8th Circuit upholds mandatory arbitration

By Jane Pribek
Special to Minnesota Lawyer

The courthouse doors are closed to union members seeking redress for employment-related claims, when their union has waived their right to a judicial remedy and instead requires binding arbitration.

So ruled the 8th U.S. Circuit Court of Appeals on Dec. 28 regarding Keith Thompson's claim that his former employer, Air Transport International, violated his rights under the Family Medical Leave Act and the Arkansas Civil Rights Act.

Thompson, a pilot for ATI from 1993 to 2009, was hospitalized and underwent surgery in early 2009, missing eight weeks of work immediately afterward. After returning to work, he was terminated for violating an operational procedure after completing approximately 12 hours of flight time.

Thompson filed a lawsuit, arguing that other similarly situated pilots who had not taken FMLA leave weren't terminated for the same error. He claimed ATI dismissed him in retaliation for his taking of sick leave, in violation of the FMLA. Additionally, he argued that he was forced to identify himself as a person with a disability, in violation of state disability discrimination law.

Chief Judge J. Leon Holmes of the U.S. District Court for Eastern District of Arkansas dismissed the complaint without prejudice, finding Thompson's claims were subject to the mandatory arbitration provision contained in the collective bargaining agreement between his union and ATI.

Thompson appealed, arguing the arbitration provision is invalid because it was joined with an illegal and nonseverable waiver of his FMLA claims.

The case is *Thompson v. Air Transport International.*

The decision

The appellate court affirmed in a six-page decision written by Judge Bobby Shepherd.

His analysis began by concluding that the Railway Labor Act applies to the dispute.

On appeal, Thompson conceded that the provision at issue in the CBA subjects his claims to mandatory arbitration but also argued the clause is part of an unconscionable and nonseverable waiver of his claims.

The clause at issue stated:

"[C]laims of discrimination arising within the employment relationship between the Company and the Crewmembers, whether such claims are made under the collective bargaining agreement or in state or federal court and alleged to be violations of state or federal law ... are to be addressed, resolved and finalized solely under Section V–Grievance and/or [Section] VI–Arbitration of the Agreement as by the terms of the Collective Bargaining [Agreement] each Crewmember waives each and every cause of action and remedies provided under these statutes and common law frameworks."

The CBA did not purport to waive Thompson's FMLA remedies, the court reasoned. Rather, it waived the courts as a forum.

Thompson had based his argument on the last clause of the CBA's arbitration provision — "Crewmember waives each and every cause of action and remedies provided under these statutes and common law frameworks."

But the court found other provisions in the CBA to support the airline's position.

Shepherd wrote:

"[W]hen the last sentence of the arbitration clause is read in conjunction with section 9 of the collective bargaining agreement, it is clear that the agreement does not purport to waive Thompson's FMLA claims. Section 9(A) of the agreement expressly retains the FMLA rights of crewmembers, stating 'Crewmembers are permitted leaves of absence to the extent required by, and in accordance with the terms of, the Family Medical Leave Act (FMLA). All requests for FMLA leave, and the terms of such leave are governed by the FMLA.' Thus, it is clear the waiver referenced in the last sentence of the arbitration clause is the waiver of a judicial forum, not the waiver of Thompson's claims."

The court concluded by noting that the U.S. Supreme Court recognized in 2009 in *14 Penn Plaza LLC v. Pyett*, that unions may agree to arbitration provisions in CBAs in return for other concessions from the employer, and that courts generally may not interfere in this bargained-for exchange.

Counsel reacts

The ruling has implications beyond the parties involved, said Sarah Pierce Wimberly, who represented ATI, because it was the first time the 8th Circuit has followed *Penn Plaza.*

"That was a pretty monumental case when it came down in 2009, because usually an individual had to consent to binding arbitration," she said.

The Railway Labor Act is somewhat obscure because it applies to the railroad and airline industries, whereas the much better-known National Labor Relations Acts applies to other unions, explained Wimberly, of Atlanta. Still, in this case, the RLA's uniqueness wasn't dispositive.

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> —Susan Coler, president, Minnesota chapter of the National Employment Lawyers Association

Rather, the case turned on the lengthy, "poorly worded" arbitration clause within the CBA, she said.

Luther Oneal Sutter in Little Rock represented Thompson. He did not return a call seeking comment.

Closer to home, Susan Coler of Minneapolis, president of the Minnesota chapter of the National Employment Lawyers Association, said, "What's interesting to me is that the court did render an opinion about what the collective bargaining agreement said. Sometimes people think that anything in a collective bargaining agreement is off-limits for the courts. A court can apply a CBA to facts, which is what it did here."

