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Employment Law - Duffield v. Robertson Stephens & Co.

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EMPLOYMENT LAW

DUFFIELD v. ROBERTSON STEPHENS & CO.

144 F.3d 1182 (9th Cir. 1998)

I. INTRODUCTION

In *Duffield v. Robertson Stephens & Company*,¹ the United States Court of Appeals for the Ninth Circuit held that the Civil Rights Act of 1991 prohibited an employer from requiring, as a condition of employment, that prospective or current employees agree in advance to arbitrate Title VII claims arising out of the employment relationship. Relying on the purposes and legislative history of the 1991 Act, the Ninth Circuit became the only circuit to find that the Act barred these mandatory arbitration agreements.

II. FACTS AND PROCEDURAL HISTORY

Pursuant to national securities exchanges regulations requiring employees to agree in advance to arbitrate all employment-related disputes,² Tonyja Duffield, a securities broker,

1. See 144 F.3d 1182 (9th Cir. 1998), cert denied, 119 S. Ct. 445 (1998), and cert denied, 119 S. Ct. 465 (1998). The appeal from the United States District Court for the Northern District of California was argued and submitted on March 9, 1998 before Circuit Judges William C. Canby and Stephen Reinhardt, and Judge Jane A. Restani, United States Court of International Trade, sitting by designation. The decision was filed on May 8, 1998. Judge Reinhardt authored the opinion.

2. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1186 (9th Cir. 1998). Both the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) have rules that compel employees to arbitrate any employment-related dispute at the request of their employers. The NASD has since eliminated its mandatory arbitration requirement with regard to employment discrimination claims, accordingly, only the relevant portion of the NYSE rule is reproduced here.

NYSE Rule 347 provides:

Any controversy between a registered representative and any member or member organization arising out of the employment or termination of em-

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signed a form waiving her right to a judicial forum to resolve disputes arising in the course of her employment with Robertson Stephens & Co.³ Despite the agreement to arbitrate, Duffield sued her employer in federal court, alleging sex discrimination and sexual harassment in violation of Title VII as amended by the Civil Rights Act of 1991, and California's Fair Employment and Housing Act.⁴

As a threshold matter, Duffield sought a declaratory judgment that securities industry employees could not be compelled to arbitrate claims of discrimination on the grounds that the Civil Rights Act of 1991 precludes compulsory arbitration of Title VII claims.⁵ The United States District Court for the Northern District of California denied Duffield's request for declaratory relief and granted Robertson Stephens' motion to compel arbitration.⁶ The Ninth Circuit reversed,⁷ holding that the arbitration provision contained in the U-4 form signed by Duffield as a condition of employment was unenforceable with respect to Duffield's Title VII and Fair Employment and Housing Act (FEHA) claims.⁸

ployment of such registered representative by and with such member or member organization shall be settled by arbitration at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

Id. The NYSE has proposed a change that will exclude employment discrimination claims from the scope of cases to be arbitrated under the form U-4. The Securities and Exchange Commission has yet to approve the change, but because the SEC approved the NASD change (see above) they are likely to approve the NYSE change as well. See Notice of Filing of Proposed Rule Changes to the New York Stock Exchange, Inc., Relating to Arbitration Rules, 63 Fed. Reg. 52,782 (1998).

3. See *Duffield*, 144 F.3d at 1186.

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.* at 1203. In addition to her Title VII claims, Duffield alleged state law breach of contract, deceit and infliction of emotional distress. The district court's holding that Duffield's contract and tort claims were arbitrable was not disturbed on appeal. See *id.* at 1185.

8. See *Duffield*, 144 F.3d at 1203. The court observed that since "[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme, FEHA claims are arbitrable to the same extent as Title VII claims." *Id.* at 1187, n.3. This is contrary to California state cases finding that claims under the California Fair Employment and Housing Act are not arbitrable. See *Armendariz v. Foundation Health Psychcare Services, Inc.*, 68 Cal. App. 4th 374 (1998) (listing California cases holding that FEHA claims are arbitrable.)

