

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH CHEVROLET, INC. and JOSEPH
HOOD,

UNPUBLISHED
June 8, 2010

Plaintiffs-Appellees,

v

LORI HUNT,

Defendant-Appellant.

No. 290882
Tuscola Circuit Court
LC No. 07-024445-CZ

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant by leave granted the trial court's opinion and order reversing and vacating an arbitrator's award of costs and attorney fees in favor of defendant. We reverse the order and opinion of the trial court and reinstate the decision of the arbitrator.

This case stems from an arbitration decision dated August 3, 2007, awarding defendant \$270,000 in attorney fees and \$26,730.14 in costs.¹ On August 24, 2007, plaintiffs moved to vacate the arbitrator's award of attorney fees and costs. Defendant opposed that motion and moved to confirm the arbitration award and for entry of judgment. Plaintiffs opposed that motion. Both motions were argued at a hearing, and the trial court took the matter under advisement. The trial court then issued its written opinion and order vacating the arbitrator's award of attorney fees and costs to defendant and reversing the denial of attorney fees to plaintiffs. Defendant moved for reconsideration, and the trial court denied that motion and then reissued its opinion and order.

¹ Defendant filed a four-count demand for arbitration with the American Arbitration Association, alleging claims of retaliation and sex harassment under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e and Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq.* The arbitrator had previously concluded that defendant had satisfied her burden of proof as to a quid pro quo claim under the CRA and awarded her \$168,000 in damages, but he had reserved the issue of attorney fees and costs. Defendant's damages award is not being appealed.

Defendant first argues that the trial court erred in vacating the arbitrator's award of attorney fees and costs to her. We agree. A trial court's decision to enforce, vacate, or modify an arbitration award is reviewed de novo. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118; 128; 596 NW2d 208). Therefore, judicial review of arbitration awards is strictly limited by statute and court rule. *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). If an agreement to arbitrate provides that judgment may be entered on the arbitration award, then it is considered statutory arbitration. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). Here, the parties' arbitration agreement stated that a party may make a motion to, and the circuit court may, enforce the award. Therefore, this is a statutory arbitration.

MCR 3.602 governs judicial review and enforcement of statutory arbitration agreements. MCR 3.602(A). A trial court may only vacate an arbitration award if one of the following occurs:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights. [MCR 3.602(J)(2).]

By limiting the grounds upon which an arbitration decision may be invaded, the court rules "preserve the efficiency and reliability of arbitration as an expedited, efficient, and informal means of private dispute resolution." *Gordon Sel-Way, Inc*, 438 Mich at 495.

There are two ways a reviewing court can find that an arbitrator exceeded his powers, requiring vacation of an arbitration award. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). First, because an arbitrator derives his authority from the arbitration agreement, he is bound to act within the terms of that agreement. *Id.* If an arbitrator acts beyond the materials terms of the parties' arbitration agreement, then he exceeds his powers. *Id.* Second, if an arbitrator acts in contravention of controlling principles of law, then he exceeds his powers. *Id.* The second way, whether or not the arbitrator acted in contravention of controlling principles of law, is at issue in this case.

An arbitration award will be vacated because an arbitrator exceeded his powers through an error of law when it clearly appears on the face of the award or the reasons for the decision as stated that the arbitrator, through error of law, was lead to the wrong conclusion, and but for that error a substantially different award must have been made. *Gordon Sel-Way, Inc*, 438 Mich at 495. This standard precludes the trial court from review of the arbitration award on the basis that

it was against the great weight of the evidence or was not supported by substantial evidence. *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403. Indeed, our Supreme Court has stated that “[i]t is only the kind of legal error that is evident without scrutiny of the intermediate mental indicia which remains reviewable” *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). In addition, this Court has repeatedly emphasized that it must carefully evaluate claims of arbitrator error to ensure that they are not used as a ruse to induce this Court to review the merits of the arbitrator’s decision. See, e.g., *Washington v Washington*, 283 Mich App 667, 675; 770 NW2d 908 (2009); see also *Gordon Sel-Way, Inc*, 438 Mich at 497 (“[C]ourts may not substitute their judgment for that of the arbitrators”).

