RENDERED: JULY 1, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002434-MR

MICHAEL D. COVINGTON

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 04-CI-006882

PIPE FITTERS' LOCAL 502 TRAINING AND EDUCATION FUND; PIPE FITTERS' LOCAL 522 TRAINING AND EDUCATION FUND; PLUMBERS AND PIPEFITTERS' LOCAL 502 JOINT EDUCATION AND TRAINING FUND

APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; MILLER, SENIOR JUDGE.[1]

MILLER, JUDGE: Michael D. Covington appeals from an Opinion and Order of the Jefferson Circuit Court dismissing his claims for breach of contract and wrongful termination without

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

prejudice and referring the case to arbitration pursuant to the appellant's January 30, 2003, employment contract with Pipe Fitters' Local 522 Joint Educational and Training Fund (522 Fund).[2] Because the arbitration clause contained in the contract is a valid and enforceable contract term, we affirm.

On January 30, 2003, Covington entered into an employment contract with 522 Fund under which, among other things, Covington was named as Director of Training of the organization. Paragraph 8 of the contract provides that "[s]hould a disagreement between the two parties not come to resolve, then the matter in controversy shall be arbitrated in accordance with the rules and procedures of the Industrial Relations Council for the Plumbing and Pipefitting Industry. All the decisions of the Council shall be final and binding upon both parties."

On November 24, 2003, an Order of Consolidation was executed under which Pipefitters' Local Union 522 (Local 522)[3] and Plumbers Union Local 107 (Local 107) would be consolidated into one local labor union named Plumbers and Pipefitters Local Union 502 (Local 502). The Order of Consolidation contained the following provision: "All contractual obligations of Locals 107

[2] In his notice of appeal, Covington names as an appellee Pipe Fitters' Local 522 Training and Education Fund. However, it appears that the proper name for that Fund is Plumbers and Pipe Fitters' Local 522 Joint Training and Education Fund.

[3] It appears that 522 Fund was the apprenticeship affiliate of Local 522.

and 522, including collective bargaining agreements, shall be assumed and carried out by new Local 502."

In July 2004, 522 Fund issued a letter to Covington which stated, in relevant part, as follows:

> Due to last year's merger of Pipefitters' Local 522 and Plumbers Local 107, the Apprenticeship Funds associated with both unions are to be combined effective August 1, 2004. Accordingly, each employee's term of employment with the Pipefitters' Local 522 Joint Education and Training Fund terminates as of July 31, 2004. We ask that you submit a new application for employment to the newly established Training Fund.

According to Covington, on July 26, 2004, he was offered a position with the newly merged fund, Plumbers and Pipefitters' Local 502 Joint Education and Training Fund (Fund 502),[4] but that the offer was at a substantially lower salary, did not include the provisioning of a company car as did the prior position, and did not include an employment contract.

On July 30, 2004, counsel for Covington sent a letter to counsel for Local 502. It appears that counsel for Local 502 had previously, prior to their dissolution, represented Local 522 and 522 Fund; it further appears that he represents 502 Fund. The letter stated, in relevant part, as follows:

> This letter is a follow-up to our telephone conversation of July 29, 2004. I have enclosed a copy of the Agreement between the Pipe Fitters Local 522 Joint Educational and

[4] It appears that 502 Fund is the apprenticeship affiliate for Local 502.

> Training Fund and Michael D. Covington entered into between the parties on January 30, 2003. I believe that the action taken by the Trustees of the Educational and Training Fund violate the agreement between the parties. Specifically, the trustees have unilaterally and without consultation altered the terms of Mike's compensation in a manner that is inconsistent with the agreement.
>
> Pursuant to the provisions of paragraph 8 of the agreement, it appears that this agreement is not going to be resolved. Mike requests arbitration in accordance with the terms of the agreement.
>
> Unless we hear from you or the Trustees that they are willing to continue to abide by the terms of this agreement, Mike is unwilling to accept the changes he has been told will take effect on Monday, August 2, 2004. I would, therefore, respectfully request that any change to the agreement be deferred until such time as an agreement between the parties has been reached or the matter has been resolved through the arbitration process specified in paragraph 8 of the agreement.
>
> We appreciate your prompt attention to this matter as tie is of the essence.

By letter dated August 3, 2004, counsel for Local 502 responded as follows: "I am in receipt of your letter of July 30, 2004, concerning Mike Covington. As there is no Pipefitters' 522 Training and Education Fund in existence, there is no entity with which to dispute an issue."

On August 13, 2004, Covington filed a complaint in Jefferson Circuit Court naming, as amended, 502 Fund and 522

Fund as defendants. The complaint alleged wrongful termination and breach of contract. In its answer, 502 Fund purported to respond by "special appearance" and denied that Covington's employment contract survived the dissolution of 522 Fund. 502 Fund also denied the conduct alleged by Covington in support of his claim for wrongful termination. In the alternative, 502 Fund alleged that Covington's complaint was improper pursuant to the employment contract's arbitration clause.

On October 27, 2004, the circuit court entered an order dismissing Covington's complaint without prejudice. The circuit court determined that the matter should be referred to arbitration based upon the arbitration clause contained in paragraph 8 of the employment contract. This appeal followed.

On appeal, Covington argues that the circuit court erred in dismissing his complaint. In support of his position, Covington raises two arguments.

First, Covington argues that pursuant to Kentucky Revised Statute (KRS) 417.050, the arbitration clause contained in his employment contract is not enforceable. KRS 417.050 provides as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist

> at law for the revocation of any contract. This chapter does not apply to:
>
> (1) Arbitration agreements between employers and employees or between their respective representatives; and
>
> (2) Insurance contracts. Nothing in this subsection shall be deemed to invalidate or render unenforceable contractual arbitration provisions between two (2) or more insurers, including reinsurers.

"The construction and application of statutes is a matter of law and may be reviewed de novo." Bob Hook Chevrolet Isuzu, Inc. v. Transp. Cabinet, 983 S.W.2d 488, 490 (Ky. 1998). "The essence of statutory construction is to ascertain and give effect to the intent of the legislature." Hale v. Combs, 30 S.W.3d 146, 151 (Ky. 2000). To ascertain the intent of the legislature, courts should view the statute as a whole, considering not only its language but also its spirit. Combs v. Hubb Coal Corp., 934 S.W.2d 250, 252 (Ky. 1996). However, the language in the statute bears the greatest importance, and a statute may not be interpreted in a manner that conflicts with the stated language. Hoy v. Kentucky Industrial Revitalization Auth., 907 S.W.2d 766, 768 (Ky. 1995), *citing* Layne v. Newberg, 841 S.W.2d 181, 183 (Ky. 1992). Accordingly, a court may not insert language to arrive at a meaning different from that created by the stated language in a statute. Beckham v. Bd. of Educ. of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994).

Moreover, Kentucky statutes must be given a liberal construction, and the language used must be given its ordinary meaning except when the language used has a special meaning in the law; in such a case, the technical meaning is appropriate. KRS 446.080(1) and (4); Peter Garrett Gunsmith, Inc. v. City of Dayton, 98 S.W.3d 517, 520 (Ky.App. 2002)

While KRS 417.050, by its plain language, excludes employment contracts from coverage under KRS Chapter 417, we do not construe the statute as prohibiting, invalidating, or otherwise vitiating the enforceability of arbitration clauses contained in employment contracts. The statute does not so state, nor do we believe that it was the intent of the legislature to implement such a policy upon its enactment of KRS 417.050. By our interpretation, the language of the statute does nothing more that exclude arbitration clauses contained in employment contracts from the broad procedural rules contained in KRS Chapter 417 applicable to arbitration clauses in other contexts. This is distinguishable from barring employment contracts from containing a valid and enforceable arbitration clause.

We believe that the federal courts have properly interpreted Kentucky law in holding that arbitration clauses in employment contracts are enforceable. See, e.g. Shadeh v. Circuit City Stores, Inc., 334 F.Supp.2d 938 (W.D.Ky. 2004)

(Under Kentucky law, agreement to arbitrate as condition of employment is enforceable if supported by sufficient consideration and a mutuality of obligation, and where employee has sufficient time to read and understand the obligations of the arbitration agreement and procedures).[5] We accordingly reject Covington's contention that employment contract arbitration agreements are unenforceable under KRS 417.050.

Covington also argues that the trial court erred in dismissing his complaint on the basis that the defendants waived their right to enforcement of the arbitration clause contained in the employment clause when counsel for the defendants, in his letter dated August 3, 2004, denied his request for arbitration.

Waiver is among those grounds on the basis of which a court may refuse to enforce an arbitration agreement. St. Mary's Medical Center of Evansville, Inc., v. Disco Aluminum Products Company, Inc., 969 F.2d 585 (7th Cir. 1992). Waiver is commonly defined as

> a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon.

Greathouse v. Shreve, Ky., 891 S.W.2d 387, 390 (1995) (*quoting* Barker v. Stearns Coal & Lumber Co., 291 Ky. 184, 163 S.W.2d 466, 470 (1942)).

[5] Covington does not allege that the arbitration clause at issue was not supported by sufficient consideration and a mutuality of obligation; that he had insufficient time to read and understand the clause; or that the clause was otherwise unconscionable.

A waiver may be either express or implied, although waiver will not be inferred lightly. Valley Construction Company, Inc. v. Perry Host Management Company, Inc., 796 S.W.2d 365 (Ky. App.1990)

In his August 3, 2004, letter to Covington, counsel for the defendants stated "[a]s there is no Pipefitters' 522 Training and Education Fund in existence, there is no entity with which to dispute an issue." We do not interpret the August 3, 2004, letter as a voluntary and intentional surrender of Fund 502's rights under the arbitration clause. The letter, rather, asserted the legal position that there was no obligation to arbitrate on the basis that Fund 522 had ceased to exist. This was the assertion of a legal position, not a relinquishment of a right to arbitrate in the event this legal position was incorrect and there was a valid arbitration clause. The letter does not rise to the level of an intentional and voluntary relinquishment of a known right. Accordingly, we reject the appellant's position that the defendants had waived their right to arbitration under paragraph 8 of the employment contract.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Clay
Garry R. Adams
Louisville, Kentucky

BRIEF FOR APPELLEE:

John Frith Stewart
Dennis F. Janes
Louisville, Kentucky