

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3390-08T3

MYRON COWHER,

Plaintiff-Appellant,

v.

CARSON & ROBERTS SITE CONSTRUCTION
& ENGINEERING, CO., INC.,
GARY MERKLE, JAY UNANGST
and NICK GINGERELLI,

Defendants-Respondents.

Argued November 2, 2009 - Decided November 19, 2009

Before Judges Reisner and Chambers.

On appeal from the Superior Court of New
Jersey, Law Division, Sussex County, L-867-
08.

Robert A. Scirocco argued the cause for
appellant.

Frederick B. Polak, argued the cause for
respondents (Post, Polak, Goodsell, MacNeill
& Strauchler, P.A., attorneys; Mr. Polak of
counsel and on the brief; Holly English, on
the brief).

PER CURIAM

Plaintiff Myron Cowher appeals from a trial court order
dated March 6, 2009 dismissing his complaint and requiring

plaintiff to submit his Law Against Discrimination (LAD) claim to binding arbitration. We reverse the order on appeal, reinstate the complaint and remand this matter to the trial court.

I

These are the most pertinent facts. Cowher began his employment with Carson & Roberts Site Construction and Engineering, Co., Inc. (Carson & Roberts) as a truck driver in April 2006. In February 2007, Cowher was given a copy of an employee manual and signed an acknowledgment form confirming that he had received it. The manual provided in pertinent part:

Carson & Roberts hopes that difference[s] will not arise. If they do, employees are encouraged to discuss them with their managers or the Human Resources department.

If differences cannot be resolved informally within the Company, then they will be resolved through binding arbitration before a neutral panel of arbitrators. The Company and its employees agree as a condition of employment to be bound by the mutual agreement to arbitrate claims.

The acknowledgment form provided:

I have read and understand the Company Employee Manual.

. . . .

I acknowledge that all formal disputes will be resolved by final and binding arbitration as set forth in the Employee Manual.

Before the trial court, the parties submitted conflicting certifications concerning the circumstances surrounding the signing of the acknowledgment form. Cowher attested that he was not given an opportunity to read the manual before signing the acknowledgement. According to Cowher's certification, Jay Unangst, his manager, handed him the form and told him to sign it, "indicating that it simply stated that I had received the employee manual." Cowher stated that Unangst waited for about ten seconds until Cowher signed the acknowledgement "and then he walked off with it."

Unangst certified that it was his usual practice to inform employees to read the manual before signing the form. He attested that he also advised employees that they could either take the manual home or take company time to read it in the management office. He recalled that Cowher heeded his advice and sat in the management office to read through the manual. He denied placing any pressure on Cowher to sign the form.

On December 18, 2008, Cowher filed a complaint against Carson & Roberts and several of its managers, alleging that beginning in January 2007, the managers had subjected him to religious slurs, creating a hostile work environment in violation of the LAD, N.J.S.A. 10:5-1 to -49. Cowher alleged that despite his repeated complaints, the harassment continued

until May 2008, when he took a leave of absence because of a worker's compensation injury.

Relying on the arbitration clause in the employee manual, defendants filed a motion to dismiss the action and compel arbitration. In an oral opinion placed on the record on March 6, 2009, the motion judge concluded that "consistent with [Garfinkel v. Morristown Obstetrics & Gynecology Associates, 168 N.J. 124 (2001)], . . . this [arbitration clause] language . . . creates a requirement that . . . all employment disputes be . . . settled by a final and binding arbitration as require[d] by the employment manual."

II

Our review of the trial court's decision is de novo. See Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiff claims that he was coerced and misled into signing the arbitration agreement and, therefore, he did not knowingly and voluntarily waive his right to pursue his LAD claim in a trial court. See Martindale v. Sandvik, Inc., 173 N.J. 76, 96-97 (2002). We agree that there were material

disputes of fact which precluded summary judgment on the issue of whether his agreement was knowing and voluntary. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). However, our decision to reverse, rather than remand for an evidentiary hearing on that issue, rests on our conclusion that the clause is unenforceable because it is not sufficiently specific.

We take guidance from relevant Supreme Court precedent on this issue. In Garfinkel v. Morristown Obstetrics & Gynecology Associates, 168 N.J. 124 (2001), the Court upheld the plaintiff's right to file suit alleging employment discrimination, although he had signed an agreement to arbitrate claims against his employer. The arbitration clause provided that "any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration" Id. at 128. The Court held that "because of its ambiguity the language contained in the arbitration clause does not constitute an enforceable waiver of plaintiff's statutory rights under the LAD." Id. at 127.