Lastly, vacation of an arbitrator’s award must be based on an obvious, “facial” error. *Gordon Sel-Way, Inc*, 438 Mich at 495. “[A] trial court may not hunt for errors in an arbitrator’s explanation of how it determined who is liable under the arbitrated contract, and who owes what damages to whom.” *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 558; 682 NW2d 542 (2004). Failing to limit review in this fashion “would allow a dissatisfied court to delve deeper and deeper into an arbitrator’s factual and legal support until it finally unearthed a perceived error that could justify the court’s desired outcome.” *Id.*

MCL 37.2802, the attorney fee provision of the CRA, provides: “A court . . . may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.” The attorney fee provision of the CRA was enacted for two purposes. “[T]o encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts.” *King v Gen Motors Corp*, 136 Mich App 301, 307; 356 NW2d 626 (1984). The second purpose exists to ensure “compliance with the goals of the act and thereby deter discrimination in the work force.” *Id.* at 308.

In determining a reasonable amount of attorney fees to award under the ELCRA, a trial court must consider various factors, including:

- (1) the skill, time and labor involved, (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer, (3) the fee customarily charged in that locality for similar services, (4) the amount in question and the results achieved, (5) the expenses incurred, (6) the time limitations imposed by the client or the circumstances, (7) the nature and length of the professional relationship with the client, (8) the professional standing and experience of the attorney, and (9) whether the fee is fixed or contingent. [*Grow v W A Thomas Co*, 236 Mich App 696, 714-715; 601 NW2d 426 (1999), citing *Wood*, 413 Mich at 588.]

However, in making an award of attorney fees, a trial court need not detail its findings on each specific factor considered. *Wood*, 413 Mich at 588

After discussing the purpose of the CRA attorney fee provision, the arbitrator reasoned as follows:

The Arbitrator believes that an award of fees and costs in Claimant’s [defendant’s] favor is warranted here to fulfill both prongs of the attorney fee

statute [referring to the two purposes stated in *King*, 136 Mich App at 307]. At the time litigation was commenced, there was a significant economic disparity between the parties. Claimant had essentially no source of income, in large part due to the actions of Respondents [plaintiffs] in terminating her, whereas Respondents represent one of the largest automobile dealerships in Genesee County. The arbitrator finds that an award of fees is necessary to permit civil rights litigants in Claimants' position to attract competent counsel, who would not otherwise recover for the substantial amount of time and effort invested in the case under a contingent fee arrangement because a large portion of the relief was injunctive rather than monetary. An award of fees and costs is also appropriate given the conduct at issue in this case. Attorney fees will help to deter future acts of discrimination by these Respondents as well as other defendants.

* * *

The Arbitrator also finds that Claimant's litigation expense was, for the most part, reasonable. The hourly fees charged were not excessive given the experience of the attorney involved, this was a hard fought case on both sides, and Claimant's counsel achieved a good result for the client. The Arbitrator is also not unmindful of the pressures faced by a small firm in trying to balance litigation workload, and has taken into account [defense counsel's] testimony that he had to turn prospective clients away in order to devote his time to this case.

The trial court explained its reasons for vacating the arbitrator's award of attorney fees as follows:

The Arbitrator exceeded his power in awarding \$270,000 in attorney's fees to Respondent [defendant] and in denying attorney's fees to Applicant [plaintiffs]. \$270,000 is not a reasonable attorney fee given the circumstances of this case. Despite being in an economically disadvantageous position compared to Applicant, Respondent was able to acquire counsel by agreeing to a contingent fee arrangement. All thought [sic] the presence of the contingency agreement does not preclude an award of attorney's fees, it is a factor that should be consider [sic]. The Arbitrator stated that a contingent fee would not adequately compensate counsel because "a large portion of the relief was injunctive rather than monetary." Although Respondent was granted the injunctive relief of being reinstated to her position she was also awarded \$168,000 for back pay and mental anguish; this is a significant sum of money and 33% of it (the amount Respondent's counsel would receive) is a reasonable attorney's fee under the circumstances.

Although the trial court claimed that the arbitrator "exceeded his power," it is apparent that the trial court simply disagreed with the arbitrator's conclusion that \$270,000 was a reasonable attorney fee. Whether the trial court would have decided the issue differently is irrelevant because reviewing courts may not substitute their judgment for that of the arbitrators. *Gordon Sel-Way, Inc*, 438 Mich at 497. The award contains no evident facial error and was within the powers expressly conferred to the arbitrator. Thus, the trial court improperly set aside the award.

