No. 19-0459

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

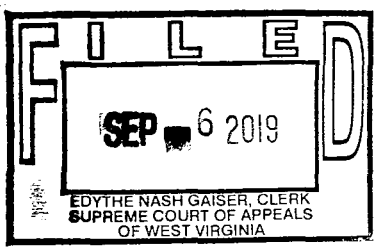
AC&S INC.,

Appellant,

v.

JEFFERY R. GEORGE.

Appellee



From the Circuit Court of
Putnam County, West Virginia
Civil Action No. 17-C-196

PETITIONER'S BRIEF

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Dated September 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Statutes:

I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred by finding that the Collective Bargaining Agreement ("CBA") needed to clearly and unmistakably waive an employee's right to a judicial forum for employment discrimination claims in order for the CBA's arbitration clause to be enforceable. An arbitration clause cannot be invalidated based upon a reason that applies solely to arbitration clauses; rather, only generally applicable contractual defenses can be asserted to invalidate an arbitration agreement. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 n.8, 129 S. Ct. 1456, 1469 (2009).

2. The Circuit Court erred by finding that the arbitration clause contained in the CBA did not clearly and unmistakably waive an employee's right to a judicial forum for employment discrimination claims. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

3. The Circuit Court erred by finding that Mr. George's course of conduct was not relevant to the issue of determining whether or not the arbitration clause clearly and unmistakably waives an employee's right to a judicial forum for employment discrimination claims. Mr. George's conduct clearly evidenced his understanding that his employment discrimination claims are subject to the CBA's arbitration clause and the Circuit Court's decision to not take this evidence into account contributed to the Circuit Court's erroneous assessment of the arbitration clause. *See Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913) and *New Jersey v. Delaware*, 552 U.S. 597, 618-19 (2008).

II. STATEMENT OF THE CASE

This is an employment discrimination/Workers' Compensation discrimination case in which the Plaintiff, Mr. George, alleges that the disciplinary action his former employer, Defendant AC&S, Inc., imposed upon him (termination of his employment) was in retaliation for him making a Workers' Comp claim and because he was perceived as having an impairment or being disabled. The issue on Appeal is whether Mr. George must arbitrate his claims rather than pursue a civil lawsuit.

Mr. George was a unionized employee of AC&S, and so he was employed by AC&S pursuant to AC&S's Collective Bargaining Agreement (the "CBA") with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO. Section 2 of Article X of the CBA specifically states that any dispute between AC&S and a union employee regarding disciplinary actions taken by AC&S shall be resolved via arbitration. Mr. George, therefore, must arbitrate his claim that the disciplinary action AC&S took against him, termination of his employment, was motivated by discriminatory reasons.

1. Procedural History.

The Complaint was filed on October 2, 2017. *See* A.11-24. AC&S moved to Dismiss and/or Compel Arbitration and to Stay Discovery pending the outcome of its Motion on November 8, 2017. *See* A.25-89. Mr. George Responded to the Motion on May 22, 2018, and a hearing on the Motion to Dismiss and/or Compel Arbitration was held on May 25, 2018. *See* A.90-91, A.94-155, and A.227-270. At the conclusion of the hearing, the Court asked Mr. George's counsel to submit an order denying AC&S's Motion to Dismiss and/or Compel Arbitration (*see* A.261-262), and an agreed Order was submitted to the Court on June 12, 2018.

See A.205-216. Also at the conclusion of the hearing, a scheduling conference was held and a Scheduling Order was entered. *See* A.156-162.

In July 2018, Mr. George Moved to Compel AC&S to respond to his outstanding discovery requests. *See* A.163-176. AC&S opposed this Motion due to the fact that the Court had not yet entered the Order denying its Motion to Dismiss and/or Compel Arbitration. *See* A.177-179. AC&S's counsel also wrote a letter to the Court, asking the Court to enter the proposed agreed Order and informing the Court that entry of the Order would alleviate the need for the parties to litigate discovery issues. *See* A.218.

