ORAL ARGUMENT – 12-11-02
01-0774
DAVIDSON V. WEBSTER

WESLEY: Petitioner, J.M. Davidson, is seeking to enforce an arbitration agreement. It's a plain vanilla arbitration agreement. After suit was filed by Chelsey Webster alleging a violation of the Texas Labor Code Worker's Comp. retaliation claim, J.M. Davidson moved to compel arbitration. The TC denied that motion. Appeal was taken to the 13th CA. The 13th CA affirmed with J. Castillo dissenting. And from that decision we have appealed and are here today.

There has never been any dispute that there is an arbitration agreement and that the claims in the underlying lawsuit are subject to that arbitration agreement.

O'NEILL: If Davidson were for some reason to be the plaintiff in a case against the employee, could it go to court and could the employee compel arbitration?

WESLEY: Certainly the employee could compel arbitration.

ENOCH: What in the record demonstrates that?

WESLEY: The agreement itself states that both Webster and J.M. Davidson mutually agree in contract that any and all claims, disputes or controversies shall be exclusively and finally settled by binding arbitration.

O'NEILL: But that's something that you can terminate that at anytime at its own option isn't it?

WESLEY: No. If J.M. Davidson said, we are changing our policy and we no longer have an arbitration agreement, and the claim arose after that change had been made...

O'NEILL: Does it say that in the agreement?

WESLEY: The agreement simply states that, as this court held in Hathaway v. General Mills, the employer has the right to change its policy. And in fact, this court recently held in In re Haliburton that an employee of Haliburton who had been working for 30 years that all that was required was that the employee be given notice and the employee keeps working.

O'NEILL: But in that case, the employee - if the claim arose the company could not get out of the arbitration. And it strikes me under this agreement it says that the company reserves the right to unilaterally abolish any personnel policy without prior notice. So it strikes me that under this broad language the company could unilaterally decide that it didn't want to arbitrate at anytime.

WESLEY: I think that if they decided that they no longer wanted to have that policy, they could make that decision from that point forward. But it doesn't say that they are reserving the right to not

apply arbitration to events that happened while the arbitration agreement was in place.

HECHT: Then your position is that once a claim has arisen they have to play by whatever rules that are in effect at the time?

WESLEY: Yes. That is exactly what our position is. And just as it was with the plaintiff in In Re Haliburton. First there was one set of rules. There was no arbitration agreement. The company said this arbitration agreement is going apply. And in fact they did not require the plaintiff in In Re Haliburton to sign an agreement. They simply said we're imposing this arbitration agreement to this program.

ENOCH: Assume that a dispute arises. Assume that a claim is made and assume that Davidson unilaterally exercises its right to do away with arbitration and says it will not arbitrate this claim. What agreements of the parties could Webster rely on to support a claim in the TC that it needed to be arbitrated? What theory or documents could Webster rely on to say that Davidson could not unilaterally _____ with arbitration once they are aware of a claim?

WESLEY: I think that if your question is the claim arose before the arbitration agreement was modified or abolished...

ENOCH: Let's just say if Davidson was aware of the claim what could Webster rely on if Davidson refused to arbitrate it? What could they rely on to say that Davidson could not unilaterally choose to do away with arbitration after it had notice of the claim?

WESLEY: Once they had notice of the claim all that Webster would be required to rely on would be the arbitration agreement and this court's holding in In Re Haliburton and Hathaway v. General Mills. Under Hathaway v. General Mills the change by Davidson would not be in effect until the employee was given notice of that change.

HECHT: Do you think there would be a problem with the enforceability of the agreement if the employer could change it retroactive?

WESLEY: I think under Hathaway an employer potentially could change it retroactively if the employee agreed that to change by simply remaining employed. So if you take a situation where an employee for example had left the employment, then the only way that it could be retroactive is for whatever reason the employee ratified that in contract form. But under Hathaway it could be retroactive if the company said not only are we abolishing the arbitration agreement but we're also not going to recognize it for any events that arose in the past. And that would be binding on the employee if the employee continued to work.

O'NEILL: It seems to me like you're inflating events that lead to contract formation verses the substance of the contract itself. I think what we're concentrating on is an enforceable contract _____ mutuality.

