COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

Appeal No. 2015AP587 **Cir. Ct. No. 2014CV310**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MENARD, INC.,

PLAINTIFF-RESPONDENT,

V.

DEPARTMENT OF WORKFORCE DEVELOPMENT,

DEFENDANT-APPELLANT,

ANGELA M. FENHOUSE,

DEFENDANT.

APPEAL from an order of the circuit court for Eau Claire County: KRISTINA M. BOURGET, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. The Department of Workforce Development (DWD) appeals an order granting a writ of prohibition entered by the circuit court barring the DWD from adjudicating an employment discrimination claim brought by employee Angela Fenhouse against Menard, Inc. We affirm the writ.

BACKGROUND

¶2 Fenhouse was employed as a human resources coordinator by Menard from February 1, 2012, to December 11, 2012. On February 1, 2012, she signed Menard's standard form Employment Agreement. The form agreement was created by Menard and all new employees are required to sign it. The Employment Agreement provides in relevant parts:

> 16. Remedy. In consideration of employment, or continued employment, ... you agree that all problems, claims, and dispute(s) ... related to your employment with Menards, ... shall first be resolved as outlined in the Team Member Relations section of the *Grow With Menards Team Member Information Booklet* …. If you are unable to resolve the dispute by these means, choose not to utilize such means, or you are no longer employed by Menards you agree to submit your dispute(s) to final and binding arbitration. Problems, claims, or disputes subject to binding arbitration include, but are not limited to: statutory claims under 42 U.S.C. § 1981, the Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964, Title I of the Civil Rights Act of 1991, Americans with Disabilities Act (ADA), Family Medical Leave Act (FMLA), and non-statutory claims such as contractual claims, quasi-contractual claims, tort claims, and any and all causes of action arising under state laws or common law.
>
> ….
>
> **Any and all** claims shall be resolved by binding arbitration ... **pursuant** to the National Rules of the Resolution of Employment Disputes of the American Arbitration Association ("AAA") ....
>
> ….

> **This provision shall supersede any contrary rule or provision of the forum state. This provision constitutes an express waiver of the right to court, jury, or administrative review or to participate in a class action.**
>
> ….
>
> Menards is engaged in commerce using U.S. Mail and telephone service. Therefore, this Agreement is subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-14, as amended from time to time.

(Emphasis added.) We will refer to the above provisions as the "arbitration clause."

¶3 Later, paragraph 16 contains the following clause:

> Nothing in this Agreement infringes on your ability to file a claim or charge of discrimination with the U.S. Equal Employment Opportunity Commission 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. You understand that you have the right to participate in such action.

The DWD calls this the "exception clause" and Menard calls it the "agency-rights clause." We will refer to it as the "agency-rights clause."

¶4 Menard discovered that Fenhouse had a criminal record and, as a result, it terminated Fenhouse's employment on December 11, 2012. On December 18, 2012, Fenhouse filed a discrimination complaint with the DWD under the Wisconsin Fair Employment Act (WFEA), WIS. STAT. § 111.39.[1] Her complaint alleged employment discrimination and unlawful employment

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

termination by Menard on the basis of her criminal record. Finding probable cause that Menard had unlawfully discriminated against Fenhouse, the DWD's Equal Rights Division (ERD) scheduled a hearing.

¶5 On February 20, 2014, Menard and Fenhouse filed a Joint Stipulation to Submit to Arbitration and Motion to Stay the WFEA Proceedings. Menard and Fenhouse agreed that the arbitration clause of the Agreement was binding upon both parties and applicable to Fenhouse's WFEA complaint. They asked for a stay of the WFEA proceedings to allow them to submit to binding arbitration and "request[ed] that upon the completion of arbitration, the Equal Rights Division issue an Order adopting the Arbitrator's Final Ruling and Award as final and binding on all parties."

¶6 The Administrative Law Judge (ALJ) assigned to the case responded that he was "unable to comply with such a suggestion" that he adopt a ruling by an arbitrator as the DWD's final order. He suggested that Fenhouse could withdraw her WFEA complaint instead and "voluntarily proceed with the arbitration process …."

¶7 On March 14, 2014, Menard asked the ALJ to reconsider his decision and indicated that if DWD did not comply with its request, Menard would seek a writ of prohibition in circuit court to prevent DWD from conducting a merits hearing in the Fenhouse case. Menard argued the arbitration clause deprived DWD of its authority and jurisdiction to adjudicate Fenhouse's WFEA claim.