In reaching its conclusion, the Court considered the public policy to eradicate discrimination, embodied in the LAD, and the public policy favoring arbitration. The Court found no bar to an employee waiving the right to trial of LAD claims, in favor of

arbitration, so long as the waiver was voluntary, clear and unambiguous:

In respect of specific contractual language, "[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively."

[Id. at 132 (citations omitted).]

In the Court's view, the language of the arbitration clause suggested that the plaintiff only waived a trial on disputes "involving a contract term, a condition of employment, or some other element of the contract itself." Id. at 134. "Moreover, the language does not mention, either expressly or by general reference, statutory claims redressable by the LAD." Ibid.

Providing guidance to employers, the Court elaborated on the language necessary to waive a plaintiff's right to litigate statutory claims:

To reiterate, the policies that support the LAD and the rights it confers on aggrieved employees are essential to eradicating discrimination in the workplace. The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms. That said, we do not suggest that a party need refer specifically to the LAD or list every

imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims.

[Id. at 135.]

In Martindale v. Sandvik, Inc., supra, the Court concluded that the following, much more specific arbitration clause, set forth in an employment application, was enforceable:

AS A CONDITION OF MY EMPLOYMENT, I AGREE TO WAIVE MY RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING RELATED TO MY EMPLOYMENT WITH SANDVIK.

I UNDERSTAND THAT I AM WAIVING MY RIGHT TO A JURY TRIAL VOLUNTARILY AND KNOWINGLY, AND FREE FROM DURESS OR COERCION.

I UNDERSTAND THAT I HAVE A RIGHT TO CONSULT WITH A PERSON OF MY CHOOSING, INCLUDING AN ATTORNEY, BEFORE SIGNING THIS DOCUMENT.

I AGREE THAT ALL DISPUTES RELATING TO MY EMPLOYMENT WITH SANDVIK OR TERMINATION THEREOF SHALL BE DECIDED BY AN ARBITRATOR THROUGH THE LABOR RELATIONS SECTION OF THE AMERICAN ARBITRATION ASSOCIATION.

[173 N.J. at 81-82.]

In holding that this clause was specific enough to require arbitration of the plaintiff's LAD claim, the Court restated its

holding in Garfinkel concerning the enforceability of such arbitration clauses:

In so holding, we stated: "The Court will not assume that employees intend to waive [their statutory rights] unless their agreements so provide in unambiguous terms." Id. at 135. However, we did not require a party to "refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights." Ibid. Instead, we instructed that "a waiver-of-rights provision should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination." Ibid.

[Martindale, supra, 173 N.J. at 95 (quoting Garfinkel, supra, 168 N.J. at 135).]

Based on its broad and specific wording, the arbitration clause was enforceable:

In the circumstances of this case, the language in the arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action. The arbitration agreement provides that plaintiff agreed to waive her right to a jury trial "in any action or proceeding relating to my employment with Sandvik" and that "all disputes relating to my employment with Sandvik or termination thereof" shall be subject to arbitration. Unlike the arbitration provisions contained in Garfinkel and Alamo, the arbitration provision here does not contain any limiting references. Its wording provided plaintiff with sufficient notice at the time she signed the agreement that all claims relating to employment with and termination from Sandvik would be resolved through

arbitration. It also addressed specifically a waiver of the right to a jury trial, augmenting the notice to all parties to the agreement that claims involving jury trials would be resolved instead through arbitration.

[Id. at 96.]

See also Leodori v. Cigna Corp., 175 N.J. 293, 301 (2003), cert. denied sub nom, CIGNA Corp. v. Leodori, 540 U.S. 938, 124 S. Ct. 74, 157 L. Ed. 2d 250 (2003) (reaffirming Garfinkel and Martindale); Alamo Rent A Car, Inc. v. Galarza, 306 N.J. Super. 384, 391 (App. Div. 1997) ("An agreement to waive statutory remedies must 'be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively.'" (citation omitted)).


Comparing the arbitration clause in this case to those considered in Garfinkel and Martindale, we conclude that the language here does not pass muster as a waiver of plaintiff's statutory trial rights under the LAD. The arbitration language does not refer to claimed violations of statutory rights or the right to a jury trial. The clause appearing in the acknowledgement section above plaintiff's signature is no more specific, providing only that "all formal employment disputes will be resolved by final and binding arbitration as set forth in the Employee Manual." We conclude that the phrase "formal employment disputes," without more, is insufficiently specific

to put plaintiff on notice that he was agreeing to waive his right to a jury trial on a statutory discrimination claim. See Garfinkel, supra, 168 N.J. at 135.

Consequently, the arbitration clause is unenforceable. The order dismissing the complaint is vacated, and the complaint is reinstated. This matter is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office


CLERK OF THE APPELLATE DIVISION