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Employee Gets Day in Court, Thanks to Ambiguous Arbitration Pact

By Jay-Anne B. Casuga

Oct. 28 — Employers got a reminder from the Second Circuit that they must specify the laws covered by a bargaining agreement's arbitration provisions to ensure arbitration of employees' claims under those laws (*Lawrence v. Sol G. Atlas Realty Co.* , 2016 BL 359771, 2d Cir., No. 15-3087, 10/28/16).

Winston Lawrence, a porter for Sol G. Atlas Realty Co. and a union member, had his discrimination and retaliation claims against the property management company reinstated to federal court Oct. 28 by the U.S. Court of Appeals for the Second Circuit.

The collective bargaining agreement between Sol G. Atlas Realty and Lawrence's union, Service Employees International Union Local 32BJ, didn't include "clear and unmistakable" language that Lawrence waived his right to pursue those statutory claims in federal court, the Second Circuit said. It vacated a lower court order requiring Lawrence to arbitrate his claims under Title VII of the Civil Rights Act, the Civil Rights Act of 1866 (42 U.S.C. § 1981), the Fair Labor Standards Act, the New

York State Human Rights Law and the New York Labor Law.

Lawrence's attorney told Bloomberg BNA Oct. 28 that if an employer and a union intend to require arbitration of statutory claims, they can either list the specific laws in the CBA or "make it clear that all statutory claims are subject to arbitration."

"Here, neither was achieved," said Andrew S. Goodstadt of the Goodstadt Law Group in New York.

Stanley A. Camhi, of Jaspan Schlesinger in Garden City, N.Y., one of the attorneys representing Sol G. Atlas, disagreed.

"We believe that the language in the CBA was clear and unambiguous and consistent with the requirements of the Supreme Court," he told Bloomberg BNA.

However, Camhi also suggested that employers and unions should ensure that the non-discrimination provisions in a CBA "refer to statutory prohibitions and link them specifically" to the agreement's arbitration clause.

No 'Clear and Unmistakable' Language

The CBA at issue includes language prohibiting employment discrimination. That section also states: "Any disputes under this provision shall be subject to the grievance and arbitration procedure." The agreement further provides that "any dispute or grievance" that the employer and union can't settle directly between them shall be sent to arbitration.

Taken together, the provisions give employees a contractual right to be free of discrimination, and disputes concerning that right are subject to arbitration, the Second Circuit said.

"However, a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive," the court said.

The bargaining agreement doesn't identify specific laws or claims, and only generally refers to "law" and "disputes under this provision." It therefore doesn't clearly and unmistakably require arbitration of statutory claims because it "may plausibly be interpreted" as requiring arbitration of only contractual disputes, the court said.

Judge Dennis Jacobs wrote the opinion, joined by Judges Debra Ann Livingston and Jed S. Rakoff.

Jessica M. Baquet of Jaspan Schlesinger also represented Sol G. Atlas Realty.

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The opinion is available at http://www.bloomberglaw.com/public/document/WINSTON_LAWRENCE_PlaintiffAppellant__

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