¶8 Shortly thereafter, Fenhouse informed the ALJ that she opposed the request for reconsideration. She argued that Menard had waived the arbitration

provision by not raising it sooner, and that the arbitration clause did not bar the administrative proceeding.

¶9 On June 3, 2014, the ALJ issued a decision and order denying Menard's motion to stay the administrative proceedings. He concluded the agreement contained conflicting provisions. The ALJ stated that "[b]y permitting an individual to 'file a claim' with a state agency like the [DWD], the contract itself allows for an alternative means of resolving the claim and, therefore, arbitration cannot be said to be the 'exclusive remedy' under the employment contract."

¶10 On June 12, 2014, Menard filed a complaint in the circuit court seeking a writ of prohibition to prevent the administrative proceeding from going forward. Menard again asserted the arbitration clause deprived the DWD of its authority and jurisdiction to adjudicate Fenhouse's WFEA claim. The DWD and Fenhouse both opposed the issuance of the writ.

¶11 On February 6, 2015, the circuit court issued a writ of prohibition holding that "Defendant Department of Workforce Development lacks jurisdiction to conduct a binding adjudication of the Wisconsin Fair Employment Act claims Defendant Angela M. Fenhouse has filed against Plaintiff Menard, Inc. because such claims are within the scope of the parties' arbitration agreement." The circuit court concluded the most reasonable interpretation of the arbitration clause was that Fenhouse and Menard had agreed to arbitrate all employment-related claims arising under state law, including WFEA claims, but under the agency-rights clause, the DWD retained all its investigative authority. DWD appeals from the order.

DISCUSSION

¶12 On appeal, the DWD argues the agency-rights clause unambiguously excepted DWD's adjudication of Fenhouse's WFEA claim from any arbitration requirement. Further, the DWD asserts that if the agreement is determined to be ambiguous, the ambiguity must be resolved against Menard as the drafter of the agreement. Menard argues Fenhouse's WFEA claim unambiguously falls within the scope of the arbitration clause and also argues arbitration is required here under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (FAA). Menard asserts that if this court finds the agency-rights clause renders the agreement ambiguous, based upon extrinsic evidence, any ambiguity must be resolved in favor of Menard's right to arbitration. The DWD counters that extrinsic evidence of Menard's subjective intent is inadmissible and irrelevant.[2]

¶13 We are called upon to interpret the agreement of the parties, particularly the arbitration clause in light of the agency-rights clause. The interpretation of the parties' arbitration agreement is a question of law this court reviews de novo. ***Osborn v. Dennison***, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20.

¶14 The ultimate aim in contract interpretation is to give effect to the intent of the parties as determined from the language of their agreement. ***Patti v.***

---

[2] As to Fenhouse's claim that Menard waived the arbitration provision by not raising it sooner, the circuit court held that any claim of waiver was "undone" by virtue of the stipulation to arbitration signed by Fenhouse. Fenhouse does not appeal and the DWD does not argue on appeal that Menard waived the arbitration provision. "[Issues] raised in the trial court, but not raised on appeal, [are] deemed abandoned." ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). We therefore do not address the waiver argument.

Western Mach. Co., 72 Wis. 2d 348, 351, 241 N.W.2d 158 (1976). "If the contract is unambiguous, [the court's] attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence." ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807. Contract language is to be interpreted consistent with what a reasonable person would understand the words to mean under the circumstances. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. When interpreting a contract provision, we must read the language within the context of the contract as a whole rather than interpreting a sentence or paragraph in a vacuum. ***Marlowe v. IDS Prop. Cas. Ins. Co.***, 2013 WI 29, ¶44, 346 Wis. 2d 450, 828 N.W.2d 812. Courts must avoid interpretations that render language meaningless or superfluous. ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship***, 2004 WI 92, ¶44, 273 Wis. 2d 577, 682 N.W.2d 839. "Another important rule employed in construing agreements is that where there is an apparent conflict between a general and a specific provision, the latter controls." ***Goldmann Trust v. Goldmann***, 26 Wis. 2d 141, 148, 131 N.W.2d 902 (1965).