Defendant also argues that the trial court erred in reversing the arbitrator's decision not to award costs and attorney fees to plaintiffs. The arbitrator denied plaintiffs' motion for attorney fees and costs, reasoning as follows:

The Arbitrator rejects the notion that fees and costs should be denied Claimant, or that fees should be awarded to Respondents, because Claimant prevailed on only one of her claims, while Respondent was successful in defending against the remaining three. The factual proofs on all four claims substantially overlapped insofar as [sic] they revolved around the adverse employment actions taken against Claimant flowing from her refusal to continue a sexual relationship with Respondent Hood. Here, as in the *Grow* case, the Arbitrator does not believe that the pre-arbitration cost and effort would have been substantially different had Claimant not pursued the claims which she ultimately lost. Nor did Claimant take a frivolous position in this arbitration by raising Title VII claims without first filing an EEOC [Equal Employment Opportunity Commission] complaint. Counsel for both sides acknowledged that there was no case law on the precise issue of whether such an administrative filing is a mandatory precursor to arbitration, as opposed to litigation.

The trial court disagreed with the arbitrator's conclusion that defendant did not take a frivolous position by raising Title VII claims without first filing an EEOC complaint. The trial court explained as follows:

According to the plain language of Title VII, Applicant is the prevailing party on those claims and is entitled to a reasonable attorney fee. Respondent continued to pursue those claims throughout the arbitration proceedings without filing an EEOC charge as required by statute. Clearly Respondent's attorney should have been aware that the filing of an EEOC charge was required prior to commencing litigation. In maintaining a cause of action under Title VII without first exhausting all administrative remedies Respondent was continuing to litigate a claim after it clearly became frivolous, unreasonable, or groundless.

In *Bonner v Mobile Energy Services Co, LLC*, 246 F3d 1303, 1304 (CA 11, 2001) the United States Court of Appeals for the Eleventh Circuit explained when awarding attorney fees to a prevailing Title VII defendant is appropriate:

A district court may award attorney's fees to the prevailing Title VII defendant when it determines that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," a standard the Supreme Court has described as "stringent." In deciding whether an action is so lacking in merit as to justify awarding attorney's fees to the prevailing defendant, the trial court is to consider the denominated *Sullivan* factors, *i.e.*, whether (1) the plaintiff established a prima facie case; (2) the defendant offered to settle; and (3) the trial court dismissed the case prior to trial.

The trial court is correct that a plaintiff seeking relief under Title VII is required to exhaust her administrative remedies with the EEOC before pursuing judicial relief. *Heurtebise v Reliable Business Computers*, 452 Mich 405, 419; 550 NW2d 243 (1996) (opinion by Cavanagh,

J.). An employee must first file a “charge” with the EEOC. If the EEOC determines that the employee’s claim has merit, it may sue on her behalf. Otherwise, it will issue her a right to sue letter, and she then can file a complaint and begin the litigation process. See 42 USC § 2000e-5(b), (c), (e). A plaintiff has exhausted her administrative remedies when she has received a right to sue letter from the EEOC. *Shannon v Ford Motor Co*, 72 F3d 678, 684 (CA 8, 1996); see 42 USC § 2000e-5(b), (c), (e).

In this case, contrary to the trial court’s determination, it was not clearly settled law that “Respondent was continuing to litigate a claim after it clearly became frivolous, unreasonable, or groundless” by “maintaining a cause of action under Title VII without first exhausting all administrative remedies.” The precise issue before the arbitrator was whether an employee is required to receive a right to sue letter from the EEOC before commencing arbitration, as opposed to litigation. As noted by the arbitrator and acknowledged by counsel for both parties during arbitration, that precise issue is one of first impression. Given that the law was unsettled in this area, the arbitrator’s decision that plaintiff did not “take a frivolous position in this arbitration by raising Title VII claims without first filing an EEOC complaint” was not an error of law. See *Christiansburg Garment Co v Equal Employment Opportunity*, 434 US 412, 423-424; 98 S Ct 694; 54 L Ed 2d 648 (1978) (affirming district courts denial of attorney fees when the district court concluded that a suit brought by the EEOC under Title VII could not be characterized as unreasonable or meritless because “the basis upon which petitioner prevailed was an issue of first impression requiring judicial resolution”); see also *Ross v Auto Club Group*, 481 Mich 1, 748 NW2d 552 (2008) (holding that insured was not entitled to attorney fees when insurer’s refusal to pay was a reasonable position considering the insured claim was an issue of first impression); *Harbour v Correctional Med Serv, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005) (noting that a case involving a legal issue of first impression provides an exception for awarding attorney fees under the case evaluation attorney fee provision). Thus, the trial court erred in reversing the arbitrator’s decision not to award plaintiffs attorney fees.

We reverse the order and opinion of the trial court and reinstate the decision of the arbitrator.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis