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 REPLY BRIEF

Brian J. Moore (WVSB # 8898)
Arie M. Spitz (WV State Bar #10867)
DINSMORE & SHOHL LLP
P.O. Box 11887
Charleston, West Virginia 25339-1887
Telephone: (304) 357-0900
Facsimile: (304) 357-0919
arie.spitz@dinsmore.com
brian.moore@dinsmore.com
Counsel for AC&S Inc.

Dated November 12, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Statutes:

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

There are three issues that this Court needs to address in order to resolve this Appeal:

1. Should the "clear and unmistakable" standard apply to the determination of whether or not Mr. George is compelled by the CBA to arbitrate his employment discrimination claims?

2. If so, does the CBA contain a "clear and unmistakable" requirement that Mr. George arbitrate his employment discrimination claims?

3. In deciding whether or not the CBA contains a "clear and unmistakable" agreement to arbitrate employment discrimination claims, should this Court take into account the fact that, prior to the filing of this lawsuit, Mr. George, and his Union, submitted a grievance alleging that his employment was terminated in violation of state and federal laws?

As discussed in detail below, Mr. George' Response is correct that the US Supreme Court has not yet specifically overruled the line of cases that call for the application of the "clear and unmistakable" standard. Mr. George's Response, however, selectively cites to the US Supreme Court's recent opinions in order to argue that this standard is not ripe for overturning. The bottom line here is that "Congress has instructed that arbitration agreements ... must be enforced as written." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018).

Further, Mr. George's Response tacitly acknowledges the fact that the US Supreme Court has never enunciated a test for assessing what language constitutes a "clear and unmistakable" agreement to arbitrate employment discrimination claims in a CBA. And all of the cases cited by Mr. George's Response to argue that the CBA language at issue in this case fails to meet the "clear and unmistakable" standard are factually distinct from this case because none of them dealt with a CBA that had two arbitration clauses: a general arbitration clause as well as a specific arbitration clause that applies to disputes regarding disciplinary actions taken by the employer. *See* A.54 and A.57. So while Courts, other than the US Supreme Court, have interpreted how to apply the "clear and unmistakable" standard to CBAs that only contain a single arbitration clause, their interpretations are not the precedent of the US Supreme Court and

they are not applicable to this case because they did not involve the assessment of a CBA that has multiple arbitration provisions.

Finally, in this case everyone knew that the CBA required Mr. George to submit his employment discrimination claims to arbitration. We know this because that is exactly what Mr. George and his Union did. *See* A.88-89. Mr. George's Response fights hard to keep this evidence out, but its reliance upon *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App'x 556 (9th Cir. 2016) is misplaced. This is because in *Wawock* the employer sought to rely exclusively upon the parties' historical practice (*Id.* at 558-559); whereas in this case AC&S relies upon the language of its CBA as well as the actions of Mr. George and his Union.

Moreover, Mr. George's Response incorrectly defines the scope of course of conduct evidence – it is evidence of the parties' course of conduct that takes place after the execution of a contract and prior to the arising of a controversy over the contract. Indeed, this point is borne out by the authorities relied upon by the Response. *See* Restat 2d of Contracts, § 223 (at Illustration 2), *Old Colony Tr. Co. v. Omaha*, 230 U.S. 100, 118, 33 S. Ct. 967, 972 (1913) ("the practical interpretation of a contract by the parties to it for any considerable period of time *before it comes to be the subject of controversy* is deemed of great, if not controlling, influence.") (emphasis added), and *New Jersey v. Delaware*, 552 U.S. 597, 618-21, 128 S. Ct. 1410, 1425-26 (2008) (in which the meaning of a 1905 contract was assessed via analysis of the parties' conduct that took place after the execution of the contract and prior to the filing of the civil action in which the meaning of the contract was disputed).

Here, Mr. George's submission of a grievance over his termination in which he claims that his termination was in violation of state and federal laws clearly meets the definition of course of conduct evidence. *See* A.88-89. And the reason Mr. George and his Union made this

submission is because the CBA "clearly and unmistakably" requires the arbitration of such claims.

II. ARGUMENT

1. *Wright* relied upon *Gardner-Denver*, and the US Supreme Court has indicated *Gardner-Denver* is ripe for overruling.

