State of Wisconsin

Labor and Industry Review Commission

Melvin D. Reed
2402 North Sherman Boulevard
Milwaukee, Wisconsin 53210
Complainant

Menard, Inc.
5101 Menard Drive
Eau Claire, Wisconsin 54703
Respondent

ERD Case Nos. CR201803005,
CR201803114 & CR201900562
EEOC Case Nos. 26G201900165C,
26G201900231C & 26G201900552C

Fair Employment Decision[1]

Dated and Mailed:

OCT 3 1 2019

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The decision of the administrative law judge is **affirmed, subject to the following modifications**. Accordingly, the complaints filed with the Equal Rights Division are dismissed.

By the Commission:

Michael H. Gillick, Chairperson

David B. Falstad, Commissioner

Georgia E. Maxwell, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

The complainant filed three complaints against the respondent alleging violations of the Wisconsin Fair Employment Act (hereinafter "Act). The three complaints were investigated by an equal rights officer, who issued three Initial Determinations making probable cause determinations on some allegations and no probable cause determinations on others. All three complaints were certified for an administrative hearing in the Equal Rights Division (ERD). Prior to hearing on any of the complaints the respondent filed a motion with an administrative law judge requesting that the complainant be compelled to submit all his claims to binding arbitration in lieu of an administrative hearing in the ERD. The administrative law judge granted the motion and dismissed the three complaints. The complainant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties and has reviewed the document at the center of this case, an agreement signed by the parties containing an arbitration provision. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modifications

1. On page 2, in the paragraph beginning "On June 7, 2019", delete everything in the paragraph after the clause "because he had opposed a discriminatory action under the WFEA."

2. On page 4, delete the two paragraphs immediately preceding the ORDER.

Memorandum Opinion

Motion to Recuse

Before the complainant answered the merits of the respondent's motion to compel him to submit his claims to binding arbitration in lieu of an administrative hearing, he filed a motion to recuse, asking that the cases be transferred to a different administrative law judge. In the motion the complainant made the general assertion that "this court" (by which he meant "this administrative law judge") in the past had committed "judicial malfeasance" and attempted "to derail and sabotage" his rights, and stated that, contemporaneously with the filing of the motion, he was filing a complaint with the Office of Lawyer Regulation (OLR). He argued that no judge would remain on the case knowing that the complainant had a pending complaint against him in the OLR and asked that the cases be transferred to a different administrative law judge. He did not provide a supporting affidavit and did not provide a copy of his OLR complaint. The administrative law judge denied the motion, stating that he had no knowledge of the content of an OLR complaint, and knew of no basis for alleged "judicial malfeasance."

The administrative law judge's denial of the motion to recuse was not improper. Decision-makers in state administrative hearings enjoy a presumption of honesty and integrity. A party seeking to prove bias or an impermissibly high risk of bias bears a heavy burden to overcome that presumption. *Cassetta v. Zales Jewelers,* ERD Case No. 200204189 (LIRC June 14, 2005). In order to disqualify an administrative law judge in an ERD proceeding for bias, a party must provide and establish an actual reason, documented in a supporting affidavit, for the judge's disqualification. *See Odya v. Captain Install, Inc.,* ERD Case No. 199705081 (LIRC May 19, 2000); Wis. Admin. Code § DWD 218.16. The complainant never filed a timely and sufficient affidavit asserting personal bias on the part of the administrative law judge or other reason for disqualification.

The administrative law judge carried out his responsibility under administrative rules by determining whether to disqualify himself for personal bias or other reason and by making his determination part of the decision in the case. Wis. Admin. Code § DWD 218.16. The information that the complainant filed a complaint against him with the OLR, the content of which was unknown to him, is not sufficient to overcome the presumption that he proceeded in this matter without personal bias.

