of Appeals for the Third Circuit reversed. A federal statutory dispute falls within the scope of a CBA's arbitration provision when the arbitration provision clearly and unmistakably waives the employee's right to vindicate his or her federal statutory right in court and the federal statute does not exclude arbitration as the appropriate forum. Title VII claims are arbitrable. The Court found no reason to review the waiver of a judicial forum for state statutory claims under a standard different from that for the waiver of a judicial forum for federal statutory claims. Here, the CBA arbitration provision waived the Darringtons' right to sue in state or federal court for disputes alleging discrimination based on membership in categories protected by federal

law, state law, or Section 10.1 of the CBA. This clearly or unmistakably included within its scope the Darrington's claims under Title VII and the PHRA.

New York

- **FUNCTUS OFFICIO DOCTRINE DID NOT APPLY**

  American International Specialty Lines Insurance Co. v. Allied Capital Corp
  2020 NY Slip Op 02529
  State of New York Court of Appeals
  April 30, 2020

  After settling with the federal government to resolve a federal qui tam action, Ciena Capital and Allied Capital (the insureds) sought payment of their defense costs for the federal action and indemnification for the resultant settlement under two insurance policies issued by AISLIC. AISLIC denied coverage and the insureds demanded arbitration. The arbitration panel issued a Partial Final Award, concluding that Allied was not entitled to indemnification but was entitled to defense costs, which would be resolved after a separate evidentiary hearing. The insureds moved for reconsideration of the Partial Final Award, which the panel granted. The arbitration panel reversed the first award and found for the insured on the issue of liability under the insurance policy. The panel then held an evidentiary hearing to determine defense costs and issued a Final Award. AISLIC sought vacatur of the Corrected Partial Final Award and the Final Award, asserting that the doctrine of functus officio precluded the panel from reconsidering the Partial Final Award. The Supreme Court confirmed the Final Award. The Appellate Division then reversed the court's order, granted the petition, vacated the Corrected Partial Final Award and the Final Award, and confirmed the Partial Final Award, holding that under the functus officio doctrine, it was improper and in excess of the panel's authority to reconsider the Partial Final Award. The Appellate Division then certified the question to the New York Court of Appeals: "Was the Appellate Division correct in reversing the confirmation of the Final Award?"

  In a unanimous decision, the State of New York Court of Appeals reversed the Appellate Division and reinstated the Supreme Court's confirmation of the Final Award. Functus officio has operated historically as a restriction on the authority of arbitrators, precluding them from taking additional actions after issuing a final award. Federal courts have consistently recognized that partial arbitration determinations may be treated as final awards where the parties expressly agree both that certain issues submitted to the arbitrators should be decided in separate partial awards and that such awards will be considered to be final. The Court had not yet determined whether or under what circumstances parties may agree to the issuance of a final award that disposes of some, but not all, of the issues submitted to the arbitrators; they did not resolve that question here. Even assuming that parties to an arbitration may agree to the issuance of a partial determination that constitutes a final award, the parties here did not reach such an agreement. Absent an express mutual agreement between the parties to the issuance of a partial and final award, the functus officio doctrine had no application to this case.

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

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