WESLEY: There certainly would be mutuality. It would not be the employer's prerogative to say retroactively we're not going to apply the arbitration agreement. The employee would have to agree to that change. Just as with any other contract if you're going to modify the contract both parties would have to agree. An employee may agree by simply - one very straightforward way would be for the employee simply to remain employed. If an employer wanted to make that contention, obviously that would have to be very clear.

O'NEILL: Then you're saying if it were unenforceable for lack of mutuality by its terms, are you saying that as long as the employee accepts a contract that lacks mutuality it's enforceable?

WESLEY: If you look at for example _____ Healthcare, the employer in that case said none of this is binding on us. Only on the employee. One way of looking at your question is Hathaway and In Re Haliburton really overrule Tenet(?) Healthcare. And I think there is an argument that it does. But we don't have to reach that here because here both sides are saying yes we mutually agree that this applies to both of us.

ENOCH: In In Re Haliburton there was a claim made that the agreement to arbitrate these claims were unconscionable. Is there any sort of claim here?

WESLEY: Not at this stage. That was raised in the court below. There is nothing in the record reflecting that or to support that.

ENOCH: That's not being raised up here or argued up here?

WESLEY: That is not.

O'NEILL: I think what we're struggling with is we're trying to find out where in the contract that premise is. And that is, that it can't be applied unilaterally retroactively. And you're presuming you cannot, but it strikes me we're reading that into the contract _____.

WESLEY: Let me make an analogy for example to In re Alamo Lumber Co. that the 4th CA heard. In in re Alamo Lumber Co the employer did not say, as we did here, that we mutually agree. They simply said while we deserve the right to bring an injunction against the employer the court in In re Alamo said, well that presumes then that all other claims by the employer must be arbitrated. Similarly in this contract all claims would have to be arbitrated unless and until there was a change in the arbitration agreement and that change would have to be effectuated in the manner, and nothing in the contract runs contrary to the manner in which you would change a contract as set out in Hathaway v. General Mills or In re Haliburton.

Notably if you look at the language that is in our contract it's very similar to the language that the 14th CA upheld in In re _____. In re _____ being a case that followed Tenent(?) Health Care by the same court. So the Tenent(?) court, the 14th CA enforced arbitration language very similar to the arbitration language that we have in this case.

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RESPONDENT

NIELSON: We are here arguing that the arbitration agreement is not enforceable as a contract. In hearing the arguments of my opposing counsel, J. O'Neill you've picked up very much on our main argument in this case in that we have a unilateral reservation by the employer within the agreement to modify, abolish, or change the agreement in anyway, at anytime without prior notice.

OWEN: Let's assume that this contract was a contract to pay a set salary. It's a company policy that we will pay you $2,000 a month. And the agreement had this same sentence: the company reserves the right to unilaterally abolish or modify any personnel policy without prior notice. Could they unilaterally, retroactively lower the salary after...

NIELSON: That did not occur in this case.

OWEN: I'm saying would that be a reasonable construction of the contract?

NIELSON: Of our contract?

OWEN: No. I'll give you the hypothetical. Let's assume that you had a contract that says, it's company policy to pay an employee at your level $2,000 a month. Your employee works May, June and July, most of September, October. The company comes in and says we're going to unilaterally, retroactively abolish that policy and lower your salary to $1,500 a month. Would it be a reasonable construction of this language, the company reserves the right to unilaterally abolish or modify any personnel policy without prior notice to permit them to retroactively lower the salary? Would that be a reasonable construction of the contract?

NIELSON: I believe it would. We are talking about employment at will. However, in that instance we have notice given to an employee of the change that's occurring at the time it occurs according to your scenario.

OWEN: You've worked. And they say well we paid you $2,000 but we're going to retroactively lower your salary.

NIELSON: I would argue that...

OWEN: We agreed to pay you $2,000. It's the end of the month. We're going to lower it to $1,500. Is that a reasonable construction of this contract to let them do that?

NIELSON: I don't think so. I don't think that's a reasonable argument because you have terms that are set, although the contract may not have had those set terms. You have a consideration and a service already provided by an employee under those terms, and then you have a retroactively change. You have a devaluation without notice of services already rendered.

HECHT: Then how can you retroactively change the right to arbitrate?

NIELSON: It's a good question.

HECHT: Under this language wouldn't it be the same result?

NIELSON: Yes, I think it would be.

HECHT: So under this contract language you can't retroactively change the right to arbitrate. You can only change it prospectively.

NIELSON: I would agree with that.

