ALTERNATIVE DISPUTE RESOLUTION
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Arbitration Clause Does Not Apply To Unsuccessful Job Applicant

Gove v. Career Systems Development Corporation, 689 F.3d 1 (1st Cir. 2012)

In *Gove v. Career Systems Development Corporation*, 689 F.3d 1 (1st Cir. 2012), the First Circuit held that an unsuccessful job applicant was not bound by the arbitration clause contained in her job application.

The plaintiff completed an online job application for a position with the defendant. The final section of the application included a provision requiring that any dispute with the employer "with respect to any issue prior to your employment, which arises out of the employment process" to be arbitrated. The provision stated that all "pre-employment disputes" would also be arbitrated. The plaintiff was required to check a box stating that she accepted these terms, which she did.

The plaintiff was interviewed for the position when she was approximately eight months pregnant. The plaintiff was not hired by the defendant and subsequently filed a complaint with the Maine Human Rights Commission which found reasonable grounds to conclude that she was denied the job because of her pregnancy. The plaintiff then filed suit in the U.S. District Court for the District of Maine, alleging discrimination on account of her gender and pregnancy.

The defendant moved to compel arbitration, arguing that the plaintiff was bound by the arbitration clause in the job application. The district court found that the arbitration clause was not valid, reasoning that the provision was ambiguous as to whether it covered job applicants who were never hired and construed that ambiguity against the defendant, the drafter of the agreement.

On appeal, the First Circuit affirmed the judgment, but with different reasoning. The First Circuit found that the dispute actually concerned the scope of the arbitration clause—not its validity. Although the First Circuit noted that federal policy favors arbitration, it found that the defendant had not argued this federal policy on appeal but instead had merely argued contract interpretation under Maine law. As a result, the First Circuit did not consider any arguments concerning the federal policy favoring arbitration in reaching its decision.

The First Circuit looked to Maine law to determine whether the arbitration clause was ambiguous in its coverage of applicants not hired by the defendant. The defendant argued the clause unambiguously covered applicants because of the term "pre-employment" and that "employment

process" referred to every step of the potential employment relationship. The defendant also argued that arbitration clauses are subject to broad interpretation under Maine law.

The plaintiff argued that the clause's references to "employment process" and "pre-employment disputes" should be read literally—that if one is never employed by the defendant, then a dispute cannot be "pre-employment" or related to the "employment process"—thus making the arbitration clause inapplicable.

The First Circuit zeroed in on the fact that the arbitration clause did not specifically refer to "applicants," thus supporting the plaintiff's belief that she would be bound by the arbitration clause only if she were hired. The First Circuit found that the arbitration clause was susceptible to different interpretations, was ambiguous and that this ambiguity must be construed against the defendant as drafter. The First Circuit also noted the unequal bargaining power of the parties: the plaintiff was in no position to negotiate the terms of the application and was required to accept the clause as part of an online job application without a meaningful opportunity to inquire as to its meaning. Applying Maine contract law, the First Circuit found that the plaintiff was not required to arbitrate her claims.

In a lengthy dissent, one judge argued that the defendant did not waive arguments based on the federal policy favoring arbitration and that precedent required the First Circuit to decide the case in the defendant's favor.

Given the First Circuit's reasoning, it would be wise for potential employers who wish to have disputes with unsuccessful job applicants subject to arbitration clearly set this forth in their job applications.

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