Binding Arbitration

On the merits of the respondent's motion to compel arbitration, the complainant made two arguments. First, he asserted that the agreement between the parties containing the arbitration clause was unenforceable because the agreement mis-stated the complainant's address under his signature as "24 12 N. Sherman Blvd." His correct address was 2402 N. Sherman Blvd. The mistaken address does not make the agreement unenforceable. The complainant received a copy of the agreement as an attachment to the respondent's motion to compel arbitration and did not dispute that it was a copy of the agreement he signed on October 3, 2017. The mistake in the complainant's address is of no consequence, given that the complainant does not dispute that he signed the agreement.

The other argument the complainant made was that the agreement did not mandate arbitration, it only permitted it. The respondent disagreed and argued that the agreement clearly mandates private arbitration of the complainant's claims.

The commission has recognized the enforceability, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., of provisions in employment contracts specifying binding arbitration as the exclusive and final remedy for claims under state law, including discrimination claims. *Carrington v. General Electric,* ERD Case No. 200701080 (LIRC Apr. 30, 2010), citing *Circuit City Stores, Inc., v. Saint Clair Adams,* 532 U.S. 105 (2001); *Southland Corp. v. Keating,* 465 U.S. 1 (1984); and *Allied-Bruce Terminix Cox. V. Dobson,* 513 U.S. 265 (1995). Agreements to

arbitrate federal and state employment discrimination claims are enforceable, subject to "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Ionetz v. Menard, Inc.*, ERD Case No. CR201700593 (Mar. 13, 2018). Employment contracts containing mandatory arbitration provisions similar to those in this case have been found not to be unconscionable contracts of adhesion. *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *Engedal v. Menard, Inc.*, 2013 WI App 13, 345 Wis. 2d 847, 826 N.W.2d 123.

The primary goal in interpreting a contract is to determine and give effect to the parties' intention at the time the contract was made. *Wisconsin Label v. Northbrook Prop. & Cas. Ins.*, 2000 WI 26, ¶ 23, 233 Wis. 2d 314, 607 N.W.2d 276. When the language is unambiguous, the literal meaning applies. *Id.* If a contract provision is ambiguous, extrinsic evidence can be considered to discern its meaning. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). The adjudicator's function in determining the arbitrability of a dispute is limited to considering "whether: (1) there is a construction of the arbitration clause that would cover the grievance on its face; and (2) whether any other provision of the contract specifically excludes it." *Cirilli v. Country Insurance & Financial Services,* 2009 WI App 167, ¶ 14, 322 Wis. 2d 238, 776 N.W.2d 272.

The complainant's argument that his employment agreement does not make arbitration mandatory is based on the first sentence of the section of the agreement entitled "Remedy." The entire section of the agreement should be considered in order to interpret it. It reads as follows:

> **6. Remedy.** I agree that all problems, claims and disputes experienced related to my employment may be resolved in one of the following ways: 1) I understand that I may bring a claim or charge of discrimination with the U.S. Equal Opportunity Commission, National Labor Relations Board or comparable state or local agencies; 2) individual claims which are not part of a class, collective or representative action must be resolved by binding arbitration. Unless Menard and I agree otherwise, any arbitration proceedings will take place in the county of my Menard's employment where the dispute arose. Problems, claims or disputes subject to binding arbitration include, but are not limited to: statutory claims under 42 U.S.C. §§ 1981 – 1988; Age Discrimination in Employment Act of 1967; Older Workers' Benefit Protection Act ("OWBPA"); Fair Labor Standards Act; Title VII of the Civil Rights Act of 1964; title I of the Civil Rights Act of 1991; Americans with Disabilities Act; Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"); Family and Medical Leave Act; and non-statutory claims such as

contractual claims, quasi-contractual claims, tort claims and any and all causes of action arising under state or common law.

Individual claims must be resolved by binding arbitration with the American Arbitration Association ("AAA") located at 150 North Michigan Avenue, Suite 3050, Chicago, Illinois 60601 under its current version of the National Rules for the Resolution of Employment Disputes. Both Menard Inc. and I understand that the AAA Notional Rules for the Resolution of Employment Disputes shall govern the fees in this matter; and that the costs of filing a demand for arbitration will not exceed the costs of filing a civil complaint in federal court. A copy of the National rules for the Resolution of Employment Disputes and fee schedule of the American Arbitration Association may be obtained by contacting it at the address listed above. Both Menard, Inc. and I agree that all arbitrators selected shall be attorneys. This provision shall supersede any contrary rule or provision of the forum state.

