Massachusetts Supreme Judicial Court Upholds Right to Enforce Employment Arbitration Agreements

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Earlier this year, in *Joulé, Inc. v. Simmons*, 459 Mass. 88 (2011), the Massachusetts Supreme Judicial Court ("SJC") held that a lower court erred in denying an employer's motion to compel an employee to arbitrate her gender and pregnancy discrimination claims while the Massachusetts Commission Against Discrimination ("MCAD") processed her complaint. In so doing, the SJC refused to give the MCAD primary jurisdiction over the claims and instead ruled that, assuming the arbitration agreement was valid, the employer was entitled to proceed with arbitration of the dispute. The SJC, however, also ruled that the arbitration agreement did not prohibit the MCAD from concurrently proceeding with its investigation of the MCAD complaint.

In the case, an employee, Randi Simmons, claimed that her employer, Joule Technical Staffing, Inc. ("Joulé"), subjected her to a hostile work environment and discriminated against her on the basis of gender and pregnancy. Although she had signed an employment contract in which she agreed to arbitrate any claims of harassment or discrimination, Simmons filed a complaint with the MCAD rather than filing a demand for arbitration. Joulé, in turn, then filed suit in Massachusetts Superior Court asking the court to compel Simmons to arbitrate her claims. In opposition, Simmons argued that the arbitration provision was unenforceable and, in any event, did not bar her from participating in the MCAD process as a complainant. The MCAD intervened in the case and argued that the agreement between Joulé and Simmons to arbitrate did not affect the MCAD's authority to investigate and adjudicate Simmons' claims.

After a hearing, the Superior Court accepted the MCAD's argument that its authority to conduct an investigation and adjudication of Simmons's claim of discrimination was not affected by the parties' agreement to arbitrate. The Court ordered (1) that Joulé's motion to compel arbitration be denied, (2) that the Superior Court action to compel arbitration be stayed pending resolution of the MCAD's proceeding, and (3) that the arbitration provision in the employment agreement did not preclude Simmons from participating as a party in the MCAD proceeding. Joulé appealed the order and the SJC granted direct appellate review.

The SJC's Rulings

The SJC agreed with the Superior Court's decision that even a clear and valid agreement requiring arbitration of discrimination claims would not affect an employee's right to file a claim with the MCAD and participate in the MCAD's investigation and adjudication of that claim. The SJC reasoned that "[t]he MCAD is not a party to the employment agreement at issue here, has not agreed to the arbitration of Simmons's MCAD complaint, and cannot be bound by the agreement's arbitration provision." Quoting the U.S. Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the SJC stated that "the proarbitration policy goals of the FAA [the Federal Arbitration Act, 9 U.S.C. §§1 et seq.] do not require the agency to relinquish its statutory authority if it has not agreed to do so."

The SJC, however, ruled that the lower court erred by staying the court action to compel arbitration. According to the SJC, "[i]f an employer and employee enter into a valid and sufficiently clear agreement to arbitrate any and all disputes relating to discrimination, then the party seeking arbitration of such a dispute is entitled to have the agreement enforced." If, as in

this case, a claim is filed with the MCAD, "the agency could proceed notwithstanding the arbitration provision in the parties' agreement … and there is no legal bar to having the arbitration and the MCAD proceeding continue concurrently, on parallel tracks."

The SJC also rejected the lower court's ruling that, in essence, the MCAD proceeding should take precedence over any arbitration. Quoting the U.S. Supreme Court's decision in Preston v. Ferrer, 552 U.S. 346 (2008), the SJC stated that "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." Thus, the employer, Joulé, had the right to go forward with the arbitration.

Lastly, the SJC rejected the lower court's ruling that, even assuming she entered into a valid arbitration agreement, Simmons was not barred from participating in the MCAD proceeding as a party. The SJC distinguished between private court actions brought by individuals under M.G.L. c. 151B, Section 9 (which may be barred by a valid arbitration agreement between the employer and the individual), and administrative proceedings before the MCAD under M.G.L. c. 151B, Section 5 (which are not barred). Under Section 9, ninety days after filing a complaint with the MCAD an individual can voluntarily dismiss his/her MCAD complaint and file a lawsuit in court. The SJC noted that "[t]he main objective of the judicial proceeding [under Section 9] is to recover damages for the individual victim on unlawful discrimination."

When an individual does not pursue a private court action under Section 9, and the MCAD subsequently finds probable cause to conclude that discrimination occurred, and conciliation of the matter is unsuccessful, the MCAD may proceed to a public hearing. Under Section 5, and the MCAD regulations promulgated thereunder, when a complaint proceeds to a public hearing a complainant is normally permitted to "intervene" as a party in the case. When a complainant files a request to intervene she must certify her "allegations of discrimination" and, in essence, "is required to advance a claim of discrimination in her own name." By doing so, she forgoes her right to pursue a private court action under Section 9. If, after the hearing, the MCAD finds that the respondent employer has violated M.G.L. c. 151B, the MCAD may grant relief specific to the complaining individual, including back pay and emotional distress damages.

