

# Selected Labor & Employment Law Updates

*compiled by* Updates Editor

This section of the *Journal* provides notes on recent cases, pending or newly-enacted legislation, and other current legal materials. The Updates section is designed to aid the practitioner in relating the *Journal* articles to the daily practice of labor and employment law. The *Journal* welcomes outside submissions of brief judicial and legislative summaries.

## ARBITRATION

*Supreme Court holds that any collective bargaining agreement waiver of an employee's right to litigate statutory employment discrimination claims must be clear and unmistakable. Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998).*

In November, the Supreme Court vacated a Fourth Circuit judgment and held that for a union to waive employees' rights to a federal judicial forum for statutory antidiscrimination claims, the agreement to arbitrate such claims must be "clear and unmistakable." The Court did not address the question of whether such a waiver would be enforceable.

Petitioner Ceasar Wright, a longshoreman, was subject to a collective bargaining agreement ("CBA") which contained an arbitration clause. The arbitration clause was very general and contained no explicit contractual incorporation of statutory antidiscrimination requirements. When respondent Universal Maritime Service Corporation refused to employ him following his settlement of a claim for permanent disability benefits for job-related injuries, Wright filed suit, alleging discrimination in violation of the Americans with Disabilities Act ("ADA"). The District Court dismissed the case without prejudice because Wright had failed to pursue the arbitration procedure prescribed by the CBA. The Fourth Circuit affirmed. The Supreme Court vacated the judgment and remanded the case, holding that the CBA's general arbitration clause did not require

Wright to use the arbitration procedure for an alleged violation of the ADA.

The Court found that Wright's ADA claim was not subject to the presumption of arbitrability under section 301 of the Labor Management Relations Act ("LMRA"); matters beyond the specific terms of a contract may be subject to arbitration as directed by the CBA, but they are not presumed to be so. The Court assumed, without deciding, that an employee's right to litigate statutory employment discrimination claims is waivable in a CBA. However, the Court did not resolve the question of the validity of a union-negotiated waiver of an employee's statutory rights to a federal forum since no waiver occurred here. Even so, the Court held that if such a waiver were to be enforceable, any such waiver must be clear and unmistakable. In this case, a labor contract providing that its grievance procedure is intended to cover all matters "affecting wages, hours, and other terms and conditions of employment" was not sufficiently explicit to waive the petitioner's right to litigate his ADA claim, particularly in light of the additional CBA language providing that "[a]nything not contained in this Agreement shall not be construed as being part of this Agreement."

*Labor and employment contracts held to be outside scope of FAA. Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998).

In a 2-1 per curiam decision, the Ninth Circuit held that labor and employment contracts are outside the scope of the Federal Arbitration Act ("FAA"), and refused to compel an employee to arbitrate all aspects of his grievance, including Title VII discrimination questions.

In *Craft*, a Campbell Soup employee filed a race discrimination suit while his grievance under a CBA was still pending in arbitration. The District Court ordered arbitration of the employee's supplemental state law claims but ruled that *Craft* could not be compelled to arbitrate his Title VII claim. On appeal, the Ninth Circuit rejected the majority view among the federal appellate courts that the FAA applies to all employment contracts, with the exception of contracts for employees who work in interstate commerce. The court read broadly an exclusion in section 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." It also emphasized the limited reach of section 2, which provides for enforcement of certain arbitration agreements.

In interpreting the relevant sections of the FAA, the Ninth Circuit found the statute ambiguous and looked to the legislative history. Citing *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the court reasoned that Congress' commerce power at the time of the FAA's enactment in 1925 "was clearly limited to the actual interstate movement of goods." Although

most courts have construed section 1's narrow exclusion to apply only to seamen, railroad workers, and similarly situated employees, the Ninth Circuit said that such a construction relied on a contemporary understanding of the statute, rather than one based on the time of enactment.

*Broad arbitration clause may constitute waiver of an employer's statutory right to a judicial forum. Interstate Brands Corp. v. Bakery Drivers & Baked Goods Vending Mach. Local No. 550, No. 98-7194, 1999 U.S. App. LEXIS 1162 (2d Cir. Jan. 29, 1999).*

Under a recent Second Circuit decision, employer Interstate Brands must arbitrate its claim for damages caused by a union's alleged illegal secondary boycott. The court held that a broad arbitration clause in a CBA waives an employer's statutory right under the Labor Management Relations Act ("LMRA") to adjudicate a secondary boycott damages claim in a judicial forum. In so deciding, the court rejected the employer's argument that the recent Supreme Court decision in *Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391 (1998), eliminated the presumption of arbitrability with regard to disputes arising between parties to a CBA that contains an arbitration clause.