There can be no mistake that the majority of the US Supreme Court views *Gardner-Denver* as "a strong candidate for overruling" given the development of the US Supreme Court's arbitration jurisprudence – since that is exactly what they said. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 264 n.8, 129 S. Ct. 1456, 1469 (2009).

In order to try and preserve *Wright's* reasoning that a CBA must contain a "clear and unmistakable" waiver of employees' rights to a judicial forum for claims of employment discrimination, the Response argues that *Wright* did not rely upon *Gardner-Denver* to reach this conclusion. *See* Response at Pg 14. This argument, however, fails because *Wright* specifically relied upon *Gardner-Denver* to reach its conclusion that the CBA at issue did not compel arbitration of employment discrimination claims:

> ***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 CBA in this case does not meet that standard.

Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80, 119 S. Ct. 391, 396 (1998) (emphasis added).

Because *Wright's* holding that a CBA must contain a "clear and unmistakable" agreement to arbitrate employment discrimination claims relies specifically on *Gardner-Denver*, and because the US Supreme Court has stated that *Gardner-Denver* is a strong candidate for overruling, the "clear and unmistakable" standard is a strong candidate for overruling. To that end, this Court should follow the developments of the US Supreme Court's arbitration jurisprudence since *Gardner-Denver* and *Wright*, and find that the "clear and unmistakable"

standard is no longer applicable and therefore should not be used to assess whether or not Mr. George's employment discrimination claims must be arbitrated.

2. The bottom line is that arbitration clauses should be enforced as written, and so a standard that imposes a more stringent analysis to arbitration clauses does not pass muster, including the "clear and unmistakable" standard.

The Response seeks to make a distinction ultimately doesn't make a difference by arguing that there must be a different analysis between assessing the enforceability of an arbitration clause versus determining its scope. But whether interpreting the scope of an arbitration agreement or assessing its enforceability, applying a standard that imposes a burden that is higher than that which is contained in traditional contract law is impermissible because arbitration agreements must be treated equally with all other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745 (2011) ("Courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.") (internal citations omitted), and *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017).

Moreover, laws, rules, or opinions that seek to curtail or to prevent the enforcement of arbitration agreements as written run afoul of the Federal Arbitration Act. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). The Federal Arbitration Act also prohibits defenses that apply only to arbitration or which derive their meaning from the fact that an agreement to arbitrate is at issue. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018), *Concepcion*, 563 U. S., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742, and *Kindred Nursing Ctrs.*, 137 S. Ct. 1421, 1426-29.

Whether it is "interpretation," "enforcement," or "analysis," the bottom line is that Courts cannot use standards other than those contained in traditional contract law when answering the question: does a written arbitration agreement require someone to arbitrate their claims. *See*

Epic Sys., 138 S. Ct. 1612, 1622, *Concepcion*, 563 U. S., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742, and *Kindred Nursing Ctrs.*, 137 S. Ct. 1421, 1426-29. This is because arbitration agreements must be treated equally with all other contracts. *See Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745, and *Kindred Nursing*, 137 S. Ct. 1421, 1426. With respect to this case, that means the "clear and unmistakable" standard should not be imposed to permit Mr. George to escape the written terms of the CBA, which require him to arbitrate his employment discrimination claims because they regard the disciplinary action that AC&S took against him.

3. The US Supreme Court has not defined what constitutes a "clear and unmistakable waiver."

The US Supreme Court has not enunciated a specific test for determining whether or not a CBA contains a "clear and unmistakable" agreement to arbitrate employment discrimination claims. That is why Mr. George's Response spends a great deal of time describing the various tests that *US Circuit Courts* have devised to assess whether or not a CBA contains a "clear and unmistakable" agreement to arbitrate employment discrimination claims. *See* Response at Pg 19-22. But these are the opinions of the US Circuit Courts, not the US Supreme Court. *See Carson v. Giant Food, Inc.*, 175 F3d 325 (4th Cir. 1999), *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34 (1st Cir. 2013), *Abdullayeva v. Attending Homecare Servs. LLC*, 928 F.3d 218 (2d Cir. 2019), *Ibarra v. UPS*, 695 F.3d 354 (5th Cir. 2012), *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App'x 556 (9th Cir. 2016), *Mathews v. Denver Newspaper Agency LLP*, No. 09-1233, 2011 U.S. App. LEXIS 11454 (10th Cir. 2011).