O'NEILL: If it were prospective only, then your opposing counsel's argument that if the claim arose before the prospective change, the company would be bound by the arbitration agreement. If this contract does apply only prospectively, then if an injury arose before the policy was changed, then the company would be bound by its agreement to arbitrate?

NIELSON: It's a good question. The case law seems to indicate that - in fact I found a case that if there is a change in the terms of the employment that we've discussed, and there is notice given at that time, it's okay for the new agreements to be enforced. There was a case - it's not necessarily factually similar, but it's Threadgill v. Farmers where there was a contractual relationship between employment of an insurance agent and an insurer. And they found that hey if the agreement has within it language that we may modify this later, if there's a bargaining for that possible change at a later date prospectively, it would be effective. In our case we have no discussion whatsoever about retroactive or prospective implications.

O'NEILL: So I guess your argument then depends upon whether it can be applied retroactively. I think you just said if it only applied prospectively, if it said in the contract that the company could unilaterally change prospectively only, then there wouldn't be a problem with mutuality?

NIELSON: I would agree with that.

HECHT: But you also said this doesn't apply retroactively. So does it or not?

NIELSON: Our whole argument in this case - basically the case law starts out with a two-prong test on whether you have a valid agreement. And our whole argument here is that the case fails on the first prong: is there a valid agreement?

HECHT: I understand the argument. And my question to you is does this agreement allow the employer to decide not to arbitrate a claim that has already arisen?

NIELSON: By its language it appears to allow that. We are saying though by that very instance

that causes the contractual relationship.

OWEN: So under my example are you changing your answer they could retroactively change the salary?

NIELSON: I didn't mean to change my answer. It may be that I didn't fully understand it. I may have been somewhat inconsistent in my statements.

There are contractual cases that are not in our briefing that talk about when a party does reserve the right to cancel at anytime without notice it's an illusory promise. Therefore there's no effectual contractual relationship. Those cases are Spacek(?) v. Maritime Association, 134 F.3d 283; Avilar(?) v. Gonzales, 934 S.W.2d 237. Again those are not employment related factual scenarios.

ENOCH: How do you distinguish this case from Haliburton?

NIELSON: In Haliburton, I believe we had agreements in that case factually where there was a payment or a membership fee paid. A monetary consideration paid. And in this case we don't have that. We have a continuing just employment of working with the employer.

I also wanted to distinguish the reliance of the Davidson party on the Alamo case. In the Alamo case they acknowledge they are somewhat going against the Tenent(?) Healthcare findings. But I wanted to note that within the Alamo case there was language specifically with the arbitration provision was not binding on the employer Alamo. And in this case we have that as well. And in that case they specifically though set out that they would not be bound and be allowed to take judicial action as opposed to our case. And we feel that's a distinguishing note as well.

I also wanted to point out to the court a point in that case that bothered me. There's a discussion on page 581 of that decision where the court talks about an illusory promise can form a unilateral contract, and that illusory promise can serve as an offer which the promisor can accept by performance. And what I wanted to point out to this court is we do not have the performance in this matter. There may be a unilateral offer out there, but there has not been an acceptance by party Webster that I represent. He obviously took no steps towards effectuating the offer out there that he could possibly ratify to go towards arbitration. In our case we filed a lawsuit instead.

SCHNEIDER: Now are you saying that this is a unilateral contract?

NIELSON: No. I'm saying in case the Justices decide to review that case, note that point. I wanted to make that counterpoint while I was here in front of the court because it is not contained in any of our briefing.

SCHNEIDER: You're saying it's not a contract obviously, but you're saying that there is no promise for a promise.

NIELSON: That's true. And there's no promise with performance.

SCHNEIDER: And there's no performance for a promise.

NIELSON: That's correct. I'm saying either mutuality doesn't exist nor does a unilateral contract exist.

SCHNEIDER: Where does it say in the agreement that they will not apply this or that it will be applied prospectively or will not be?

NIELSON: There is no mention of prospective or retrospective in the agreement.

SCHNEIDER: So do we just assume in every unilateral contract that it it's silent. Basically it would not apply retroactively.

NIELSON: I think we have to decide that. Since there's a lack of mutuality and one party reserves to do whatever they want if they decide to make a change there should be some type of notice given. And this agreement specifically indicates that they can unilaterally abolish any personnel policy without prior notice.