Employer Interstate Brands Corporation ("IBC") had used nonunion firms to distribute products for a number of years. In 1995, IBC acquired Continental Baking Company ("CBC") and assumed the terms and conditions of a contract between the union and CBC, which required in part that the parties arbitrate "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this agreement, or any act or conduct or relation between the parties thereto, directly or indirectly." The CBA also excluded from arbitration certain disputes over changes in the employer's distribution policies, including compensation or delivery methods. This section provided for strike and lockout rights if the parties failed to agree on proposed changes in distribution that IBC implemented.

Arguing that union-represented workers who already distributed CBC's products were also entitled to distribute IBC's products, the union claimed that IBC's use of nonunion firms to distribute products was a change in distribution policy that did not require arbitration and could trigger the right to strike. IBC's continued use of nonunion distributors prompted the union to strike, and the company filed an unfair labor practice charge alleging a secondary boycott in violation of the National Labor Relations Act. IBC then brought suit under section 303 of the LMRA for damages caused by the union's allegedly unlawful secondary activity,

arguing that the recent Supreme Court decision in *Wright* had eliminated the presumption of arbitrability for disputes under a CBA. In *Wright*, the Supreme Court held that a longshoreman could bring his ADA claim in court, notwithstanding a collective bargaining agreement's arbitration clause. The Court held that a union-negotiated waiver of an employee's statutory right to a judicial forum will not be given effect unless the waiver is "clear and unmistakable." Rejecting IBC's argument, the Second Circuit held that the strict standard of *Wright* does not apply when an employer waives its own rights in an individually-negotiated contract with a union. Since the contract's arbitration language is unusually broad and covers the employer's section 303 claim, the court concluded that IBC had waived its right to a judicial forum.

*Arbitration award in conflict with an earlier NLRB ruling must cede to NLRB decision. T. Equip. Corp. v. Massachusetts Laborers' Dist. Council*, No. 98-1148, 1999 U.S. App. LEXIS 641 (1st Cir. Jan. 15, 1999).

The First Circuit has held that an arbitration award that disagrees with an earlier National Labor Relations Board ("NLRB") ruling in a jurisdictional dispute must give way to the NLRB ruling. The court upheld the NLRB's award of construction work to employees represented by the United Brotherhood of Carpenters, rejecting a labor arbitrator's award of "pay-in-lieu of work" to employees represented by the Laborers International Union.

After a dispute arose over the assignment of construction work, the NLRB conducted a jurisdictional dispute resolution hearing under section 10(k) of the Labor Management Relations Act, awarding the disputed work to the Carpenters. Less than a week later, the arbitrator held the contractors in breach of contract and awarded "pay-in-lieu of work" to the Laborers. Although the arbitration award involved damages, and not the work itself, the First Circuit concluded that the two awards were irreconcilable.

Although case law clearly suggests that an arbitration award must cede to a section 10(k) decision where the two conflict, the circuits are not in agreement as to what constitutes such a conflict. The First Circuit chose to follow a line of cases holding that a section 10(k) determination awarding work to one union will conflict with an arbitration award favoring the other union—regardless of whether the award constitutes damages or work assignment. Two additional factors the court considered were that the NLRB's section 10(k) decision preceded the arbitration award and that requiring the employer to pay damages would penalize the company for settling a jurisdictional dispute by complying with a section 10(k) decision.

*Arbitrator's subpoena for documents from nonsignatory to collective bargaining agreement is enforceable in federal court. American Fed'n of Television and Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).*

In a case of first impression at the appellate level, the Sixth Circuit held that a labor arbitrator's subpoena directed to a nonsignatory to a collective bargaining agreement is enforceable in federal district court pursuant to section 301 of the LMRA. The court limited its holding to subpoenas compelling production of documents, as opposed to subpoenas compelling testimony.

The employee, a television news anchor who was fired for alleged misuse of automobile privileges, filed a grievance alleging that other media personalities guilty of similar acts had been neither disciplined nor discharged. After the employee unsuccessfully attempted to subpoena the records of an automobile rental company, the arbitrator issued a subpoena directing the company to produce records concerning use of its vehicles by other media personalities. The company refused to comply with the subpoena, and the employee sought enforcement. The district court found that it had subject matter jurisdiction and authority to enforce the subpoena under section 301 of the LMRA, but the court declined to enforce the subpoena.

The Sixth Circuit upheld the District Court ruling with regard to subject matter jurisdiction. The court found that the Federal Arbitration Act does not create any independent federal question jurisdiction, but that where the agreement to arbitrate is part of a collective bargaining agreement governed by the LMRA, "the agreement to arbitrate itself arises under federal law." Ordering the District Court to enter judgment compelling production, the Sixth Circuit said the issue was not whether the auto rental company could be forced to arbitrate a dispute, but whether "as a non-party, it can be compelled to produce documents in the arbitration" between the employee news anchor and the employer television station.