¶15 In ***Cirilli v. Country Insurance & Financial Services***, 2009 WI App 167, ¶14, 322 Wis. 2d 238, 776 N.W.2d 272, this court set forth the test for resolving "doubts concerning the scope of arbitrable issues":

> [W]hen a court is called upon to ascertain the arbitrability of a dispute, the court's function is limited to a determination of 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 [arbitration].

In addition, if an arbitration agreement is found to be ambiguous, any ambiguity, must be resolved in favor of arbitration. *See* ***id.***[3]

I. The Federal Arbitration Act

¶16 We begin our analysis with the FAA. The Agreement specifically states: "Menard is engaged in commerce using U.S. Mail and telephone service. Therefore, this Agreement is subject to the Federal Arbitration Act, 9 U.S.C. §§ 1-14, as amended from time to time." Under 9 U.S.C. § 2, the FAA provides in relevant part:

> A written provision in … 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 … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The United States Supreme Court has held the FAA preempts states laws that vest authority to adjudicate claims with a state administrative agency. ***Preston v. Ferrer***, 552 U.S. 346, 359 (2008); ***Southland Corp. v. Keating***, 465 U.S. 1, 16 (1984). The agreement specifically states that it is subject to the FAA and the DWD does not contend that the FAA is inapplicable in this case. However, under Title 9 U.S.C. § 2, the FAA only preempts state laws if the claim at issue—here, Fenhouse's WFEA claim—is "a contract evidencing a transaction involving

[3] Both parties contend the Agreement is unambiguous, but alternatively assert that if this court finds it to be ambiguous, we should interpret it in their respective favors. However, we have analyzed the Agreement under the two-part conflict test set forth in ***Cirilli***, and do not find any ambiguity.

commerce to settle by arbitration a controversy thereafter arising out of such contract …." That is, the FAA only applies if the WFEA claim is within the scope of the arbitration clause. If so, 9 U.S.C. § 2 would mandate that Fenhouse's claim is arbitrable "save upon such grounds as exist at law or in equity for the revocation of any contract."[4]

II. Scope of the arbitration clause

¶17 We next consider whether the WFEA claim is within the scope of the arbitration clause, such that arbitration is mandated under the FAA. Menard cites to the end of the first paragraph of the arbitration clause, arguing it broadly covers WFEA claims, as "causes of action arising under state law." Then in boldfaced and underscored print, the arbitration clause provides: "This provision constitutes an express waiver of the right to ... administrative review …." The DWD acknowledges that, "at first glance," that wording would seem to cover a WFEA claim that is a cause of action arising under state law.

¶18 We agree. Not only is a WFEA claim a cause of action under state law, but the agreement also states, "[t]his provision constitutes an express waiver of the right to ... administrative agency review." That second provision fortifies the proposition that WFEA claims will be arbitrated, not adjudicated, by an administrative agency. As a result, we conclude that WFEA claims fall within the scope of the arbitration clause and are subject to arbitration under the FAA. That, however, does not end our inquiry because, under ***Cirilli***, we must then determine if the agency-rights clause excepts Fenhouse's claim from arbitration.

[4] The DWD does not claim there is any legal or equitable reason for revocation of the arbitration clause or the entire agreement. We therefore need not address the revocation exception to the arbitration mandate under 9 U.S.C. § 2.

III. Scope of the agency-rights clause

¶19 In support of its contention that the agency-rights clause conflicts with or excepts the arbitration requirement of the arbitration clause, the DWD cites a rule of contract interpretation—that is, "where there is an apparent conflict between a general and a specific provision, the latter controls." ***Goldmann***, 26 Wis. 2d at 148. That rule does not help the DWD, because we do not view the agency-rights clause as any more specific than the arbitration clause. While the agency-rights clause specifically refers to "discrimination" claims, which include WFEA discrimination claims, the arbitration clause specifically refers to all "causes of action arising under state law," which also includes WFEA discrimination claims. The arbitration clause also refers specifically to the "waiver of the right to … administrative review." The DWD provides us with little reason we should hold the agency-rights clause more specific and the arbitration clause more general. In addition, as we explain below, the "specific/general" rule is inapplicable because we do not find a substantial conflict between the two clauses.

¶20 We agree with the DWD that the Fenhouse claim generally fits within the language of the agency-rights clause. As described in the agency-rights clause, the DWD is a state agency comparable to the U.S. Equal Employment Opportunity Commission, is an agency with authority to carry out its statutory duties by investigating the charge, issuing a determination, and taking any other action authorized under those statutes. WIS. STAT. § 111.39.