The Court, however, did not enter the Order. After the passing of several months, Mr. George noticed a hearing for his pending Motion to Compel. *See* A.219-220. AC&S's counsel then wrote another letter to the Court, asking again for the Court to enter the agreed Order since it would alleviate the need for a hearing on the Motion to Compel because AC&S intended to immediately appeal the Order once it was entered. *See* A. 221. AC&S's counsel then called the Court's law clerk, with the permission of Mr. George's counsel, to request entry of the Order and to discuss the lack of need for a hearing upon entry of the Order. *See* A.184 at Paragraph No. 11.

Not long after, the Court's law clerk called counsel for both parties and informed them that the Order would soon be entered and that the hearing on the Motion to Compel was cancelled. *See* A.184 at Paragraph No. 12. The Court, however, still did not enter the Order.

Eventually, on April 5, 2019, Mr. George moved to vacate the Scheduling Order due to the fact that the Court had still not entered the Order denying the Motion to Dismiss and/or Compel Arbitration. *See* A.182-226. Then, on May 5, 2019, the Court finally entered the Order denying the Motion to Dismiss and/or Compel Arbitration. *See* A.1-10. AC&S then Noticed this Appeal on May 13, 2019.

2. Statement of Facts.

Mr. George's employment with AC&S was subject to the CBA. *See* A.37-72, the CBA. The CBA contains two arbitration provisions, one in Article X that is specific to disciplinary matters and one in Article XI that is general and pertains to the interpretation of the CBA. *See* A.54, Article X, Section 2 of the CBA; and A.57, Article XI, Section 1 of the CBA.

The arbitration provision concerning disciplinary matters is set forth in a single, explicit, and self-contained paragraph that uses plain language:

> It is expressly understood and agreed by all parties to this Agreement, the Employer, the Union, and Bargaining Unit employees that the sole remedy for disputes regarding disciplinary actions taken by the employer against employees covered by this Agreement shall be in accordance with **ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES**, of this Agreement.

See A.54, Article X, Section 2 of the CBA.

The parties agree that AC&S terminated Mr. George's employment on April 26, 2016. *See* A.73, April 26, 2016 termination letter, and A.74, the Complaint, at ¶ 5. Likewise, there can be no dispute that AC&S informed Mr. George that his termination was a disciplinary action that was being taken against him as a result of AC&S's investigation into a chemical upset that occurred on April 21, 2016. *See* A.73.

After his termination, in accordance with the arbitration clause discussed above, Mr. George submitted a grievance in which he alleged that AC&S violated his rights, the CBA, and applicable state and federal laws. *See* A.88-89, Grievance Report. AC&S denied these allegations, and Mr. George did not pursue his grievance to arbitration. *See Id.*

In this lawsuit, Mr. George again contends that his termination was in violation of state law. *See* A.74-83, the Complaint. And Mr. George seeks damages to compensate him for the

fact that his employment was terminated, including lost wages and benefits, and related damages. *See Id.*

As argued below, because Mr. George complains that a disciplinary action taken by AC&S, termination of his employment, was wrongful, Mr. George's claims are subject to the arbitration provision of Article X, Section 2 of the CBA. Mr. George, therefore, can only pursue these claims via arbitration.

III. SUMMARY OF THE ARGUMENT

The standard incorrectly applied by the Circuit Court, a heightened "clear and unmistakable waiver" standard for the enforcement of arbitration clauses contained in CBAs, is premised upon the U.S. Supreme Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011 (1974) and its progeny cases. The reasoning of *Gardner-Denver*, however, has become inconsistent with the U.S. Supreme Court's evolving attitude towards arbitration, given the development of the Supreme Court's arbitration jurisprudence in the years since *Gardner-Denver* was issued (1974). As such, the *Gardner-Denver* line of cases "would appear to be a strong candidate for overruling." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 n.8, 129 S. Ct. 1456, 1469. In other words, given the current state of the law, the U.S. Supreme Court would not employ a heightened "clear and unmistakable waiver" standard for the enforcement of arbitration clauses in CBAs, and would instead review the clause using generally applicable contract defenses. The Circuit Court, therefore, erred by using the heighted "clear and unmistakable waiver" standard to assess whether or not the arbitration clause at issue in this case requires the arbitration of Mr. George's claims. Under general contract principles, the arbitration clause is valid and compels arbitration of Mr. George's challenge to AC&S's disciplinary action.