The cases cited by the Response, however, do not involve CBAs that contain two arbitration clauses. *See Carson*, 175 F3d 325, *Manning*, 725 F.3d, *Abdullayeva*, 928 F.3d 218, *Ibarra*, 695 F.3d 354, *Wawock*, 649 F. App'x 556, *Mathews*, No. 09-1233, 2011 U.S. App. LEXIS 11454.

This is a critical difference that causes the cases cited by the Response to be factually distinct and thus not applicable to the issue before this Court. The issue before this Court is whether or not a specific arbitration clause for claims that arise out of or relate to disciplinary actions is a "clear and unmistakable" agreement to arbitrate employment discrimination claims when that clause is a separate provision contained in a CBA that also contains a general arbitration clause for disputes that pertain to the interpretation of the CBA. *See* A.54 and A.57.

Again, none of the cases cited by the Response address a CBA that contains both a general arbitration clause as well as a specific arbitration clause for disputes regarding disciplinary actions. *See See Carson*, 175 F3d 325, *Manning*, 725 F.3d, *Abdullayeva*, 928 F.3d 218, *Ibarra*, 695 F.3d 354, *Wawock*, 649 F. App'x 556, *Mathews*, No. 09-1233, 2011 U.S. App. LEXIS 11454. In this case, because the CBA contains a specific clause as well as a general clause, the CBA contains a "clear and unmistakable" agreement to arbitrate employment discrimination claims regarding disciplinary action taken by AC&S. Since Mr. George's employment discrimination claims arise out of the disciplinary action AC&S took against him, his employment discrimination claims must be arbitrated.

4. *Wawack* does not preclude review of course of conduct evidence.

The facts of this case are that everyone knew that the CBA required Mr. George to submit his employment discrimination claims to arbitration. We know this because that is exactly what Mr. George and his Union did. *See* A.88-89. So Mr. George's Response fights hard to come up with an argument to nullify these facts, but the Response's use of *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App'x 556 (9th Cir. 2016) fails to accomplish this goal.

The CBA at issue in *Wawock* contained only a single general arbitration clause requiring arbitration of "all grievances or questions in dispute." *Id.* at 557. Because such general arbitration clauses had previously been found to not be "clear and unmistakable" agreements to

arbitration employment discrimination claims, the employer in *Wawack* argued "that the parties' historical practice can provide a "clear and unmistakable" waiver." *Id.* at 558-559. The 9th Circuit held that "[n]either historical practice nor the parties' unexpressed intent can fulfill this standard [the "clear and unmistakable" standard]." *Id.* at 559 (editions added). Notably, the employee in *Wawack* did not submit his employment discrimination claims to arbitration; rather, the question was whether or not the historical practice of employees and the employer demonstrated a "clear and unmistakable" agreement to arbitrate employment discrimination claims.

Here, both the language of its CBA as well as the actions of Mr. George and his Union, not historical practice, demonstrate that the CBA contains a "clear and unmistakable" agreement to arbitrate employment discrimination claims. As such, *Wawack*'s holding that historical practice alone cannot fulfill the "clear and unmistakable" standard is not applicable to this case because this case does not involve historical practices nor does it call for an assessment of such practices standing alone. Rather, as discussed below, the course of conduct of Mr. George and his Union demonstrate that the arbitration clause contained in the CBA is a "clear and unmistakable" agreement to arbitrate employment discrimination claims.

5. Course of conduct evidence is the conduct that occurs after execution of the contract and prior to the parties' dispute – and that is exactly what the grievance paperwork is.

