Case Notes and Case Reviews

BETTER TO HAVE TRIED AND FAILED THAN NEVER TO HAVE TRIED MEDIATION AT ALL: IMPLICATIONS OF MANDATORY MEDIATION IN *FISHER V. GE MEDICAL SYSTEMS*[1]

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INTRODUCTION

The role of ADR in the employer-employee relationship has been well established these days, having been incorporated in federal laws, programs and private contractual arrangements such as an employment handbook. Employers, employment lawyers and human resource managers are well aware that mandatory ADR has served as a quite useful productive alternative to costly and delayed litigation in various employment disputes. In late 2003, the United States District Court for the Middle District of Tennessee, however, had to resolve an issue not definitively addressed yet in the ADR revolution: whether or not mandatory mediation clauses in employment handbooks constitute "arbitration" under the Federal Arbitration Act? To those well-versed in ADR principles, arbitration and mediation are very different forms of alternatives to litigation. Employers and employees find value in both alternatives, but since mediation is non-binding must either the employee attempt first to mediate a case (as an employment handbook might require) before either can pursue legal action in the courtroom? This Court held in the affirmative and reasoned that "mediation" is a valid form of "arbitration" under the FAA.

THE FACTS

On April 7, 2003, plaintiffs Mark Fisher and Chuck Floyd filed a Collective Action Complaint against their employer GE Medical Systems in accordance with the Fair Labor Standards Act (FLSA) of 1938. A frequent claim in employment relationships, the plaintiffs alleged that their employer failed to provide proper compensation and overtime wages in accordance with federal law. During the pre-trial phase, GE filed a Motion to Dismiss and Petition to Compel Arbitration and Mediation of the claims. GE's motion was granted.

Mark Fisher worked for defendant GE from January of 1998 until March 2002. Though Mr. Fisher disputed that he ever personally received a copy of GE's employment handbook called the RESOLVE Program, he did acknowledge that he was aware of the

[1] *Fisher v. GE Medical Systems*, 2003 WL 21939479 (M.D. Tenn.)

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handbook's existence and discussed it with other employees at GE. Additionally, a former Human Resources Manager for GE stated that copies of the RESOLVE Program were mailed to all GE employees the first week of July 1998.

RESOLVE was a "written agreement for the resolution of employment issues, pursuant to the Federal Arbitration Act" and if an employee was hired before the RESOLVE program was instituted and subsequently continued their employment after the institution of the program, the handbook stated that they therefore agreed "as a condition of employment" to follow the dispute resolution procedure before pursuing a claim in court. The program consisted of four incremental levels of resolution with Level III being mediation. If the parties could not settle their disputes through this process, employees could then take their claim to court.

RESOLVE on its face seemed quite fair. The Program stated that Levels I and II would be in-house attempts to resolve a dispute. If unsuccessful, the Level III mediation would provide an outside mediator to "open lines of communication in an attempt to facilitate resolution". It also provided that its purpose was to find a "common ground for the voluntary settlement of covered claims." Additionally, the parties could still be represented by counsel and GE would pay for all the costs and fees associated with the mediation other than expert and attorney fees and any witness costs, if at all.

THE ANALYSIS

This Court was called upon to decide whether Fisher's FLSA claim should be stayed and the RESOLVE mediation requirement must be complied with first. The Court first examined the FAA which provides that where this is a written contract "to settle by arbitration a controversy thereafter arising out of such contract…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The plaintiffs argued that the term "arbitration" under the FAA does not mean "mediation." The defendants argued otherwise, and the look looked to the Supreme Court and the Sixth Circuit Court of Appeals for guidance.

The Court noted in its dicta that federal courts encouraged informal, non-judicial resolution of labor disputes. Included in this process is the arbitration process, but the court noted that it is the broader goal of providing the opportunity for other methods of a "conclusive resolution." Citing persuasive authority, the Court found special significance in C.B. Richard Ellis, Inc. v. American Env'tal Waste Management, No. 98-CV-4183(JG), 1998 WL 903495, at *2 (E.D.N.Y.1998) (sic) where a New York district court reasoned that the structure of the FAA portrays arbitration as a process to settle a controversy and that a mediation clause fit within the FAA's definition of arbitration. As such, the GE Court opined that it believed that "arbitration" is a broad term that encompasses many forms of dispute resolution and meditation "surely falls" under that preference. The Court held that the claim had to be mediated first before it could proceed in court.

The Court expressly stated that programs such as RESOLVE should be encouraged. Troublesome to the Court, however, was the plaintiffs' additional assertion that mediation would not be appropriate for hearing FLSA claims because employees would have to waive "nonwaivable" statutory rights. In a strong tone, the Court noted that RESOLVE did not force an employee to waive any rights whatsoever and that access to the court system was not terminated-it was merely delayed. The Court emphasized that the Sixth Circuit itself even previously ruled that FLSA claims could be arbitrated, citing itself in Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 313-314 (6th Cir.2000) and the Supreme Court in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Court even went further and provided numerous examples of federal courts that have approved of mediated settlements and even ordered a mediation to take place. In one short paragraph, the District Court stated that mediation is proper under the FAA and that the agreement to mediate [in the handbook] was also valid under the FAA and the FLSA.

UNILATERAL IMPOSITION

An additional argument made by the plaintiffs was that the RESOLVE program was not binding in that it was unilaterally imposed on them and lacking their consent and consideration. Unfortunately, the plaintiffs' argument was again shot down by the Court with numerous cases in Tennessee that established that an employee handbook may become part of an employee's contract of employment provided that both parties are bound by the rules, regulations and procedures. The Court also noted that by continuing their employment there, the employees accepted the terms of the agreement.[3] Even though Mr. Fisher stated that he did not recall receiving it, he did state in an affidavit that he discussed the RESOLVE program with other employees.

IMPLICATIONS

While reasonable minds might differ as to whether mediation should be included under the FAA's support of arbitration, it is apparent that several courts in different jurisdictions have interpreted arbitration and mediation synonymously-to degree-in circumstances involving the FLSA. One wonders why arbitration is not defined under the FAA, but maybe the time has come to amend the FAA to include mediation. Clearly, though, the tone of this decision was highly favorable to mediation even it if was unsuccessful. In other words, give mediation a chance first!

A well-written and carefully prepared employment handbook benefits and protects both the employer and the employee and promotes a feeling of equity within an organization rather than inequity. Handbooks give both employer and employee written rights and though non-binding, mediation could lead to more settlements outside of formal legal system. Effectively utilizing arbitration and mediation in an organization might even encourage teamwork, fairness and trust rather than a distrustful relationship in the generally at-will nature of many employment relationships. At the very least, it should give employers and employees a chance to discuss corporate policies. Finally, to

[3] Also mention that continued employment may be adequate consideration for other employment agreements that restrict employees' rights or even compensation.

avoid questions of receipt and consideration, employees should receive written notification of changes and updates to the employment handbook and should acknowledge their receipt of the changes in writing.