Alternatively, the arbitration clause satisfies the "clear and unmistakable waiver" standard because it clearly and unmistakably waives an employee's right to a judicial forum for

employment discrimination claims. This is because the CBA contains two arbitration clauses: a general arbitration clause pertaining to the CBA, and a specific, self-contained arbitration clause that only pertains to disputes regarding discipline. It is this second arbitration clause that applies to Mr. George's allegations, and this clause meets the "clear and unmistakable" standard: the clause is set forth in a single, explicit, and self-contained paragraph that uses plain language and states "the sole remedy for disputes regarding disciplinary actions taken by the employer against employees covered by this Agreement shall be in accordance with disputes regarding disciplinary actions ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES, of this Agreement." The Circuit Court, therefore, erred by finding that the arbitration clause does not meet the 'clear and unmistakable" standard, and Mr. George should not be permitted to circumvent the clear language of the clause's arbitration mandate for disciplinary actions.

Finally, Mr. George's own actions evidence his recognition that his challenge to the disciplinary action should be addressed under the CBA, including its arbitration provisions. Mr. George filed a grievance through his Union as required by Article X, Section 2 of the CBA. The claims contained in the grievance include allegations that AC&S violated applicable state and federal laws. Mr. George's course of conduct, therefore, demonstrates that he knew and understood that he needed to pursue all claims related to his termination via the arbitration process. The Circuit Court, however, refused to consider this evidence when determining if the arbitration clause constituted a clear and unmistakable waiver of an employee's right to a judicial forum for employment discrimination claims. The Circuit Court, therefore, erred by refusing to consider this evidence when it incorrectly held that the arbitration clause does not meet the 'clear and unmistakable" standard.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of fundamental public importance concerning the interpretation of Collective Bargaining Agreements and application of the Federal Arbitration Act.

V. ARGUMENT

1. The Standard of Review.

This is an appeal of the Circuit Court's Order denying a Motion to Dismiss and/or Compel Arbitration. The Standard of Review, therefore, is *de novo*. *See Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013).

2. The Circuit Court should not have applied the "clear and unmistakable waiver" standard when determining the validity of the arbitration clause.

In 1998 the U.S. Supreme Court found that arbitration clauses contained in collective bargaining agreements need to contain a "clear and unmistakable waiver" of employees' rights to a judicial forum with respect to employment discrimination claims in order for such arbitration clauses to be enforceable with respect to employment discrimination claims. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80-82, 119 S. Ct. 391, 396-97 (1998). The basis for imposing this heightened standard with respect to arbitration clauses contained in collective bargaining agreements was the U.S. Supreme Court's reasoning in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011. *See Wright* at 525 U.S. 70, 80, 119 S. Ct. 391, 396 ("*Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.").

The U.S. Supreme Court jurisprudence with respect to arbitration agreements has evolved past *Gardner-Denver* to the extent that the U.S. Supreme Court has expressed an intention to overrule *Gardner-Denver* once presented with the opportunity to do so. *See 14 Penn Plaza LLC*

v. Pyett, 556 U.S. 247, 264 n.8, 129 S. Ct. 1456, 1469 ("Because today's decision does not contradict the holding of *Gardner-Denver*, we need not resolve the stare decisis concerns raised by the dissenting opinions. But given the development of this Court's arbitration jurisprudence in the intervening years, *Gardner-Denver* would appear to be a strong candidate for overruling.") (internal citations omitted).

Moreover, the U.S. Supreme Court stated that *Gardner-Denver*'s reasoning, which was relied upon by *Wright* to impose the "clear and unmistakable waiver" standard, is flawed. "The suggestion in *Gardner-Denver* that the decision to arbitrate statutory discrimination claims was tantamount to a substantive waiver of those rights, therefore, reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266, 129 S. Ct. 1456, 1470.