III. THE COURT'S ANALYSIS

Prior to 1991, there was general agreement among the circuits that arbitration of Title VII claims could not be compelled.⁹ The basis for this agreement was the United States Supreme Court's unanimous holding in *Alexander v. Gardner-Denver Co.*¹⁰ The Court held that an arbitration clause contained in a collective bargaining agreement did not preclude an employee from bringing a Title VII claim in court.¹¹ "The purpose and procedures of Title VII," the court explained, "indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal."¹²

In 1991, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*,¹³ which held that the Federal Arbitration Act (FAA) required the enforcement of a mandatory arbitration clause contained in the Form U-4.¹⁴ *Gilmer* involved a claim of age discrimination brought under the Age Discrimination in Employment Act (ADEA).¹⁵ The Court held that agreements to arbitrate statutory claims should be enforced unless the plaintiff could show congressional intent to

9. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir. 1998).

10. See *id.* at 1188. See also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

11. See *Duffield*, 144 F.3d at 1188.

12. *Id.*

13. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

14. See *Gilmer*, 500 U.S. at 26. The Uniform Application for Securities Industry Registration or Transfer, or U-4, is a standardized registration form generally required of all employees in the securities industry. By signing the U-4, an employee agrees to abide by the rules of the securities organizations of which their employer is a member. Paragraph 5 of the Form U-4 provides in relevant part as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register...." *Duffield*, 144 F.3d at 1186.

15. See *Duffield*, 144 F.3d at 1188. After the Supreme Court granted certiorari in *Gilmer*, Congress amended the ADEA to provide that all waivers of rights under the Act, including a jury trial, must be "knowing and voluntary." See *id.* at 1190, n. 5. See also Older Workers Protection Act of 1990, 29 U.S.C. § 626(f)(1)(C). The Supreme Court did not consider this new statutory language in *Gilmer*, therefore, current ADEA claims may require a determination as to whether an agreement to submit to arbitration was "knowing and voluntary." See *Duffield*, 144 F.3d at 1190, n. 5. Having found the U-4 unenforceable as to *Duffield's* Title VII claims, the Ninth Circuit did not reach the question of whether *Duffield's* waiver was in fact "knowing and voluntary." See *id.* at 1190 n. 7.

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preclude arbitration.¹⁶ Since the Court found no conflict between the arbitration agreement in *Gilmer* and the ADEA's underlying purposes, the Court upheld the enforceability of the Form U-4 in that circumstance.¹⁷ To determine intent, courts were directed to look to a statute's text and legislative history to ascertain whether there was a conflict between arbitration and the statute's goals.¹⁸

Almost simultaneously with the *Gilmer* decision, Congress passed the Civil Rights Act of 1991.¹⁹ Section 118 of the Act provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including, ... arbitration is encouraged to resolve disputes arising under [Title VII]."²⁰ Citing to the plain language of section 118, Robertson Stephens' urged that this language demonstrated a Congressional intent to encourage compulsory arbitration, and specifically, that the language "to the extent authorized by law" demonstrated a congressional desire to codify *Gilmer*. Thus, according to Robertson Stephens' interpretation, compulsory arbitration was properly among the "alternative means of dispute resolution" authorized by section 118.²¹

After thoroughly examining the legislative history of the 1991 amendments to the Civil Rights Act, the Ninth Circuit flatly rejected Robertson Stephens' argument.²² The broad purpose of the 1991 amendments, the court stated, was to expand employee rights and to broaden remedies available to civil rights plaintiffs.²³ Given this purpose, it would be "paradoxical" to conclude that the language in section 118 was meant to encourage a process by which employees are forced,

16. See *Duffield*, 144 F.3d at 1189.

17. See *id.*

18. See *id.* at 1190. See also *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). See *Duffield*, 144 F.3d at 1190.