JEFFERSON: Let's say the employee did some negligent act and burned the building down. And the company would then have a cause of action against the employee for negligence let's say. And this agreement covers tort and all sorts of other things. If the company then sued the employee and the employee said that I want this claim arbitrated. Are you saying that the company could then refuse arbitration by abolishing this agreement, or are you saying that the company would be compelled to arbitrate by the terms of this agreement? Which one is it?

NIELSON: I'm saying that the employer would have the option to abolish and not arbitrate. The language of the agreement gives the complete option of not abiding by the agreement to the employer, only Davidson.

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REBUTTAL

WESLEY: I would like to make a clarification on whether a change could be made that would be retroactive to this agreement or to any agreement. If the parties agree that a change is to be retroactive, for example, if an employee has earned a bonus and it's clear what that bonus is, and the employer is in desperate financial straits, and the employer goes to the employee and says look we want to change this. Will you agree to it? And we don't want to pay you this big bonus that we had previously promised. And then if you sued us you could get that bonus. But going forward we want to modify this. We don't want to pay you that. Will you agree? And the employee agrees. Yes, then there can be a retroactive change to a contract.

JEFFERSON: Let me ask you in my example then. Davidson sues. The employee wants to compel arbitration. And then you're saying you would have an option at that point, the employer would? You could say we're going to abolish our agreement to arbitrate and if you stay employed then you're ratifying that agreement by staying employed. But you have the right to say we don't have to arbitrate because the contract says we can abolish it. Is that what you're saying?

WESLEY: Yes. In your situation, or that hypothetical let's say that the employer brought the suit against the employee. The employee moved to arbitrate it. And in the meantime the employer said well I would rather stay in court. I don't want to go to arbitration. And the question then is in what way can that agreement be...

JEFFERSON: But at that point I'm asking can the employer looking at this contract say yes there's arbitration initially when we both signed it, but we retain the right to revise the agreement at anytime. And so based on the contract we're refusing to arbitrate. And then leave it up to the employee either to remain employed and abide by that new term of the contract, or enforce the arbitration agreement.

WESLEY: Could they do that? I'm not sure that that's a settled issue frankly. Does this contract give them the right to do that? This contract doesn't give them - the answer is no. This contract doesn't give them any rights greater than what this court held in Hathaway. I can change policies in the future.

Now I'm not aware that this court or any court has addressed the question of what does that mean under Hathaway? In your scenario, in your hypothetical does that mean as a matter of contract construction that we can do this retroactively. I would argue that in fact the parties do have the ability to make that retroactive change, but whether the parties have that right it is not something that Davidson was reserving here. Davidson was not asking for more or stating that he have more power to unilaterally change a contract than what this court held that it did in Hathaway v. General Mills, and subsequently what this court said that it had the right to do in In re Haliburton.

SCHNEIDER: Where is the consideration in this contract?

WESLEY: It is a mutual agreement to arbitrate. In a whole string of cases, but in In re Alamo, and In re _____ both courts have consistently held that a mutual agreement to waive the right to go to trial is consideration.

SCHNEIDER: So it's not a unilateral contract where you're saying you keep working here everyday, you accept everyday and we will arbitrate.

WESLEY: It's very specifically a mutual agreement. It states by its terms that it's a mutual agreement that they would arbitrate. And in addition the contract simply states that policies can be changed, including this policy and without prior notice. But it doesn't say without notice. It doesn't say we're ignoring Hathaway. It doesn't say we have more rights than what the SC said we have in Hathaway. It's simply saying we can change policies, including this policy.

SCHNEIDER: And you can basically change it without agreement.

WESLEY: In In re Haliburton and in Hathaway v. General Mills well both of them are very clear on what is required to get the employee's agreement.

SCHNEIDER: Didn't in Haliburton they gave him 10 days _____?

WESLEY: I believe that's correct.

SCHNEIDER: It really basically says you could enforce the rights you had before it was changed. And in this one it doesn't say that language.

WESLEY: This is a very, very simple arbitration agreement. The agreement just simply says we mutually agree we're going to arbitrate. If you go to In re Haliburton there is all sorts of terms that are spelled out. None of those terms are spelled out in this one. This is a very, simply arbitration agreement.

SCHNEIDER: So it's implied that you have a vested right once your claim arises to basically enforce that by arbitration?

WESLEY: Absolutely.