Recently, the U.S. Supreme Court made clear its opinion that arbitration agreements cannot be invalidated by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (internal citations omitted). Instead, courts are instructed to apply traditional contract defenses when analyzing the enforceability of arbitration provisions. These defenses include fraud, duress, or unconscionability. The heightened "clear and unmistakable waiver" standard utilized in *Wright*, on the other hand, is premised on the clause's relation to arbitration and is exactly the sort of defense that is prohibited under *Epic Sys. Corp.*

Pursuant to *Wright*, in order for an arbitration clause contained in a collective bargaining agreement to be enforceable with respect to claims of employment discrimination, the arbitration clause must contain a "clear and unmistakable waiver of an employee's right to a judicial forum for employment discrimination claims." *Wright* 525 U.S. 70, 80-82, 119 S. Ct. 391, 396-97.

Because this heighted standard is used solely to assess the enforceability of arbitration clauses, it runs afoul of the U.S. Supreme Court's holdings in *Epic Sys. Corp.*

> The Federal Arbitration Act
>
> recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration."

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (citations omitted).

The heightened standard imposed by *Wright* on the enforceability of arbitration clauses in collective bargaining agreements with respect to employment discrimination claims is plainly not a "generally applicable contract defense, such as fraud, duress, or unconscionability." *Id.* The "clear and unmistakable" standard, therefore, cannot be used to invalidate the arbitration clause at issue in this case.

The Circuit Court, therefore, erred by finding that Mr. George's employment discrimination claims were not subject to the arbitration clause because the arbitration clause did not clearly and unmistakably waive Mr. George's right to a judicial forum for employment discrimination claims. The arbitration clause is not otherwise subject to attack on general contract principles. As such, this Court should reverse the Circuit Court's Order, remand this case to the Circuit Court, and instruct the Circuit Court to compel Mr. George to arbitrate his claims.

3. Alternatively, the arbitration clause is a clear and unmistakable waiver of employment discrimination claims that arise out of disciplinary actions.

While AC&S believes that the Circuit Court applied the incorrect standard when reviewing enforceability of the arbitration clause, the clause still meets the heightened standard

the Court employed. The US Supreme Court has not articulated a standard or method for determining whether or not an arbitration clause clearly and unmistakably waives an employee's right to a judicial forum for employment discrimination claims. *See Wright*, 525 U.S. 70 and *14 Penn Plaza*, 556 U.S. 247. Some Circuit Courts of Appeal, however, have held that an arbitration clause which generally requires the arbitration of disputes related to a CBA is not sufficiently specific so as to make it a clear and unmistakable waiver of an employee's right to a judicial forum for employment discrimination claims. *See Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 7 n.7 (1st Cir. 2012); and *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1134-35 (7th Cir. 2017).

The Fourth Circuit Court of Appeals has also found that arbitration clauses which specifically reference employment discrimination statutes do constitute clear and unmistakable waivers of employees' rights to a judicial forum. *See Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 216 (4th Cir. 2007).

AC&S's CBA contains two arbitration clauses: a specific, self-contained arbitration clause that only pertains to disputes regarding discipline, and a general arbitration clause pertaining to interpretation of the CBA. *See* A.54, Article X, Section 2 of the CBA; and A.57, Article XI, Section 1 of the CBA. It is the first arbitration clause that applies to Mr. George's allegations, and this clause meets the "clear and unmistakable" standard. *See Wright*, 525 U.S. 70 and *14 Penn Plaza*, 556 U.S. 247.

As discussed above, this arbitration clause is set forth in a single, explicit, and self-contained paragraph that uses plain language and states "the sole remedy for disputes regarding disciplinary actions taken by the employer against employees covered by this Agreement shall be in accordance with disputes regarding disciplinary actions ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES, of this Agreement." *See* A.54. This arbitration clause,

therefore, is sufficiently specific, clear, and obvious, so as to make it clear and unmistakable that an employee is waiving his right to a judicial forum with respect to ***any*** dispute regarding discipline. *See 14 Penn Plaza*, 556 U.S. 247, at 260 and 274.

