Anti-Retaliation Remedies in the

Workers' Compensation Act Held Non-Waivable

By Daniel York*

I. Introduction

The Texas Supreme Court has held that provisions in binding arbitration clauses that are in conflict with statutory anti-retaliation remedies under the Workers' Compensation Act ("WCA") are unconscionable under Texas law of contract formation.[1] In In re Poly-America, the court found that anti-retaliatory provisions of the WCA are non-waivable.[2] Although the arbitration provisions relating to the Worker's Compensation Act are unconscionable, the court found them to be severable from the agreement, so long as they are not essential to the parties' agreement to arbitrate.[3]

II. Evolution of the Federal Arbitration Act

Attitudes toward arbitration have changed dramatically throughout the course of American jurisprudence. During the late 19th century, American courts looked down upon arbitration as being a form of "rusticum judicium," or rustic justice.[4] Early justices regarded the arbitrator as unsophisticated and lacking essential powers, such as administrating an oath and compelling the production of documents.[5]

This view shifted dramatically in 1925 when Congress, using its commerce powers, enacted the Federal Arbitration Act ("FAA") as a means of protecting and enforcing parties' agreements to arbitrate disputes involving interstate commerce and maritime claims.[6] In section 2 of the FAA, Congress protected the right to arbitrate by preempting all state laws hostile to arbitration agreement enforceability.[7] Section 2 states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[8]

By enacting section 2, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"[9]

The Supreme Court has expanded the scope of the FAA, applying it to both federal and state courts, so long as the issues involve matters of interstate commerce.[10] The Court also interpreted section 2 as preempting state laws that are prejudiced against the enforceability of arbitration agreements.[11] State courts are left to inquire whether an actual agreement to arbitrate exists by applying state-contract law governing the formation of contracts.[12] As a matter of policy, the Court's holdings both protect legitimate arbitration agreements as a means of resolving disputes, and provide judicial protection to parties against one-sided provisions that would have been found unconscionable if brought in a court of law.

Despite federal preemption of anti-arbitration state laws, employment disputes initially did not see a significant rise in arbitration.[13] This was attributed to the low risks and costs of litigating employment disputes, and the uncertainty about whether arbitration agreements were enforceable for statutory discrimination claims.[14] Congress changed this situation when it enacted the Civil Rights Act of 1991 ("CRA"). The CRA substantially increased the potential cost of employment litigation.[15] Additionaly, the Supreme Court expressly endorsed the use of binding arbitration for employment disputes, including employment discrimination claims.[16] Employers gradually began to view arbitration as an economically efficient alternative to litigation. Likewise, courts have shown an increased willingness to uphold arbitration agreements in employment disputes.[17]

III. Purpose and Protections of the Texas Workers' Compensation Act

The enactment of the WCA was "based upon the theory that the burden of on-the-job injuries should be shifted from the worker to the employing business, and ultimately to the consuming public, as a cost of doing business."[18] Once an employee files for Workers' Compensation benefits, the employee waives his right to sue the employer for damages that resulted from his injury.[19] The WCA's purpose is to provide protection to an employee in case of injury, while also providing the benefit of quick, inexpensive relief to him without regard to the party at fault.[20] This fault-neutral relief to the employee also provides the employer with the benefit of foregoing potentially costly litigation and the possibility of large judgments in favor of the injured employee.

While the WCA's purpose is to extend benefits to employees injured on-the-job, it also protects workers seeking benefits under the WCA from employer retaliation.[21] The WCA's anti-retaliation provision functions "to protect persons entitled to benefits under the Workers' Compensation Act and to prevent them from being discharged for filing claims to collect those benefits."[22] The WCA's wording not only prohibits retaliatory firings, but also extends certain statutory remedies to an employee who was wrongfully discharged in this manner.[23] The remedies available to wrongfully discharged employees include both reasonable damages and reinstatement.[24]

IV. Luna's Claims

Luna began his employment with Poly-America in 1998. At that time, he signed an arbitration agreement that would submit all claims or disputes to arbitration.[25] Luna signed an amended arbitration agreement in 2002 that contained virtually identical provisions, governed by the FAA. Luna suffered a work-related neck injury in 2002. He filed for benefits under the WCA and began physical therapy. After two weeks, Luna received a release for light duty and returned to work though still in pain. Luna took time off to recover from his injuries by using previously scheduled vacation time. The company's doctors informed Luna that if he intended to keep his job, he needed to return to work and stop receiving workers' compensation benefits. Luna then returned to work, and discovered the company had begun training someone else for his position.[26] Luna worked for a month and then told his supervisor that his neck pains had never disappeared, and requested to see the company doctor. The next day he was fired.

Luna asserted claims for unlawful retaliatory discharge under section 451.001 of the Labor Code (WCA). Luna sought reinstatement and punitive damages against Poly-America claiming that they "acted with malice, ill will, spite, or specific intent to cause injury."[27] Luna then challenged the enforceability of the arbitration agreement, alleging the prohibitions against reinstatement and punitive damages "violated public policy and were unconscionable."[28]

V. The Challenged Arbitration Provisions

The FAA provides that an arbitration agreement or provision cannot stand where it fails to meet the requirements of contract formation according to state law.[29] The Poly-America court stated, "A contract is unenforceable if, 'given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'"[30] Additionally, the court stated a contract would be held unconscionable if it was "grossly one-sided."[31]

Luna brought claims under the anti retaliatory provisions of the WCA. Section 451.001 of the WCA states:

> A person may not discharge or in any other manner discriminate against an employee because the employee has:
> (1) filed a workers' compensation claim in good faith;
> (2) hired a lawyer to represent the employee in a claim;
> (3) instituted or caused to be instituted in good faith a proceeding under Subtitle A; or
> (4) testified or is about to testify in a proceeding under Subtitle A.[32]

As the court noted, this section's purpose is, "to protect persons entitled to benefits under the act and to prevent them from being discharged for seeking to collect those benefits."[33] In regards to arbitration agreements covering statutory claims, the court held such agreements valid so long as they do not waive any of the "substantive rights and remedies of the statute …."[34] The rights under the WCA are statutory, and cannot be minimized "by private agreements or special applications for employment."[35]

The arbitration agreement at issue contained provisions prohibiting reinstatement and the awarding of punitive damages.[36] The WCA states, in pertinent part: "… a person who violates § 451.001 is liable for reasonable damages incurred by the employee as a result of the violation," and that "an employee discharged in violation of § 451.001 is entitled to reinstatement in the former position of employment."[37]

Luna asserted that the arbitration provisions prohibiting reinstatement and punitive damages were unconscionable, because they denied him his statutory rights under the WCA.[38] The court noted that it had previously held that "an arbitration agreement covering statutory claims is valid so long as the arbitration agreement does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, 'such that the employee may effectively vindicate his statutory rights.'"[39] Section 451.002 provides a right to reasonable damages for violations of section 451.001.[40] The Texas Supreme Court had previously held that the term "reasonable damages" cannot be construed to mean mere actual damages[41], stating that both future damages

and punitive damages were available to a grievant, so long as they could show the employer acted with actual malice in retaliating against the employee for filing a workers' compensation claim.[42]

Based on this analysis, the court held the provisions of the arbitration agreement prohibiting reinstatement and punitive damages were unenforceable because the anti-retaliatory provisions of the WCA are a "non-waivable legislative system for deterrence necessary to the nondiscriminatory and effective operation of the Texas Workers' Compensation system as a whole …."[43] In its reasoning, the court stated that to allow an employer the ability to limit the remedies available to an employee under the WCA would be unfair.[44] The employer would enjoy the Act's limited liability benefits while forcing the employee to bear the burden of injury. The court further stated that to permit an employer "to contractually absolve itself of this statutory remedy would undermine the deterrent purpose of the Workers' Compensation Act's anti-retaliation provisions."[45]

VI. Severability

The arbitration agreement at issue contained a provision that stated:

> Should any term of this Agreement be declared illegal, unenforceable, or unconscionable, the remaining terms of the Agreement shall remain in full force and effect. To the extent possible, both Employee and Company desire that the Arbitrator modify the term(s) declared to be illegal, unenforceable, or unconscionable in such a way as to retain the intended meaning of the term(s) as closely as possible.[46]

The Poly-America court found "An illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement."[47] The court noted that, "Whether or not the invalidity of a particular provision affects the rest of the contract depends upon whether the remaining provisions are independent or mutually dependent promises, which courts determine by looking to the language of the contract itself."[48] The court further stated, "The relevant inquiry is whether or not parties would have entered into the agreement absent the unenforceable provisions."[49]

Finding that the unconscionable provisions were severable, the court determined the parties' main intent was to commit their dispute to arbitration and, absent the provisions limiting Luna's remedies under the WCA, their intent survived.[50]

VII. Conclusion

Employers cannot contractually absolve themselves from the statutory remedies available to their employees under the anti-retaliation provisions of the WCA. The Poly-America court's reasoning is consistent with the intent of the Legislature, because its holding provides a check to the unbalanced power in the employee/employer relationship. Employees who waive their rights to the courts by drawing workers' compensation benefits in good faith should not be penalized for doing so by further having their remedies limited through the imposition of their employer's superior contractual bargaining power. Consistent with this reasoning and the FAA's favorable view of agreements to arbitrate, provisions in a contract seeking to limit these statutory rights are severable, so long as they were not essential to the parties' intent to commit the matter to arbitration.

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1 *In re* Poly-America, 262 S.W.3d 337 (Tex. 2008).
2 *Id.*
3 *Id.*
4 Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (1845) (Story, Circuit Justice).
5 *Id.*
6 9 U.S.C. §§ 1-14 (2006).
7 9 U.S.C. § 2 (2006).
8 *Id.*
9 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).
10 Southland Corp. v. Keating, 465 U.S. 1, 2 (1984).
11 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 107 (2001).
12 First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
13 Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B 174, 177 (2008).
14 *Id.*
15 *Id.*
16 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
17 *Halvordson*, *supra* note 14 at 177-178.
18 SORM.state.tx.us, The Texas State Employees' Workers' Compensation System, http://www.sorm.state.tx.us/Claims_Coordinator_Handbook/overview.php (last visited November 8, 2008).
19 *Id.*
20 *Id.*
21 Tex. Lab. Code Ann. § 451.002(a)-(b).
22 Jason Ross, *After-Acquired Evidence In Texas Employment Law: The Trico Technologies Decision*, 50 Baylor L. Rev. 519, 531 (1998) (quoting Trico Technologies Corp. v. Montiel, 949 S.W.2d 308, 312 (Tex. 1997)).
23 Tex. Lab. Code Ann. § 451.002(a)-(b).
24 *Id.*
25 Poly-America, 262 S.W.3d at 344.
26 *Id.* at 345.
27 *Id.*
28 *Id.*
29 9 U.S.C. § 2
30 Poly-America, 262 S.W.3d at 348 (quoting *In re* FirstMerit Bank, 52 S.W.3d 749, 752 (Tex. 2001).
31 *Id.*
32 Tex. Lab. Code Ann. § 451.001.
33 Poly-America, 262 S.W.3d at 350.
34 *Id.* at 352.
35 Petroleum Cas. Co. v. Smith, 274 S.W.2d 150, 151, .
36 Poly-America, 262 S.W.3d at 344.
37 Tex. Lab. Code Ann. § 451.002(a)-(b).
38 Poly-America, 262 S.W.3d at 345.
39 Poly-America, 262 S.W.3d at 349 (quoting *In re* Halliburton, 80 S.W.3d 566, 572 (Tex. 2002)).
40 Tex. Lab. Code Ann. § 451.002.
41 *See* Azar Nut Co. v. Caille, 734 S.W.2d 667, 669 (Tex. 1987).
42 *See* Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 454 (Tex. 1996).
43 Poly-America, 262 S.W.3d at 352.
44 *Id.* at 352.
45 *Id.*
46 *Id.* at 359.
47 *Id.* at 360.
48 *Id.*
49 *Id.*
50 *Id.*