The SJC ruled that, assuming the validity of the arbitration agreement, beyond filing a complaint with the MCAD, Simmons was "barred from being a litigant or party before the MCAD." Rather, as a result of the arbitration agreement, Simmons's role before the MCAD must be limited to testifying as a witness and/or "provid[ing] information, materials or responses to [Joulé's] submissions which are necessary for investigation of the case."

The SJC noted the "inefficiency inherent in having the same core issues be the subject of simultaneous but separate proceedings in two different forums" — in private arbitrations and in Section 5 proceedings before the MCAD. According to the SJC, such simultaneous proceedings also raise a question concerning "the impact a settlement of the arbitration or final arbitration award would have on the MCAD's adjudication or on the type of relief the MCAD may order." Unfortunately, the SJC chose not to answer this question, choosing instead simply to quote the U.S. Supreme Court in stating that "it goes without saying that the courts can and should preclude double recovery by an individual."

Practical Implications for Employers

The SJC's rulings in the *Joulé* case reinforce the principal that valid arbitration agreements are enforceable, even as applied to statutory claims of employment discrimination and harassment. Thus, arbitration agreements remain an attractive option for businesses wishing to avoid the greater costs, delays, publicity, and exposure to unreasonable jury awards often associated with litigating employment disputes in court.

Of course, the possibility that an employer may have to participate in an MCAD investigation at the same time that it is engaged in arbitration is not very appealing. However, the reality of

MCAD case-processing suggests that, even in the rare instances in which an employee subject to an arbitration agreement files an MCAD complaint, the additional burden on the employer will not be great. When the MCAD receives a complaint alleging a violation of M.G.L. c. 151B the MCAD normally sends a copy of the complaint to the employer with a request that the employer file a response in the form of a position statement. After the employer files a position statement, and in some cases is required to attend a brief investigative conference, it is often many months before the employer is contacted again by the MCAD. During that period the employer is typically required to do nothing in connection with the MCAD proceeding.

In fact, it typically takes the MCAD over fifteen months to reach a determination as to whether there is probable cause to conclude that any unlawful discrimination took place. After that, MCAD cases often take another year or two (or more) to reach the public hearing stage. In contrast, most employment arbitration proceedings are completed within twelve months after the demand for arbitration is filed. Thus, it is unlikely that there would be much activity in arbitration proceedings and MCAD proceedings that would truly run concurrently.

As the SJC noted, there is uncertainly regarding the impact a settlement of the arbitration or final arbitration award will have on the MCAD's adjudication or on the type of relief the MCAD may order. Past experience, however, suggests that when a settlement is reached between an employer and the complaining employee such settlement nearly always results in the cessation of the MCAD proceeding. Indeed, most such settlements are conditioned upon the dismissal of any pending MCAD proceeding. There is no reason to expect a different result when the settlement occurs during the course of an arbitration case.

The impact of an arbitration award on MCAD proceedings is harder to predict. What weight will the MCAD give to an arbitrator's award in favor of or against an employee on a statutory discrimination claim? The MCAD position, no doubt, is that the agency makes its own independent determination as to whether M.G.L. c. 151B has been violated, and when there is a violation the MCAD will order relief consistent with the remedial and enforcement purposes of the statute. However, in cases in which an arbitrator concludes that discrimination occurred and awards money damages to an employee, it is very unlikely that the MCAD would award duplicate damages. The SJC statement that "courts can and should preclude double recovery by an individual" is a well-settled principle in civil litigation and presumably applies to MCAD proceedings.

In cases in which an arbitrator concludes that there was no discrimination the MCAD will feel free to give the conclusion no weight. However, when an arbitrator issues a reasoned decision following a full evidentiary hearing the cases in which the MCAD reaches a contrary decision should be relatively rare. Further, given the MCAD's large case load and limited resources, the MCAD should be less inclined to pursue cases when there already has been a determination that no discrimination occurred.

The bottom line is that, for businesses utilizing arbitration for employment disputes, the SJC's decision in *Joulé, Inc. v. Simmons* is, on balance, a positive development. The Court reconfirmed that valid arbitration agreements are enforceable as to statutory claims of employment discrimination and harassment, and that they preclude employees from pursuing such claims in court or as parties before the MCAD. The SJC's holding that arbitration agreements do not prevent employees from filing complaints with the MCAD or prevent the MCAD from processing the complaints when filed is no surprise and should not significantly affect an employer's decision to use arbitration agreements.

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