Menard agrees that it will pay all arbitration costs and fees of the American Arbitration Association incurred by either party commencing arbitration, regardless of who prevails n the arbitration, as long as a claim is not found to be frivolous. Menard further agrees that it will not pursue costs, arbitration fees, or its attorneys' fees, if Menard prevails either on claims which it brings or on non-frivolous claims which I may bring.

Nothing in this Agreement infringes on my ability to file a claim or charge of discrimination with the U.S. Equal Employment Opportunity Commission, National Labor Relations Board or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. I understand that I have the right to participate in such action.

Menard, Inc., is engaged in commerce using U.S. Mail and telephone service. Therefore, the Agreement is subject to the Federal Arbitration Act, 9 U.S.C. Sections 1 – 14 as amended from time to time.

In addition to the above, the agreement contains a statement in capital letters just above the signature line, that includes the following:

THIS DOCUMENT CONTAINS A BINDING ARBITRATION PROVISON FOR INDIVIDUAL CLAIMS WHICH MAY BE ENFORCED BY BOTH MENARD, INC. AND ME.

The complainant argues that the first sentence in section 6 above gives the parties a choice between two options, because it says disputes "may be resolved in one of the following ways" then lists two ways. The first choice, the complainant argued, appears to allow resolution through the filing of a complaint with, for example, the EEOC or a "comparable state or local agenc[y]" which presumably would include the ERD. There are two problems with this interpretation. The first is that this provision only mentions the right to "bring a claim." It does not make it clear how far, beyond bringing a claim, a complainant is free to pursue that claim. The second problem is in the language describing the second way to resolve a dispute:

> [I]ndividual claims which are not part of a class, collective or representative action must be resolved by binding arbitration.

The complainant's claims in this case are not part of a class, collective or representative action. According to this provision, then, the complainant's individual claims must be resolved through binding arbitration. Giving effect to both "ways" for resolving disputes, it appears that the complainant may have a right to "bring a claim" to the ERD, but his claim (so long as it is not part of a class, collective or representative action) cannot be resolved other than through binding arbitration.[2]

Later in the first paragraph of section 6 of the agreement there is a list of the kinds of "problems, claims or disputes" that are subject to binding arbitration. The list includes "any and all causes of action under state or common law." A discrimination complaint under the Wisconsin Fair Employment Act (WFEA) is a cause of action under state law.

The second paragraph of section 6 reinforces the interpretation that binding arbitration is required in order to resolve disputes within the scope of the agreement, by specifying the manner of arbitration:

> Individual claims must be resolved by binding arbitration with the American Arbitration Association ("AAA") located at 150 North Michigan Avenue, Suite 3050, Chicago, Illinois 60601 under its current version of the National Rules for the Resolution of Employment Disputes.

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[2] The agreement ignores the possibility that parties to a dispute might settle it without having any arbitrator or adjudicator deciding it, and might do so at any stage after the dispute arises. There is nothing in the agreement that suggests the parties are giving up their right to settle a dispute themselves at any time. The assumption is, then, that an individual claim "must be resolved by binding arbitration" only if the parties are unable to resolve it on their own.

In addition, the language in capital letters just above the signature line serves as a warning that individual claims are subject to binding arbitration, which either side has the right to enforce.

Considering the above, it appears that the unambiguous intent of the parties was to give each side the right to require binding arbitration of unresolved individual disputes, including claims of discrimination that have been brought with the EEOC or a comparable state agency. There is, however, one other part of section 6 that must be considered:

> Nothing in this Agreement infringes on my ability to file a claim or charge of discrimination with the U.S. Equal Employment Opportunity Commission, National Labor Relations Board or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. I understand that I have the right to participate in such action.

