

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunals

In the Matter of the Arbitration between

Re: 11 160 02760 03

Sherie Goldstein, individually and on behalf of
other similarly situated individuals, ("Claimant")
and
Ibase Consulting of Fairfield County, LLC, ("Respondent")

CLAUSE CONSTRUCTION AWARD OF THE ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated July 19, 2002, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby issue this CLAUSE CONSTRUCTION AWARD, as follows:

ISSUE PRESENTED

When the contract between the parties is silent with regard to the right to bring a class action or collective arbitration in a case brought pursuant to the Fair Labor Standards Act, should the contract be construed to permit such an action?

CONTENTIONS OF THE PARTIES

Claimant contends that the contract does not specifically preclude class or collective relief, and therefore she has not, nor can it be presumed that she has, waived her rights to participate in a class or collective action. Her employment contract, which she urges is a contract of adhesion, should be construed to permit collective or class actions when the contract is silent. The arbitration clause, which is extremely broad (including all federal or state statutory, constitutional or common-law claims), encompasses the FLSA and Rule 23 of the Federal Rules of Civil Procedure. Because Respondent, whom drafted the contract, excluded reference to collective or class actions, the contract is ambiguous and should be construed against the drafter and interpreted to allow such actions. Moreover, both the FLSA and state law are remedial statutes, and the FLSA includes a right to proceed with a collective action. If those rights are to be waived, the waiver should be specific. The mere fact that the forum has been adjudicated as properly in arbitration does not affect statutory rights and remedies to which Claimant is entitled. If the claim is deemed to be a collective action, all parties to it would have agreed to arbitration, because all parties who would opt in would have signed a similar employment agreement with Respondent.

Respondent contends that the employment agreement should be construed to preclude class or collective arbitration. Federal courts have barred class arbitration where the agreement is silent. For class or collective arbitration to take place, the agreement must expressly provide for it. This analysis is no different even if the contract is a contract of adhesion (although Respondent does not concede that point). Because this employment contract does not expressly provide for class or collective arbitration, it should be held that the parties did not contemplate this form of action.

FINDINGS

After *Green Tree Financial Corp. v. Bazzle*, 523 U. S. ___, 123 S.Ct. 2402 (2002), the issue of whether a contract, silent about whether a claimant may maintain a class or collective action, permits such an action, is clearly for an arbitrator to decide. It is a contract construction issue. Although numerous courts have resolved this issue in different ways, according to their perceptions of public policy, all of these holdings were issued before the American Arbitration Association (the "Association") promulgated its rules respecting class actions. Those rules are directly relevant to the contract interpretation in this case.

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunals

In the Matter of the Arbitration between

Re: 11 160 02760 03

Sherie Goldstein, individually and on behalf of
other similarly situated individuals, ("Claimant")
and
Ibase Consulting of Fairfield County, LLC, ("Respondent")

CLAUSE CONSTRUCTION AWARD OF THE ARBITRATOR CONTINUED

Claimant signed an employment contract which employed her "in accordance with the terms and conditions set forth in this Agreement." She agreed that she would "abide by the Company's rules, policies and procedures at all times, which may be altered from time to time at the sole discretion of the Company." She and the Company agreed that a broad group of claims which she may have "shall be settled by arbitration with the American Arbitration Association...".

Her agreement to arbitrate with the Association expressly incorporated all of the applicable rules of that organization. The Association has made it very clear that parties who utilize their offices to administer employment agreements must abide by the National Rules for the Resolution of Employment Disputes, as now supplemented by rules which have applied since October, 2003, relating to class actions. Claimant's agreement, executed on July 2002, was always subject to those rules, which (the same as her individual employment contract) could be amended or changed at any time.

Because Respondent expressly provided for administration of its employment contract by the Association, it expressly consented to the rules promulgated by the Association. Therefore, although the employment contract itself is silent on whether a class or collective action may be maintained, the rules it incorporates allow such an action. The American Arbitration Association Policy on Class Arbitration expressly states the following: "Accordingly, The American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitration when (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims."

