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Labor & Employment Law Section

Motion Practice in Arbitration: A Bridge Too Far or a Welcome Development?

I. Employment Law Arbitration

A. In General:

1. Examples of Motions:

    a. Dismissal of claim/demand/pleadings (statute of limitations/release/waiver/res judicata, etc.).

    b. Compel discovery.

    c. Summary judgment (as to the whole or part of the claim).

    d. Extend scheduling order deadlines.

2. Reasons to Entertain Motions:

    a. Advance the efficiency and speed of arbitration by disposing of unmeritorious claims and defenses and by narrowing the issues.

    b. Successful motion may contribute to early settlement.

3. Reasons Not to Entertain Motions:

    a. Motion not likely to succeed, and will waste time and money.

    b. Hearing is imminent and is expected to be relatively brief.

4. Methods to Hasten Motion Practice:

   a. Pre-motion letters, to determine if motion will be entertained, which address both the merits and efficiency of motion (with the exception of proposed motions to compel discovery which may be addressed in conference call after parties meet and confer).

   b. Page limitation on letter briefs (and possibly on declarations and exhibits).

   c. Briefing schedules which do not postpone previously agreed to hearing dates.

   d. Motion to be decided on papers only without oral argument.

B. Dispositive Motions:

1. Tribunals on Dispositive Motions:

   AAA Employment Arbitration Rule 27: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."

   JAMS Comprehensive Arbitration Rule 18: "The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."

   FINRA (Motion to Dismiss and Eligibility Rules FAQ): Rules 12504(a)(1) and 13504(a)(1) reinforce FINRA's position that parties have the right to a hearing in arbitration by clarifying that motions to dismiss filed prior to the conclusion of a party's case in chief, including prehearing motions, are discouraged in arbitration.

C. Discovery Motions:

1. Tribunals on Discovery:

AAA "Due Process Protocol." Access to Information. "One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employee's representative should also have reasonable pre-hearing and hearing access to all such information and documentation. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available."

JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. Access to Information/Discovery. "The procedures must provide for an exchange of core information prior to the arbitration. *Comment:* Generally, this discovery should include at least (a) exchange of relevant documents, (b) identification of witnesses and (c) one deposition for each side, i.e., of the employee and of a supervisor or other decision-maker of the employer. Other discovery should be available at the arbitrator's discretion."

FINRA Office of Dispute Resolution Arbitrator's Guide. "[A]rbitrators must determine that a document is relevant or likely to lead to relevant evidence. Only after determining relevancy, should the arbitrators consider the cost or burden of production. If a party has demonstrated that the cost or burden of production is disproportionate to the need for the documents, arbitrators should see whether there are alternatives that can lessen the impact, such as narrowing the relevant time frame or scope of the request, or whether the other documents can provide the same information."

2. Need for Discovery Increases as Dispositive Motions Increase:

The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration, 3d Edition (2014):

"To avoid the risk of having an award vacated for refusing to hear evidence, arbitrators should grant dispositive motions only when the party opposing the motion has had a reasonable opportunity to gather and present evidence on the pertinent issues and the arbitrators are confident that on the undisputed facts, the movant is clearly entitled to an award in its favor."

D. Standard of Judicial Review for Summary Adjudications:

Arbitration award, including partial summary judgment, is to "be enforced despite a court's disagreement with it on the merits, if there is barely a colorable justification for the outcome reached." Court noted that "arbitrators have 'great latitude to determine the procedures governing their proceedings and to restrict or control evidentiary proceedings.'" *Global Int'l Reissurance Co., Ltd. v. TIG Ins. Co.*, 2009 U.S. Dist. LEXIS 7697 (S.D.N.Y. January 20, 2009), *quoting from*, *Supreme Oil Co., Inc. v. Abondolo*, 568 F.Supp.2d 401 (S.D.N.Y. 2008).

Court denied petition to vacate arbitration award after arbitration panel granted motion to dismiss: "The law only requires that the parties be given *an* opportunity to present their evidence, not that they be given every opportunity." *Max Marx Color and Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F.Supp.2d 248, 252, n. 23 (S.D.N.Y. 1999) (emphasis in original).

Arbitration award based on written submissions confirmed where court observed: "As long as an arbitrator's choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding 'fundamentally unfair,' the arbitrator is acting within the liberal sphere of permissible discretion." *Griffin Industries, Inc. v. Petrojam, Ltd.*, 58 F.Supp.2d 212 (S.D.N.Y. 1999).

Arbitrator's grant of summary judgment confirmed by court which found that arbitrator did not "manifestly disregard" summary judgment standard and where no reasonable trier of fact could have sustained constructive discharge claim. *Hamilton v. Sirius Radio*, 375 F.Supp.2d 269 (S.D.N.Y. 2005).