The question this paragraph poses is whether, as stated in *Cirilli, supra,* this clause "specifically excludes arbitration" in favor of resolution through ERD adjudication. The commission encountered a very similar provision to this in *Ionetz v. Menard, Inc.,* ERD Case No. CR201700593 (Mar. 13, 2018).[3] In a lengthy discussion, the commission noted in *Ionetz* that this type of language in arbitration agreements has come to be known as an agency-rights clause, and its purpose was "to protect the investigative and enforcement jurisdiction of the EEOC," and not to vindicate "the individual rights of the employee signatory to the underlying agreement." In other words, the purpose of the clause was to recognize that the EEOC and comparable state and local agencies retain the right, despite the arbitration agreement, not only to investigate charges of discrimination and issue determinations of probable cause or no probable cause, but also to file lawsuits in their own names to independently enforce discrimination laws on behalf of employees. The ERD, however, has no independent statutory ability to prosecute claims for violations of the WFEA; its only role in enforcing the WFEA is to adjudicate claims between individual parties. In *Ionetz,* the commission decided that, for purposes of the agency-rights clause, the ERD was not an agency "comparable" to the EEOC, because its authority was limited to adjudicating individual claims and did not extend to direct governmental enforcement to vindicate the public interest in preventing employment discrimination. The determination in *Ionetz* that the ERD was not comparable to

[3] The provision in *Ionetz* is essentially the same as the provision in this case as far as it goes, but continues with one additional sentence not included in the provision in this case: "If you file a complaint or charge with any federal, state, or local administrative agency, such agency will have exclusive jurisdiction until they either dismiss your complaint or charge or issue a "Right to Sue" notice to you."

the EEOC for purposes of the agency-rights clause led the commission to conclude that the clause did not protect the right of the complainant *even to file a claim* with the ERD. The commission does not go so far here. In this case, unlike *Ionetz,* the arbitration agreement specifically provided, in a separate paragraph outside the agency-rights clause, that one of the ways an employee may try to resolve a dispute was to bring a claim with the EEOC, NLRB or "comparable state or local agencies." In this part of the agreement, there is no suggestion that a state or local agency must possess independent enforcement authority in order to be "comparable" to the EEOC.

Looking at the agreement and agency-rights clause in this case as a whole, the commission interprets it as protecting the right of the complainant to file a claim with the ERD, but giving the respondent the right to require submission of that claim to arbitration in place of adjudication in the ERD in order to resolve it.

The Wisconsin Court of Appeals considered a similar case involving the same issue and the same employer. *Menard, Inc. v. DWD and Fenhouse,* Ap. No. 2015AP587 (Wis. Ct. App. 2016) (unpublished). The administrative law judge stated in his decision that the arbitration agreement in *Fenhouse* was the same as the agreement in this case, and that he was bound to follow the decision in *Fenhouse* dismissing the complaint. The commission has deleted this part of the administrative law judge's decision. The agreement in *Fenhouse* was not identical to the one in this case – like *Ionetz* (and unlike this case) it did not include language apart from the agency-rights clause providing that one of the ways an employee could resolve a dispute was to bring a claim with the EEOC, NLRB or comparable state or local agencies. Also, since *Fenhouse* was an unpublished opinion, it was not binding authority. Wis. Stat. § 809.23(3)(a). *Fenhouse* was, however, authored by a member of a three-judge panel, and could therefore be cited for its persuasive value. Wis. Stat. § 809.23(3)(b). As the commission found in *Ionetz,* the court's analysis in *Fenhouse* was instructive and persuasive. In particular, the commission finds persuasive the court's explanation of the effect of an arbitration agreement on the authority of the ERD. As the commission said in *Ionetz:*