Mr. George's Response incorrectly defines the scope of course of conduct evidence by arguing that it is only evidence of the parties actions prior to entering into a contract. *See* Response at Pg 23. Actually, course of conduct evidence is evidence of the parties' course of conduct that takes place after the execution of a contract and prior to the arising of a controversy over the contract. *See* Restat 2d of Contracts, § 223 (at Illustration 2), *Old Colony Tr. Co. v. Omaha*, 230 U.S. 100, 118, 33 S. Ct. 967, 972 (1913) ("the practical interpretation of a contract

by the parties to it for any considerable period of time *before it comes to be the subject of controversy* is deemed of great, if not controlling, influence.") (emphasis added), and *New Jersey v. Delaware*, 552 U.S. 597, 618-21, 128 S. Ct. 1410, 1425-26 (2008) (in which the meaning of a 1905 contract was assessed via analysis of the parties' conduct that took place after the execution of the contract and prior to the filing of the civil action in which the meaning of the contract was disputed).

The Response's reliance upon the Restatement (Second) of Contracts, however, is providential because the Restatement makes it plain that the parties' course of conduct can be relied upon to assess a contract irrespective of whether or not the contract language at issue is ambiguous. *See* Restat 2d of Contracts, § 223 ("There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown."). Here, the arbitration clause is not ambiguous, and, pursuant to the Restatement, it is still appropriate for this Court to assess whether or not the arbitration clause is "clear and unmistakable" by looking at the course of conduct of Mr. George and his Union. And the course of conduct demonstrates that the arbitration clause was "clear and unmistakable" because Mr. George submitted his employment discrimination claims to his Union for arbitration.

III. CONCLUSION

Applying a standard in excess of that imposed by traditional contract law to assess whether or not the CBA requires Mr. George to arbitrate his employment discrimination claims is contrary to the current state of the US Supreme Court's arbitration jurisprudence. *See Kindred Nursing Ctrs.*, 137 S. Ct. 1421, 1426-29, *Epic Sys.*, 138 S. Ct. 1612, 1622, and *Concepcion*, 563 U. S., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742.

Yet in this case, Mr. George's defense to the fact that the CBA mandates arbitration of his employment discrimination claims (because these claims regard the disciplinary action that

AC&S took against him) is to argue that the arbitration agreement does not apply to employment discrimination claims because it does not "clearly and unmistakably" state that employment discrimination claims must be arbitrated. This "clear and unmistakable" standard, however, is a defense that derives its meaning from the fact that an arbitration clause is at issue. This defense, therefore, is precluded by the Federal Arbitration Act. *See Kindred Nursing Ctrs.*, 137 S. Ct. 1421, 1426-29, *Epic Sys.*, 138 S. Ct. 1612, 1622, and *Concepcion*, 563 U. S., at 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742. As such, this Court should not apply the "clear and unmistakable" standard, but instead should utilize traditional contract law to interpret the arbitration clause.

Whether under a "clear and unmistakable" standard or a traditional contract law standard, the arbitration clause at issue passes muster for two reasons. First, the CBA contains two arbitration clauses, (1) a general clause that pertains to disputes over the CBA (which clauses Federal Courts have found to not constitute a "clear and unmistakable" agreement to arbitrate employment discrimination claims), and (2) a specific clause that pertains to any disputes that arise out of or relate to disciplinary action taken by AC&S. And it is the second, specific clause that compels arbitration of Mr. George's claims.

Second, the course of conduct of the Union and Mr. George demonstrates that the specific arbitration clause for disputes regarding discipline is a "clear and unmistakable" agreement to arbitrate employment discrimination claims regarding disciplinary actions. This is because Mr. George and his Union submitted a grievance claiming that AC&S violated Mr. George's rights under the CBA as well as "applicable state or federal laws that might apply." *See* A.88-89. The CBA says employees have to arbitrate disputes regarding disciplinary actions taken by AC&S and so Mr. George and his Union started the process to submit such a dispute to arbitration. And the US Supreme Court has stated, "[p]arties course of conduct is "is deemed of great, if not controlling, influence." *Old Colony Trust Co. v. Omaha*, 230 U.S. 100, 118 (1913).

This Court, therefore, should find that the Circuit Court erred by refusing to enforce the arbitration clause and by refusing to compel Mr. George to arbitrate his claims. And this Court should award the following relief to AC&S: (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,

Brian J. Moore (WVSB # 8898)
Arie M. Spitz (WVSB # 10867)
DINSMORE & SHOHL LLP
900 Lee Street, East, Suite 600
P.O. Box 11887
Charleston, West Virginia 25339-1887
Counsel for AC&S, Inc.