Claimant's employment agreement calls for arbitration administered by the Association and the agreement is silent with respect to class or consolidated claims. Therefore, the Supplementary Rules for Class Arbitrations apply, and Claimant may file her claim on behalf of other employees who are allegedly similarly situated.

Even if the employment contract's silence requires construction without reference to the Association's rules, those cases which hold that contract provisions prohibiting class action treatment are unconscionable are persuasive. To date, most of those cases have arisen in the consumer protection context. The results have been mixed. The cases holding that class action treatment should be denied except when expressly provided in the contract are summarized in *Gray v. Conesco, Inc.*, 2001 WL1081347 (C.D.Cal. 2001). Those cases providing that it is unconscionable for a party with superior bargaining power to force a class action prohibition on the consumer are exemplified by *Szetela v. Discover Bank*, 97 Cal. App 4th 1094, 118 Cal. Rptr. 2d 862 (Cal. App. 2002), cert.denied, 537 U.S. 1226 (2003) and *Ting v. AT & T*, 319 F.3d 1126 (9th Cir. 2003).

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunals

In the Matter of the Arbitration between

Re: 11 160 02760 03

Sherie Goldstein, individually and on behalf of
other similarly situated individuals, ("Claimant")
and
Ibase Consulting of Fairfield County, LLC, ("Respondent")

CLAUSE CONSTRUCTION AWARD OF THE ARBITRATOR CONTINUED

This case, however, alleges the deprivation of overtime pay. An agreement which, on its face, required Claimant to waive her right to overtime (presuming her job classification granted her that right) would not be enforceable under Connecticut wage enforcement laws. The provisions of the Federal Arbitration Act do not, in any respect, preempt state or federal wage laws; those provisions provide that such claims shall, if required by contract, be heard in arbitration. Because an agreement specifically requiring the waiver of the right to overtime pay would not be enforceable, an agreement's silence on the issue could not act as a waiver. The class or collective action device is particularly well-suited to wage claims, as most employees are unlikely to bring such claims as a single plaintiff for fear of retaliation or loss of the job, and most terminated employees are unlikely to seek or obtain counsel to challenge either the termination or terms and conditions which applied during employment. Enforcement of one's right to compensation required by statutes is a matter of significant public policy.

The "tension" between an employment agreement and substantive statutory rights was explored in the FLSA context in *Barrentine v. Arkansas-Best Freight System, Inc.* 450 U. S. 728, 734, 101 S. Ct. 1437 (1981). In that case, the employer argued that employees should be restricted to the remedies provided under their collective bargaining agreement and its grievance procedure. The Supreme Court rejected that argument, finding that "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." *Id.* at 737. The Court "emphasized the non-waivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act." *Id.* at 740. Therefore, an employee asserting FLSA rights was entitled to utilize both the collective bargaining agreement, and sue in federal court.

Although Claimant will not be afforded the luxury of both arbitration and court to pursue her FLSA claims, she and others similarly situated should not lose non-waivable rights to compensation simply because all of her claims will be heard in the arbitration forum. The public policy of the FLSA, as stated in *Barrentine*, cannot be waived by employees because the contract is silent.

AMERICAN ARBITRATION ASSOCIATION
Employment and Class Action Arbitration Tribunals

In the Matter of the Arbitration between

Re: 11 160 02760 03

Sherie Goldstein, individually and on behalf of
other similarly situated individuals, ("Claimant")
and

Ibase Consulting of Fairfield County, LLC, ("Respondent")

CLAUSE CONSTRUCTION AWARD OF THE ARBITRATOR CONTINUED

AWARD


The contract cannot be construed as prohibiting a class or collective action under the FLSA. Pursuant to the Supplemental Rules, the arbitrator retains jurisdiction of this case, but stays any further proceedings for 30 days from the date of this Award, to give any party an opportunity to appeal this Award. Each party should notify the AAA as soon as it has determined whether such an appeal will be filed. If there will be no appeal, AAA will arrange a case management conference, by telephone, promptly.

3/29/04
Date


Mr. Joseph D. Garrison

I, Mr. Joseph D. Garrison, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

3/29/04
Date


Mr. Joseph D. Garrison