> Unlike the broad investigative, enforcement and prosecutorial authority granted to EEOC, the protection of which is at the root of agency rights provisions, [footnote omitted] ERD's statutory authority is limited to that of an adjudicative body charged with deciding particular disputes that are filed with it. Wis, Stat. § 111.39(4)(a). This point was made clear by DWD itself in *Fenhouse*, where it asserted that ERD, "unlike the EEOC and perhaps other states' employment law agencies, has no independent ability to prosecute claims for violations of the WFEA. Rather, the DWD's only statutory role in enforcing the WFEA is to *adjudicate* claims between employers and their employees." *Fenhouse* ¶ 24 (emphasis in original). Consequently,

> where an employee has agreed to waive his or her discrimination claim against an employer, or to have it adjudicated in another forum, there remains no ancillary ERD authority that requires protection [footnote omitted].

The commission concludes that the arbitration agreement in this matter is enforceable, and the respondent is entitled under the agreement to require the complainant to submit his individual, unresolved claims in the ERD to binding arbitration in accordance with the terms of the agreement. The ERD complaints in this matter, then, are dismissed.

cc: William Kelly

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Melvin D. Reed
2402 North Sherman Boulevard
Milwaukee, Wisconsin 53210

Complainant,

v.

RULING ON MOTION TO DISMISS
ERD Case Nos. CR201803114, CR201803005 & CR201900562
EEOC Case Nos. 26G201900231C, 26G201900165C & 26G201900552C

Menards, Inc.
5101 Menard Drive
Eau Claire, Wisconsin 54703

Respondent.

On October 3, 2017, the Respondent ("Menards") hired the Complainant ("Mr. Reed). As part of the hiring process Mr. Reed, whose address was listed at the time as "24 12 N Sherman Blvd", signed an "Employee/Employer Agreement" that, among other things, states:

> I agree that all problems, claims and disputes experienced related to my employment may be resolved in one of the following ways: 1) I understand that I any bring a claim or charge of discrimination with the U.S. Equal Opportunity Commission, National Labor Relations board or comparable state or local agencies; 2) individual claims which are not a part of a class, collective or representative action must be resolved by binding arbitration.
>
> . . .
>
> Menard agrees that it will pay all arbitration costs and fees of the American Arbitration Association ("AAA") incurred by either party commencing arbitration, regardless of who prevails in the arbitration, as long as the claim is not found to be frivolous. . . .

THIS DOCUMENT CONTAINS A BINDING ARBITRATION PROVISION FOR INDIVIDUAL CLAIMS WHICH MAY BE ENFORECED BY BOTH MENARD, INC. AND ME.

On November 2, 2018, Mr. Reed filed ERD Case No. CR201803005 against Menards alleging that they violated the Wisconsin Fair Employment Act ("the WFEA"), secs. 111.31-111.395, Stats. by discriminating against him in terms or conditions of employment because of race and sex, and by discriminating against him because he opposed a discriminatory practice.

On November 23, 2018, Mr. Reed filed ERD Case No. CR201803114 against Menards claiming that they violated the WFEA by discriminating against him because he opposed a discriminatory practice.

On February 25, 2019, Mr. Reed filed ERD Case No. CR201900562 against Menards claiming that they violated the WFEA by terminating his employment because of sex and race, discharging him because he filed previous claims under the WFEA, by discharging him because he opposed discrimination under the WFEA, and by discharging him because Mr. Reed had filed, or Menards believed he would file, a complaint under the Wisconsin Open Personnel Records Law, sec. 103.02, Stats.

On June 7, 2019, an Equal Rights Officer ("ERO") issued Initial Determination on all three claims, finding no probable cause regarding all issues in CR201803005, probable cause regarding the issue in CR201803114, and no probable cause for all issues in CR201900562 except the claim of discharge because he had opposed a discriminatory action under the WFEA. Fords claims of discrimination during his employment that were subject to previous complaints under the WFEA as untimely. On August 21, 2017, Mr. Ford appealed both decisions.

On June 18, 2019, the undersigned ("the ALJ) was assigned to CR201803114.

On June 27, 2019, Mr. Reed appealed the findings of no probable cause.