¶21 However, the circuit court and Menard do provide us with a way to give reasonable meaning to both the arbitration and agency-rights clauses, so as to avoid conflict. The plain language of the agency–rights clause indicates it does not infringe on Fenhouse's ability to file a claim or charge of discrimination with the DWD while at the same time pursuing arbitration. The agency-rights clause

itself shows it to be primarily intended to protect agencies' independent rights to enforce employment laws, rather than restore forum-selection rights to Fenhouse with the DWD that are relinquished under the arbitration clause.

¶22 The circuit court correctly recognized as much in its decision. After upholding the arbitration clause, the circuit court held:

> The DWD certainly is free to pursue any of its statutory rights and authorities. To the extent it tries to adjudicate something, that's not going to be binding on either of these parties.
>
> ….
>
> What I intended to communicate is that agency rights paragraph certainly gives, I think, the agency the right to pursue, you know, its statutory rights relative to this matter. However, to the extent that any of those statutory rights give the DWD the ability to adjudicate this claim, that's not going to be binding on these parties because that's going to be subject to binding arbitration. Practically, I don't think that makes any sense but I think that's the impact of the language in this agreement …
>
> ....
>
> Well, all I'm trying to accomplish is a situation where I'm giving impact to the arbitration requirement of the agreement which I think I've done. I'm also preserving to the state agency whatever rights it has with respect to discrimination issues, but those are two separate issues. We're talking about agency rights versus the party's rights. And so to the extent the DWD has a big concern about [Menard] as an employer, they can investigate all they want. They can conduct all the hearings they want, but they are not going to prosecute Ms. Fenhouse's claim in the context of those proceedings. That will happen in arbitration.

While the circuit court's decision did not enumerate all the rights preserved to the DWD under the agency-rights clause, the DWD does enumerate its statutory rights as follows:

• DWD may receive and investigate a discrimination complaint (§ 111.39(1));

• DWD can hold hearings, subpoena witnesses, and take testimony (§ 111.39(2));

• DWD shall employ examiners to hear and decide discrimination complaints (§ 111.39(4)(a));

• DWD, when probable cause of discrimination is established, may attempt to conciliate the dispute (§ 111.39(4)(b));

• DWD, if conciliation fails, shall hold a hearing, at which the respondent shall answer the complaint before the hearing examiner; and

• "[T]he examiner shall make written findings and order such action by the respondent as will effectuate the purpose of this subchapter … (§ 111.39(4)(c)).

¶23 We interpret the circuit court's decision to hold that, under the agency-rights clause, all of the above DWD rights are preserved. However, any adjudication of Fenhouse's discrimination claim by the DWD is not binding upon these parties because resolution of that claim is subject to binding arbitration. We agree with the circuit court. That interpretation gives meaning to both clauses, is consistent with the rules of contract construction and our ***Cirilli*** holding, and preserves the FAA mandate on arbitration.

¶24 Beyond its direct arguments regarding interpretation of the arbitration and agency-rights clauses, the DWD appears to contend that Menard and the circuit court's construction of the clauses ignores the fact that the DWD, 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. WIS. STAT. § 111.39(4)(a). The DWD argues that WIS. STAT. ch. 111 does not grant it independent statutory authority to enforce violations of the WFEA, such as in a lawsuit in which it acts as a plaintiff with

claims against an allegedly noncompliant employer. As such, the DWD argues, for its "agency rights"/authority to be given effect, it must be able to prosecute Fenhouse's claim.

¶25 This argument is completely misdirected. Any statutory limitation on the DWD's independent enforcement authority does not alter our foregoing interpretation of the Employment Agreement between Menard and Fenhouse. As we have explained, that contract includes an agreement that all employment claims Fenhouse may have, including state law claims that could otherwise have been pursued through "administrative review," must be arbitrated. Fenhouse is bound to honor that agreement. We agree with Menard that the agency-rights clause merely informs employees that they have rights with the EEOC—and possibly with some state agencies—to file claims triggering that agency's ability to independently enforce employment law violations. That the DWD apparently does not have such authority merely means that the notice in the agency-rights clause has limited import to Fenhouse vis-à-vis the DWD.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.