

The CHECKOFF

Resolving Procedural Issues in Statutory Employment Arbitration

by Cary R. Singletary

Arbitrators of statutory employment claims are facing tough challenges regarding the appropriate degree of due process, discovery, evidentiary and substantive law standards to apply. Unlike traditional labor-management arbitration, where arbitrators decide issues involved in the interpretation and application of a private collective bargaining contract, employment arbitrators are deciding issues of law arising from statutory rights. These statutory rights reflect this country's ideals for what the appropriate public policy should be regarding individual workers' rights in the employment relationship. As such, employment arbitrators are not merely deciding contract issues but are deciding the rights of individuals within the context of federal and state laws. In so doing, employment arbitrators are functioning in a role similar to a judge and are charged with the responsibility of dispensing justice in a manner which is fair and impartial.

In the process of arbitrating statutory employment claims, arbitrators are seeking to find an appropriate balance of procedural and substantive safeguards while not forfeiting the benefits of informality, privacy,

reduced costs and finality which accrue from arbitration.

Parties to agreements to arbitrate statutory employment issues do not always specify rules or procedures. Where they do, the procedures often do not contain a comprehensive set of procedural or evidentiary standards. As a result, an employment arbitrator may only have a state's arbitration act or the Federal Arbitration Act as a source for making rulings and deciding the award. Under such circumstances a number of issues always arise during the arbitration which are left for the discretion of the arbitrator. When an arbitrator makes decisions in this circumstance, it can cause one or all of the parties to question the basis for any such ruling. This can result in the parties losing confidence in the arbitrator's neutrality or competency to conduct a fair hearing. In other words, because the arbitrator is, in a sense, making up the rules as the case goes along based upon the arbitrator's notions of an informal but fair hearing, the parties can perceive the process as being faulty.

One method an arbitrator can use to reduce much of the conflict over "What rules are we following?" is to conduct a pre-arbitration management conference. The purpose of the conference is to gather advocates and

if possible, the parties, to discuss and arrive at the procedure and law to be followed. The pre-arbitration conference should be followed by a written order of the arbitrator containing the stipulations of the parties and the orders of the arbitrator on those matters upon which stipulation could not be achieved.

This concept has been advanced by the American Arbitration Association in its June 1, 1997 version of the *Guide for Employment Arbitrators* and under Section 8 of its *National Rules for the Resolution of Employment Disputes*. Section 8 of the National Rules suggest the following matters to be included at the arbitration management conference:

continued, page 7

INSIDE:

Chair's Message	2
Section Bulletin Board	2
Midyear Report of CLE Committee	2
Employment Aspects of the Amended Fair Credit Reporting Act	3
Mediation in EEO Cases: Overview of EEOC's Florida ADR/Mediation Program ..	4
Eleventh Circuit Update	6
Supreme Court to Consider Theories of Employer Liability for Hostile Environment Sex Harrassment	6
Resolving Procedural Issues in Statutory Employment Arbitration	7
Employee Benefits and Contingent Workers: Recent Developments	8

Chair's Message



The Section has been busy with its usual fall seminar schedule having held a successful seminar in Orlando on September 26, 1997 on "Effective Use of Experts in Employment Law Cases". My thanks and congratulations to Rich

McCrea for an excellent seminar which was not only well attended but quite well received.

Additional thanks to Steve Meck and Mike Grogan for their work on the "23rd Annual Public Employment Labor Relations Forum" held

October 16th and 17th in Tampa. This was a very well received program as evidenced by the substantial amount of audience participation during both days sessions.

Walter Aye has been given the "go ahead" by the Executive Council to finalize work on the Section's website. You can find this at: <http://www.asksam.com/flbar/>. We look forward to enhancing the website in coming months so as to provide an increasingly valuable resource to Section members. Walter, thank you for your hard work.

We presently look forward to the discrimination seminar in Miami on February 20, 1998. This will be proceeded on February 19, 1998 by a full

seminar on non-compete agreements which will be sponsored jointly by the Labor and Employment Law Section as well as the Business Law Section. Both programs look to be exceptionally well planned. I would encourage all to attend.

Stu Rosenfeldt and his committee have been hard at work gathering information with regard to the issue of certification of labor and employment law and are slated to present a report to the Executive Council at the February 19th meeting in Miami.

Finally, the committee chairs have now staffed their various committees based upon member interest and are hard at work, planning and executing their annual committee agendas.

Bulletin Board

Meeting Notices and Seminars Schedule

Executive Council Meeting
Thursday, February 19, 1998
5:00 p.m. - 6:30 p.m.
Hyatt Regency Downtown Miami

Discrimination Seminar
Friday, February 20, 1998
8:00 a.m. - 5:00 p.m.
Hyatt Regency Downtown Miami

Executive Council Meeting
Thursday, April 30, 1998
4:30 p.m. - 6:00 p.m.
Don CeSar Hotel, St. Petersburg

1998 Advanced Labor Topics
Thursday, April 30 and
Friday, May 1, 1998
8:00 a.m. - 12:00 noon
Don CeSar Hotel, St. Petersburg

**Executive Council Meeting
and Section Annual Meeting**
Thursday, June 18, 1998
2:30 p.m. - 5:30 p.m.
Buena Vista Palace, Orlando

Midyear Report of CLE Committee

by Robert J. Sniffen

The Section's CLE programs have gotten off to a strong start this year with three seminars behind us and three to go. Led by Bill and Karen Amlong, the Section once again co-sponsored the Stetson Trial Skills Seminar in August which attracted practitioners from around the state and from other states as well. The feedback from participants attending the program was excellent.

In September, the section put on a full day program on the effective use of expert witnesses in employment litigation. Under the leadership of Rich McCrea, over 80 attendees received hands on training and practical strategies to utilize in employment law litigation.

The September program was followed by the 23rd Annual Public Employment Relations Forum, chaired by Steve Meck and co-sponsored by the Local Government Law Section. This unique seminar covered a broad range of issues relating to both public employee bargaining and new trends in employment litigation.

The committee is equally excited about our remaining programs, which include the Discrimination Seminar (Miami — February 20, 1998), the Advanced Labor Topics Seminar (St. Petersburg — April 30-May 1, 1998) and the inaugural program on covenants not to compete, to be held in conjunction with the February Discrimination Seminar.

We remain committed to presenting quality educational opportunities for practitioners in this ever expanding area of the law. We hope section members will continue to take advantage of our informative and comprehensive programs.

Employment Aspects of the Amended Fair Credit Reporting Act

by Bryan L. Tyson

On September 30, 1997, changes to the Fair Credit Reporting Act ("FCRA"), which were enacted in 1996, became effective. Although employers may still obtain and use "consumer reports," which can include credit checks, criminal background checks, Department of Motor Vehicle reports, and drug test results, the changes impose additional administrative requirements on employers and present a potential litigation trap for the unwary.

Under the new FCRA, an employer must go through a three-step process to obtain a consumer report on an applicant or employee. First, the employer must provide the applicant/employee with a notification that a consumer report may be obtained for employment purposes. This notification must be in a document that consists "solely" of the notification. Second, the employer must obtain the applicant/employee's authorization to obtain a consumer report. This authorization may be on a separate sheet of paper or may be placed in an employment application. Third, the employer must certify to the consumer reporting agency (the business providing the consumer report) that the employer has complied with steps one and two above and will comply with other disclosure provisions of the law, if they become applicable. At this point, the employer will receive the consumer report.

If the employer does not use the consumer report in making an employment decision, or if the employer uses the report but the decision is favorable to the applicant/employee, the employer has fully complied with the FCRA. Alternatively, if an employer is **thinking** of taking "adverse action" — denying an applicant/employee an employment benefit (e.g., employment) based in whole or in part on information in a consumer report — the employer must send or give the applicant/employee a copy of the consumer report as well as a summary of the applicant/employee's

"consumer rights." The summary of "consumer rights" must be in a form prescribed by the Federal Trade Commission, the federal agency charged with enforcement of the FCRA.

After delivering this information to the applicant/employee, the employer must wait a "reasonable" amount of time prior to taking final adverse employment action against the applicant/employee. This time period is designed to allow the applicant/employee to quickly correct or explain mistakes in the consumer report. Unfortunately, there is no set amount of time that is "reasonable"; the amount of time employers must wait before taking final adverse action appears to differ with the circumstances of their business and each individual case.

After this reasonable amount of time, an employer may take final adverse action based in whole or in part on information in the consumer report. To do this, the employer must provide oral, electronic, or written notice to the applicant/employee of the following information: (1) that he or she is being denied the employment benefit because of information

in the consumer report; (2) the name, address, telephone number, and toll-free telephone number (if a nationwide consumer reporting agency) of the consumer reporting agency; (3) a statement that the consumer reporting agency did not make the adverse employment decision and cannot tell the applicant/employee the reason why such decision was made; (4) a statement informing the applicant/employee of his or her right to obtain a free consumer report from the consumer reporting agency within 60 days of the notice; and (5) a statement informing the applicant/employee of his or her right to dispute the information in the report with the consumer reporting agency.

Employers may also obtain and use "investigative consumer reports," which are reports on a consumer's character, reputation, personal characteristics, or mode of living made through *personal interviews* with the applicant/employee's neighbors, friends, associates, or others with whom he or she is acquainted or who may have knowledge concerning this kind of information. Obtaining an investigative consumer report requires extra disclosures beyond those

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EMPLOYMENT ASPECTS OF THE AMENDED FAIR CREDIT REPORTING ACT

from page 3

required of employers who use only consumer reports.

Many states also have laws or regulations concerning the procurement and use of consumer reports and investigative consumer reports. The new FCRA continues to require employers to comply with these state laws, except where the state law is inconsistent with the FCRA. Florida does not have a law similar to the federal FCRA with respect to employment matters, but employers doing business outside of Florida must always be aware to check other states' laws before acquiring and using consumer reports or investigative consumer reports. Other federal laws, such as Title VII, the Americans with Disabilities Act, and the Bankruptcy Act, may also affect an employer's ability to obtain and use

consumer reports or investigative consumer reports in making employment decisions.

Liability for noncompliance has also increased under the amended FCRA. Civil penalties include liquidated damages, punitive damages, actual damages, costs of the action, and attorney's fees. Persons who knowingly and willfully obtain information from a credit reporting agency under false pretenses are subject to imprisonment for up to two years as well as civil fines, including liability to the consumer reporting agency. States are authorized to enjoin the practices of an employer they believe is violating the FCRA and recover damages for employees/applicants whose rights are violated. The Federal Trade Commission may also bring actions to enforce the various provisions of the FCRA.

Overall, the new FCRA will require employers to pay closer attention to their procedures for checking employees/applicants' consumer rec-

ords and procuring investigative consumer reports on employees/applicants. A well-planned and carefully implemented application, background and consumer credit check process is imperative for employers wishing to limit their liability under the new FCRA.

Bryan L. Tyson is an associate in the Atlanta office of Fisher & Phillips. He received a J.D. with honors in 1996 from the University of North Carolina-Chapel Hill School of Law, where he was a member of the National Moot Court Team. He received his B.A. with Honors in Political Science in 1993 from the University of North Carolina-Chapel Hill, where he was a Morehead Scholar. His practice is devoted exclusively to representing management in labor and employment matters.

Mediation in EEO Cases: An Overview of EEOC's Florida ADR/Mediation Program

The goal of the EEOC's program is to allow all Charging Parties, Complainants in the federal sector, and Respondents to participate. To achieve this goal, participation of colleges, law schools, bar associations, mediation groups, volunteers and the Commission is essential. Finally, the confidentiality and integrity of the mediation process must be protected at all costs.

I. General Precepts

The first priority in starting a voluntary mediation program is to determine the structure within which the program will operate. A unit was formed in the EEOC's Miami District Office solely to mediate cases and conduct the mediation program. In time the Tampa Area Office may also have its own separate mediation unit.

The Commission employees who make up this unit are trained media-

tors who have taken the State's Civil Circuit Mediation Program. Employees who serve in this unit are not permitted to work on any charge in which they have been involved in any capacity outside of their role in the mediation unit.¹ Should a person from the mediation unit transfer out, he/she is precluded from working on any charges thereafter which he/she worked on during the employee's tenure in the mediation unit.

Unassigned charges which have been designated either as "A-2" or "B" have been targeted for mediation.² As the program matures and all charges are assigned, these charges and new receipts which meet the above criteria will become eligible for the Mediation Program.

The mediation process begins in one of three ways. The first option is that a supervisory investigator reviews a charge and determines that it would be appropriate for a media-

tion. The other two options are that a Charging Party or a Respondent requests a charge be forwarded to the Mediation Unit for a mediation to be conducted.

The charge is then transferred to the Mediation Unit. From that point, the Mediation Unit will attempt to mediate the charge. At this point, the appropriate party or parties will be called and the mediation program is explained. If the parties are interested, the Unit will match the available programs to the interests of the parties and issue a confirming letter accordingly. Included with the confirming letter will be an agreement to mediate, a confidentiality agreement, guidelines for successful mediations and standards for mediator conduct.

Should either party to the charge decide not to utilize the mediation option, if the parties cannot mediate in a timely manner, or if an impasse