On July 3, 2019, the Division received a Motion to Compel Arbitration from Menards. In this motion Menards claimed that because of the Employment Agreement signed by Mr. Reed at hire these claims must be dismissed and submitted for arbitration. In this motion Menards claimed that dismissal was required because:

I. That Mr. Reed signed a valid and enforceable agreement to arbitrate.
II. That every employee must sign an Employee Agreement before becoming an employee.
III. That the Federal Arbitration Act ("FAA") states that agreements to arbitrate are valid and enforceable unless grounds exist for revocation of the contract.

IV. That Menards is involved in interstate commerce and thus covered by the FAA.

V. That under the FAA if all claims are subject to arbitration the matter should be dismissed.

VI. That under the FAA no consideration is necessary other than employment.

VII. That under *Cirilli v. Country Insurance & Financial Services*, 2009 WI App 167, 322 Wis.2d 238, 776 N.W.2d 272 a court's function is limited to whether there is a construction of the arbitration clause that would cover the grievance and whether any other provision excludes the grievance.

VIII. That in 2016 a Wisconsin Appellate Court determined that a former Menard Team Member subject to the same arbitration clause as Mr. Read was prevented from bringing her claim under the WFEA.

IX. Mr. Reed's claims fall within the scope of the arbitration agreement.

On July 3, 2019 the undersigned was assigned to hear CR201803005 and CR201900562.

In response to the Motion to Compel, the ALJ sent the parties an email about setting up a briefing schedule for the Motion. Mr. Reed objected to the use of email, so a schedule was not set up by email.

On July 17, 2019, the ALJ held a prehearing conference. After the prehearing, the ALJ sent a letter setting out the briefing schedule.

On August 8, 2019, the Division received a brief and Motion to Recuse from Mr. Reed. Mr. Reed's Motion to Recuse stated that its basis was a "formal complaint against this court with the Wisconsin State Supreme Court by way of their Office of Lawyer Regulation." No copy of this complaint was provided. The claimed bases for this complaint was stated as "judicial malfeasance on the part of this court . . .." Mr. Reed's basis for his response was only that the agreement said that disputes "may be resolved" by arbitration, but did not have to be, and that the agreement pertains to a Melvin Reed that lives at "24 12 N. Sherman Blvd." and that since he lives at 2402 N. Sherman Blvd. that the agreement is unenforceable.

On August 20, 2019, the Division received a reply brief from Menards that referred to the language that "individual claims . . . must be resolved by binding arbitration" and that Mr. Reed does not dispute either that he signed the Agreement or that it was for the Melvin Reed hired on October 3, 2017.

Mr. Reed's Motion to Recuse is denied. No complaint was attached or known. No basis for the alleged "judicial malfeasance" is known. The ALJ is not legally a court under the law, merely a tribunal.

Mr. Reed's claim that the agreement was unenforceable because the address is wrong fails. Mr. Reed does not dispute that he was hired on October 3, 2017, that he signed the

agreement or that all employees of Menards have to sign the agreement. Mr. Reed's complaints are based on actions taken by Menards against the Melvin Reed they employed who was hired by on October 3, 2017 and signed that Agreement. If he is not that Melvin Reed there is no employment relationship and he has no basis for any complaint. If he is that Melvin Reed, the agreement is in place.

Mr. Reed does not dispute that binding precedent by a Wisconsin Court of Appeals found that this very Agreement requires arbitration and dismissal of complaints filed under the WFEA. That Court found that individual claims must be resolved by binding arbitration. This tribunal is bound to follow that decision.

Since binding precedent held that Menard's Agreement compelled arbitration and dismissal of WFEA claims and Mr. Reed asserted no reasonable distinction between the case law and the facts in his case, the Administrative Law Judge issues the following:

ORDER

1. That the complaints in these matters are hereby dismissed and the Motion to Compel Arbitration granted.

Dated at Milwaukee, Wisconsin AUG 22 2019

James A. Schacht
Administrative Law Judge

cc: Complainant
Respondent
William Kelly, Attorney for Respondent
EEOC