Arbitration panel's grant of summary judgment confirmed where court rejected argument that such outcomes, as a matter of law, qualify as arbitrator misconduct. Court noted that arbitration panel gave the parties time to thoroughly brief the issues and submit evidence. *Brooks v. BDO Seidman*, LLP, 31 Misc.3d 653 (N.Y. Sup.Ct. 2011), *aff'd*, 94 A.D.3d 528 (1st Dept. 2012).

Confirmation of arbitration award, which granted motion to dismiss, affirmed by Circuit Court that observed that appellant was "provided with a "fundamentally fair arbitration proceeding in that he was provided with the opportunity to fully brief and argue the motions to dismiss." Court further noted: "If a party's claims are facially deficient and the party therefore has no relevant or material evidence to present at an evidentiary hearing, the arbitration panel has a full authority to dismiss the claims without permitting discovery or holding an evidentiary hearing." *Dave Sheldon v Jay Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).

II. Labor Arbitration

A. Examples of Motions:

1. Dismissal on timeliness grounds.

2. Amend disciplinary charges and specifications (to cure typos, misstated dates or alleged utterances, etc.).

3. Modify the reason for the disciplinary action as stated in the termination letter/incident report/investigation report.

4. Compel discovery.

5. Dismissal for failure to state a prima facie case at conclusion of nonmoving party's case.

B. Issues Raised by Particular Motions:

1. Dismissal on timeliness grounds.

Whether to bifurcate hearing and address timeliness first and then proceed with a hearing on the merits if grievance deemed timely.

What weight, if any, to attach to the following factors:

- The late filing is for a de minimis amount of time;
- Union unaware that employer took action/implemented policy;
- Existence of a continuing violation, i.e., employer's recurring failure to pay established wage rate;
- Waiver, i.e., failure to assert timeliness defense during lower step grievance process;
- Tolling due to settlement discussions; and
- Parties' history of ignoring grievance time limitations.

2. Amend Disciplinary Charges and Specifications (to cure typos, misstated dates or alleged utterances, etc.).

Whether amendment violates a grievant's "procedural due process" right to "notice" of disciplinary charges. (This is particularly an issue in the public sector, but also in the private sector where concepts of "industrial due process" and "fundamental fairness" apply.)

Whether pre-hearing discovery provided the requisite "notice" by referencing accurate dates and other information in correct form.

3. Modify the reason for the disciplinary action as stated in the termination letter/incident report/investigation report.

Whether the employer's "new" reason to justify its disciplinary action was addressed in the pre-arbitration grievance process.

Whether the employer's "new" reason to justify its disciplinary action is "substantially similar" to the reason stated in the termination letter/incident report/investigation report.

4. Compel Discovery.

a. The Right to Discovery under Statute:

NLRA: An employer's duty to bargain includes an obligation to provide "relevant" information needed by the bargaining representative for contract administration related to grievance proceedings. *NLRB v. ACME Industrial Co.,* 385 U.S. 432 (1967).

Taylor Law: The obligation of the employer is "circumscribed by the rules of reasonableness, including the burden upon the employer to provide the information, the availability of the information elsewhere, necessity therefor, the relevancy thereof and, finally, that the information supplied need not be in the form requested as long as it satisfies a demonstrated need." *Albany City School District*, 6 PERB ¶ 3012 (1973).

NYCCBL § 12-306(c)(4): Duty to bargain in good faith includes the obligation to provide information reasonably necessary to contract administration (including in disciplinary proceedings), provided the requested materials are maintained in the ordinary course of business and do not have to be generated. *NYSNA*, 4 OCB2d 20 (BCB 2011), *order affirmed*, *City of New York v. New York State Nurses Ass'n*, 2017 NY Slip Op 04492 (Ct. of Appeals, June 8, 2017).

b. Use of Arbitral Subpoena Duces Tecum.

NY CPLR § 7505:

> Powers of arbitrator. An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas.

AAA Labor Arbitration Rule 27:

> An arbitrator or other person authorized by law to subpoena witnesses and documents may do so independently or upon the request of any party. *See also Fairweather's Practice and Procedure in Labor Arbitration*, 4th Ed. ("The arbitrator's power to issue a subpoena duces tecum is limited to ordering the production of documents that are material and relevant to the proceeding.").

5. Dismissal for failure to state a prima facie case at conclusion of nonmoving party's case.

While rare in labor arbitration, such motions arise in some disciplinary cases where the Employer allegedly failed to make a prima facie case in support of a discrete charge or specification.