The Status of Mandatory Arbitration of Workplace Disputes in N.J.

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For Discussion Only

You have asked me to discuss the enforceability of arbitration of employee disputes as a condition of at will employment in light of *Sandvik v. Martindale.*

As you know, the New Jersey Supreme Court has ruled that employees that knowingly sign job applications that contain mandatory arbitration provisions waive their right to sue their employers in a court of law. Instead, they must vindicate their rights in a private hearing before an arbitrator acting as the judge and jury. However, the decision leaves many important issues open for further clarification.

The case arose in 1994, when Maureen Martindale applied for a job as a benefits manager at Sandvik, Inc., a Swedish company. She signed a job application which stated that she agreed to waive any right to a jury trial and also agreed to submit all legal disputes to an arbitrator for resolution. The application also advised Martindale that she had a right to consult with anyone, including an attorney, before signing the application. During the job interview, Martindale had an opportunity to ask questions about the application but asked only about the job. Martindale was hired but two years later her job was eliminated while she was on pregnancy leave. After she filed a wrongful discharge suit, the trial court granted Sandvik's motion to dismiss the suit and compel the parties to arbitrate. In a close 4-3 split, the slim majority of the State's highest court agreed.

The primary issues decided by the Court were 1) whether the agreement to arbitrate was supported by "consideration," and 2) whether Martindale knowingly entered into the agreement.

With regard to the first issue of whether the agreement to arbitrate was supported by consideration, the majority opinion cited decisions in other jurisdictions that have held that

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considering an applicant for employment or offering employment was sufficient consideration to uphold an arbitration provision contained in an employment application. The Court went on to state that the arbitration provision contained in Sandvik's job application signed by Martindale "was supported by consideration in the form of [the company's] willingness to consider employment of [Martindale]." In other words, it appears that the mere consideration for a job would support an agreement to arbitrate, although in this case Martindale was actually hired.

With regard to the second issue of whether Martindale knowingly entered into the agreement to arbitrate, the majority opinion focused, in part, on whether Martindale had been given an opportunity to ask questions about the arbitration provision and to seek the advice of others, including an attorney. According to the Court, Sandvik gave Martindale an opportunity to ask questions about the application and to take it with her for further review or to consult with family, friends or an attorney. Having the opportunity to discuss the arbitration provision, and presumably to revise or modify it, the Court noted that "nothing in the record indicates that [Martindale] asked to alter any terms of the application or that [Sandvik] would have refused to consider her for the position if she did not assent to the arbitration provision as presented."

The Court also explained that Martindale was an educated businesswoman experienced in the field of human resources who was given "ample time and opportunity to review the application." As a result, the Court concluded that she understood the application before she signed it.

It is unclear whether an employer can offer a job conditioned on mandatory arbitration on a "take-it-or-leave-it" basis. The Court specifically held that such was not the case here, since Martindale was given the opportunity to ask questions and consult with others.

There is significant disagreement over whether an employee can be compelled to arbitrate statutory claims without their consent. The Equal Employment Opportunity Commission (EEOC) takes the position that an employee cannot be compelled, as a condition of employment, to arbitrate statutory claims. The Ninth Circuit Court of Appeals has adopted that position as well. The Civil Rights Act of 1991 merely states that arbitration agreements are enforceable "where appropriate and to the extent authorized by law." The U.S. Supreme Court has not interpreted the meaning of that provision. However, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that an employee's age discrimination claim was subject to a compulsory arbitration agreement contained in an employment contract.

Further, the N.J. Court did not address other issues, such as whether the employee can be required to share the costs of arbitration and whether an arbitrator can award punitive damages, attorneys' fees and other relief similar to a judge or jury.

While mandatory arbitration is still widely favored by courts, many arbitration clauses are being challenged on the ground that employees did not "knowingly" waive their right to sue. Arbitration clauses should be broadly written to include all claims arising out of the employer-

employee relationship. Specific federal and state statutes should be mentioned and the employee should acknowledge that he/she is knowingly agreeing to waive the right to sue in favor of arbitration. Mandatory arbitration most likely can be imposed as a condition of employment if these standards are met. If the employee does not agree, the employer is most likely free to withdraw the offer of employment.