Neutral Notes

The Jacobs Center for Justice and Alternative Dispute Resolution™

October 2012

Volume I, Issue 7

SUPREME COURT RULES ON CEPA/RETALIATION ACTIONS AND CIVIL SERVICE

While I would not ordinarily comment on a substantive decision that does not involve arbitration or mediation for *Neutral Notes*, this decision bears watching. Additionally, my takeaway is that mediation would have, and perhaps still could have, a positive effect on this case.

In a landmark decision by the New Jersey Supreme Court, in Winters v. No. Hudson Regional Fire & Rescue, the Supreme Court closed the door on parallel claims in Superior Court alleging CEPA retaliation when all claims would or should have been brought in a disciplinary proceeding. Winters' history is long and not to be repeated in this discussion. He was terminated from his position and had several disciplinary matters pending before the Civil Service Commission resulting in demotion, suspension, and ultimately discharge. Discovery practice before the Office of Administrative Law took place and the matter proceeded for years.

I am not commenting on the substance of the allegations, the positions of the parties, or the ruling itself. However, the Supreme Court's decision is most significant to public employees since it is likely to preclude individuals from filing CEPA claims that would have parallel actions in Superior Court. The words of the *per curium* decision of the Supreme Court are worth quoting:

> We therefore put users of the public employment system of employee discipline on notice that integration of employer-retaliation claims should be anticipated and addressed where raised as part of the discipline review process. It is unseemly to have juries second-guessing major public employee discipline imposed after litigation is completed before the Commission to which the Legislature has entrusted review of such judgments. Findings made as part of the discipline process will have preclusive impact in later employment-discrimination litigation raising allegations of employer retaliation based on the same transactional set of facts….
>
> Suffice that the facts are interesting, sometimes frightening, and also involve public disclosures of equipment error, sex discrimination, and a range of other topics.

Note: the Court did not say retaliation claims cannot be brought. It said they need to be brought in the same action so there is not a duplication of outside claims in Superior Court while the public employment system of redress is being utilized.

The Supreme Court stated that it was "hard pressed to permit Winters's litigation tactics to avoid the application of estoppel principles" since he was found to have "committed the equivalent of fraud on the public with his abuse of sick leave…."

The Court commented that Winters did not challenge the procedural sufficiency of the civil service proceedings. Thus, the question at the heart of the case was whether the issues in the two proceedings were aligned and litigated as part of the final judgment in the administrative action. The Court held that they were even though Justice Barry Albin disagreed in his lone dissent. The Court concluded that:

> Winters cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it. Retaliation was a central theme of his argument and that he chose not to present there his comprehensive proof of that claim does not afford him a second bite at the apple in this matter.

Make no mistake - this is a significant decision in public employment. It reinforces the

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Inside this issue:

The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

FITS AND STARTS FOR MANDATORY ARBITRATION

The following is excerpted from "Fits and Starts for Mandatory Arbitration," 9 Hof. Lab. & Emp. L.J. 547 (Spring 2012) by Roger B. Jacobs, Esq.

Mandatory arbitration is in the legal news almost daily. Whether it is a dispute among condominium owners regarding repairs in *Bell Tower Condominium Ass'n v. Haffert* cell phone add-ons that reached the Supreme Court in *AT&T Mobility LLC v. Concepcion*, landlord-tenant disputes, partnership disputes, and of course traditional employment disputes, among others, a significant concern is the potential diminution of rights and remedies. However, those concerns can be ameliorated by an arbitration agreement as well as through the scope of authority of arbitrators. The ABA Litigation Journal recently had a discussion on the expansive/expensive process of arbitration and proposed methods of curtailing this process.

The American Arbitration Association ("AAA") is discussing "muscular" arbitration and focusing heavily on streamlining the arbitral process so that it does not just mimic federal court litigation. Some of these problems can be resolved by the parties themselves. However, without fully addressing the "adhesion" issue, form agreements often specify the process without a discussion. Formulaic arbitration provisions would have to be reviewed and tailored.

One of the essential problems is that a "one size fits all" solution simply does not work. Just as there are different issues in matrimonial, commercial, construction, employment, and other disputes, mandatory arbitration provisions need to address those "industry" specific concerns. The remedy seems to be far simpler since a process that permits the parties to obtain the same remedy a court or jury could impose should eliminate that particular question. The process is more complicated and needs to be thought through on a systemic basis to avoid issues of unfairness, among other things.

It does not appear that the enthusiasm for mandatory arbitration is ebbing, at least in the courts. Uniformly, the Supreme Court and other courts continue to echo the notion that arbitration is an effective system of dispute resolution and is strongly favored, even if the arbitration is a result of an adhesionary process.

A mandatory arbitration provision should reduce the costs of litigation. If it does not, it will not be acceptable to the parties.

The arbitration agreement should be in **bold** and CAPITALIZED. A bold, capitalized clause will prevent employees from later arguing that they did not have notice of the mandatory arbitration provision or see it in the contract. It should also be easy to read, unambiguous, and written in terms the average employee could understand.