The Circuit Court, therefore, erred by finding that Mr. George's employment discrimination claims were not subject to the arbitration clause because the arbitration clause did not clearly and unmistakably waive Mr. George's right to a judicial forum for employment discrimination claims. As such, this Court should reverse the Circuit Court's Order, remand this case to the Circuit Court, and instruct the Circuit Court to compel Mr. George to arbitrate his claims.

4. The Circuit Court erred when it failed to take Mr. George's course of conduct into account, as it further demonstrates his own understanding that the arbitration clause is a clear and unmistakable waiver of employment discrimination claims that arise out of disciplinary actions.

Within two days of his termination, Mr. George filed a grievance through his Union as required by Article X, Section 2 of the CBA. *See* A.88-89. The claims contained in the grievance include allegations that AC&S violated applicable state and federal laws. *See Id.* Mr. George's course of conduct, therefore, demonstrates that he knew and understood that he needed to pursue all claims related to his termination via the arbitration process.

Mr. George's own behavior represents the best evidence that he clearly and unmistakably understood that his state and federal law challenges to his termination were the subject of the grievance process and arbitration. The arbitration provision of Article X, Section 2, therefore, should be interpreted as a clear and unmistakable agreement to arbitrate Mr. George's claims. *See Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913) ("Parties course of conduct is "is deemed of great, if not controlling, influence,") (internal citations omitted); *New Jersey v. Delaware*, 552 U.S. 597, 618-19 (2008) ("We turn, finally, to the parties' prior course of conduct . . . which . . ., like the course of conduct of parties to any contract, is evidence of its meaning.");

and the Restatement (Second) of Contracts § 223 ("Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.").

Because the arbitration provision of Article X, Section 2 of the CBA clearly and unmistakably waives Mr. George's right to a judicial forum with regard to disputes over disciplinary actions taken by AC&S, and because Mr. George's course of conduct demonstrates that he knew and understood that he needed to arbitrate his state and federal law causes of action, the arbitration provision is valid and binding upon Mr. George.

The Circuit Court, therefore, erred by finding that Mr. George's employment discrimination claims were not subject to the arbitration clause because the arbitration clause did not clearly and unmistakably waive Mr. George's right to a judicial forum for employment discrimination claims. As such, this Court should reverse the Circuit Court's Order, remand this case to the Circuit Court, and instruct the Circuit Court to compel Mr. George to arbitrate his claims.

VI. CONCLUSION

The U.S. Supreme Court has stated time and again that the Federal Arbitration Act prohibits Courts from invalidating arbitration agreements for reasons that derive from the fact that the agreement at issue is one for arbitration. The Circuit Court, however, did just that when it refused to enforce the arbitration clause at issue in this case. Under the proper standard – application of traditional contract defenses – the arbitration clause in this agreement is valid and enforceable and not subject to challenge.

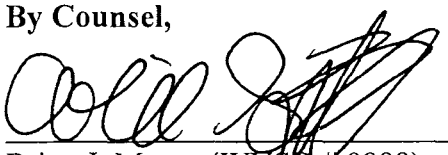
Moreover, even under the heightened "clear and unmistakable" standard, the arbitration clause at issue in this case passes muster. The clause clearly and unmistakably requires all disputes that arise out of disciplinary action to be arbitrated. Likewise, the clause is clearly not of a "general nature," as the CBA has a separate general arbitration clause that pertains to the

interpretation of the CBA. Finally, Mr. George's course of conduct makes it clear that he understood that he needed to arbitrate his claims, since he requested arbitration of them.

The Circuit Court, therefore, erred by refusing to enforce the arbitration clause and by refusing to compel Mr. George to arbitrate his claims. For these reasons, AC&S believes that it is entitled to, and therefore requests, the following relief: (1) reversal of the Circuit Court's Order Denying its Motion to Dismiss and/or Compel Arbitration; (2) remand of this matter to the Circuit Court; (3) an Order from this Court to the Circuit Court directing the Circuit Court to Grant the Motion to Dismiss and/or Compel Arbitration and compel Mr. George to arbitrate his claims; and (4) any additional relief the Court deems just.

AC&S, INC.

By Counsel,



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