19. See *Duffield*, 144 F.3d at 1189.

20. *Id.*

21. See *id.* at 1191.

22. See *id.* at 1190.

23. See *Duffield*, 144 F.3d at 1192.

as a condition of employment, to surrender their rights to a judicial forum in exchange for compelled arbitration.²⁴ The court considered it far more plausible that the section 118 language was meant to encourage voluntary agreements to arbitrate.²⁵ Robertson Stephens urged unsuccessfully that the language “where appropriate and to the extent authorized by law” was intended to codify the *Gilmer* decision. Though the 1991 Civil Rights Act was passed after *Gilmer*, the Ninth Circuit noted that section 118 was drafted long before the *Gilmer* decision, and if anything, was meant to codify the law as expressed in *Alexander*.²⁶ Even though the section 118 language could be interpreted as ambiguous, the court held that any doubt on this point could be resolved by even a cursory glance at section 118’s legislative history. In the court’s view, the statute’s history confirmed that Congress in no way intended to incorporate *Gilmer* into Title VII, or to authorize compulsory arbitration of Title VII claims.²⁷ Because the language “to the extent authorized by law” was intended to refer to the law as it existed when section 118 was drafted, the arbitration of Title VII claims could not be compelled.²⁸

IV. IMPLICATIONS OF DECISION

The controversy over mandatory arbitration has grown as the number of employers requiring employees to agree to mandatory arbitration has increased.²⁹ The Ninth Circuit appears to be a lone voice in holding that the 1991 amendments to the Civil Rights Act bar mandatory arbitration of rights provided by that Act. Though few appellate courts have dealt with the precise issue of whether the 1991 Civil Rights Act demon-

24. *See id.* at 1193.

25. *See id.* The court goes on to say that it is “at least a mild paradox” to interpret section 118 as encouraging compulsory arbitration, when the section’s other “encouraged” types of alternative dispute resolution—“settlement negotiations, conciliation, facilitation, factfinding [and] minitrials”—are all consensual. *Id.* at 1193, n. 13.

26. *See Duffield*, 144 F.3d at 1195.

27. *See id.*

28. *See id.*

29. *See generally* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMPLOYMENT POLY J. 189 (1997); Robert N. Covington, *Employment Arbitration after Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMPLOYMENT L.J. 345 (1998).

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strates congressional intent to ban pre-dispute agreements to arbitrate employment discrimination claims, many appellate courts have held that *Gilmer* applies to Title VII claims and that pre-dispute agreements to arbitrate Title VII claims are permissible.³⁰ Critics of the use of arbitration in employment discrimination disputes argue that arbitrators are not neutral, or are untrained, that reduced availability of discovery in arbitration favors employers, and that arbitration may limit certain remedies, especially punitive damages.³¹ Indeed, several courts declining to compel arbitration of civil rights claims have done so on the basis of bias or procedural unfairness of a particular arbitration system, rather than any perceived tension between the goals of Title VII and arbitration itself.³²

The Supreme Court has yet to consider whether the 1991 amendments to the Civil Rights Act preclude mandatory, pre-dispute arbitration in the individual employment context. Until then, debate over whether or not Congress intended to encourage or preclude mandatory arbitration when it drafted section 118 will likely continue.

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30. See e.g., *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179, 182-83 (3rd Cir. 1998) (interpreting Section 118's reference to "the extent authorized by law" as referring to the Federal Arbitration Act, not to case law as it stood at the time Congress drafted the 1991 Civil Rights Act, and that there is no inherent conflict between the goals of Title VII and the Federal Arbitration Act); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 98-1246, 1999 WL 80964 at *22 (1st Cir.(Mass.) 1999) (holding that neither the language of section 118 nor the legislative history demonstrates an intent to preclude pre-dispute arbitration agreements.); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); and *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998).

31. See *Developments in the Law- Employment Discrimination Mandatory Arbitration of Statutory Employment Disputes*, 109 HARV. L. REV. 1670, 1674-75, 1680-82 (1996).

32. See generally, Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got To Do With It?*, 53 NOV. DISP. RESOL. J. 40 (1998).

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