The employer should also provide the arbitration agreement to each employee. Employers should give employees sufficient time to read the agreement on their own and request a written acknowledgement of the employee's acceptance of the agreement.

Individualized mandatory arbitration provisions appear to be generally accepted and will expand. The real battle appears to be over class-wide utilization of arbitration. Discovery procedures need to be tailored in advance and fine-tuned to avoid the possibility of matching the time and expense of litigation.

The benefit of arbitration to all concerned is to provide a more user-friendly process that is efficient and less costly than litigation. The use of arbitration is, however, subject to the free market. If it is not cost effective and efficient it will not be used instead of litigation in court.

If you would like to discuss setting up an arbitration program that works for you contact Roger Jacobs at 973-226-0499 or email to jacobsjustice@gmail.com.

SETTLEMENT AGREEMENTS, ENFORCEABILITY, TERMS AND GETTING THERE

A quick thought to practitioners based upon experience and observation.

As we rely more and more on technology it is increasingly likely that "drafts" of settlements between lawyers will simply be forwarded to clients. So what you ask.

That derisive comment you may have made about your client or your adversary's client, not realizing that a forward might be at a minimum embarrassing, should be avoided.

Referring to different underlying transactions as "shady" and the basis for the deal is also problematic.

Communications between lawyers should continue to be proper realizing that they may see their day in court as evidence of a settlement. The other part of the discussion is that clients can be prickly when they see how you speak about them in shorthand. In other words, there is nothing wrong with a more old-fashioned formalistic approach, even if it is on an iPhone.

Supreme Court Rules on CEPA/Retaliation Actions

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notion of litigating all claims at the same time in the same forum; strongly criticizes attempts to end run for a second bite of the apple; and bolsters the role of administrative review for public employees.

My side comment is that had the parties sought a resolution this case might have been appropriate for mediation at various stages. However, mediation cannot work unless the parties have a mindset to resolve disputes short of maximum victory.

Call Roger Jacobs at 973-226-0499 if you have a discovery matter or complex litigation to oversee.

STEREOTYPES IN MEDIATION

A rabbi, a priest, and a broker are parties to a securities litigation.

Okay, so what image did you project for each of the parties?

In this case the priest has a MBA with a background in finance; the rabbi has a Ph.D. in economics; and the broker barely has a college degree and has been selling securities promoted by his firm.

Let's assume the rabbi and the priest each have claims against the broker for not knowing his client and lack of suitability. How credible would you think those claims are with this background?

Contrast that to your stereotypical notion before I gave any of their backgrounds.

In other words, while no judging is involved in mediation, everything in life is subjective. Mediation is, of course, built upon your experience in life and as a lawyer for your profession. For example, in the past I have had cases involving clergy and had formed my own conclusions – without any knowledge – about a lack of sophisticated investment knowledge or background and had proceeded accordingly. Obviously, such a course of action is dangerous and biased. As neutrals we must avoid both thoughts although we are not perfect.

Suitability claims are difficult to ascertain because we are often presented with a very brief sketch of the parties. The pleadings are limited and present individual claimants usually as uninformed, ill-informed, and lacking experience or knowledge of the markets. Conversely, respondents often depict the parties as highly sophisticated, long-time investors with limited input by the broker.

Perhaps it would be helpful for us to have actual knowledge. While there is no "discovery" in mediation, experienced mediators should be able to have an informed conversation to understand with whom they are dealing early on in a case. Certainly, in a theoretical suitability claim that conversation would be appropriate in my opinion.

And what about this variant? One of the claimants is an attorney. Should we automatically assume that she is highly intelligent, well informed, and a sophisticated investor? I don't think so but my guess is that would also be the assumption.

Without being disrespectful or stereotypical, we are all looking for that "little old lady" who lacks knowledge and sophistication and has been sold a bill of goods. My inclination is to take all parties at face value, question representations until I am satisfied they are accurate, and make my own assessments and judgments. Frankly, that is what the parties are buying in a mediator – a person whose judgment and experience are respected and who will have adequate credibility to make assessments so that his or her suggestions to the parties have weight. Following that approach, and a certain level of maturity, can lead parties to a resolution if they are ready.

If you have a dispute where you think I can be helpful feel free to call 973-226-0499.

THE JACOBS CENTER also focuses on workplace investigations. With more than 30 years of experience in labor and employment and a background as a prosecutor, Roger Jacobs can help in short or long term investigations in the workplace. Whether it is whistle blowing or corporate intrigue we can be a cost effective solution to problem solving.

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NEWS AND NOTES

Roger Jacobs recently mediated successfully for FINRA.

Rachel Jacobs is now enrolled in a doctoral program at the University of Wisconsin focusing on comparative politics and political science. Rachel has moved from 2nd Avenue in the East Village to Madison, Wisconsin for the foreseeable future.