She continued, "That said, it's another decision in a line of decisions limiting employees' access to federal and state courts, and that's not a good trend for employees. Arbitrations tend not to be employee-friendly and can limit their ability to get full relief."

To improve your writing, revisit some basics

By Matthew R. Salzwedel


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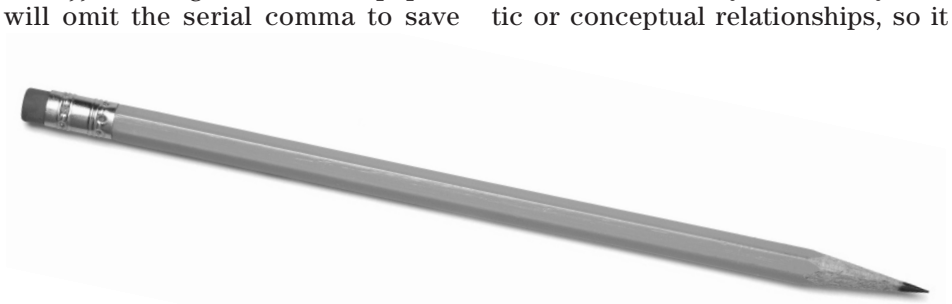
Good legal writing requires basic knowledge of language, grammar and usage; the opportunity to apply that knowledge logically and rhetorically; and, most importantly, repetition in myriad contexts. Last week, we looked at five simple tips to improve your legal writing, and various legal-writing authorities that support them. Here are five more:

Tip No. 6: You can use contractions.

Another legal-writing canard is that you can't use contractions. But consider Judge Richard A. Posner's use of the contraction *won't* in his recent opinion in *In re: Text Messaging Antitrust Litigation* (7th Cir. Dec. 29, 2010): Interlocutory "appeals should not be routine, and *won't* be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b)." A good legal writer, however, will use contractions *sparingly* to achieve a warmer, conversational tone and enhance readability. (Supreme Court Justice Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 116 (2008) (*The Garner view*: "Contractions ought to become more widespread in legal writing. ... But they shouldn't appear at every single turn — only when, in speaking, one would most naturally use a contraction.")) Note, however, that Scalia, for one, dissents from this view and advises against using contractions because some judges may view it as "an affront to the dignity of the court," which will be "*less* likely to advance your cause." (*Id.* at 118, 117)

Tip No. 7: Include the serial comma.

"The serial comma separates items, including the last from the next to last, in a list of more than two." (Garner, *The Elements of Legal Style*, at 15 ("The reason for preferring the final comma is that omitting it may cause ambiguities, while including it never will.")) Although some newspapers will omit the serial comma to save space, including it is preferred because it will always avoid ambiguity. So instead of writing "She purchased stocks, bonds and derivatives for her portfolio," write "She purchased stocks, bonds, and derivatives for her portfolio."



> A good legal writer will use contractions sparingly to achieve a warmer, conversational tone and enhance readability.

Tip No. 8: *As to* should be used — if at all — only to begin a sentence.

Though it's defensible to begin a sentence with *As to*, using it in the middle of a sentence should be avoided. The main reason is that there usually will be a more specific preposition available, such as *regarding*, *concerning* or *about*. (*Pocket Fowler's Modern English Usage* 63 (2d ed. 2008)) Using *as to* in the middle of a sentence may result in unnecessary ambiguity, and it smacks of legalese and jargon. (Garner, *Modern American Usage*, at 70 ("*As to* smells of Jargon. ... The main problem with *as to* is that it doesn't clearly establish syntactic or conceptual relationships, so it can hamper comprehensibility."))

Tip No. 9: Insert *'s* to form the possessive singular of a noun, even where the noun ends in *s*.

Many readers will recall seeing the possessive of Congress written as *Congress'*. But even where a noun ends in *s*, the possessive singular usually is formed by adding *'s*. (William Strunk Jr. and E.B. White, *The Elements of Style* 1 (4th ed. 2000)). So *Congress'* is wrong — it should be *Congress's*. Two important exceptions are the names of historical figures and where a name is formed from a plural word; in both cases, a single apostrophe is added to the end of the noun. So the possessive of Jesus and Bain Capital Partners is *Jesus'* and *Bain Capital Partners'*, respectively.

Tip No. 10: If you write *which* without a preceding comma, *which* probably should be *that*.

In general, if you can substitute *that* for *which* without changing the meaning of the sentence, you should use the restrictive pronoun *that*. (Follett, *Modern American Usage*, at 321 ("[T]here are ... numberless sentences in which *that* ought to be felt as mandatory and *which* ought not be uttered without a sense of its uncouthness.")) Consider the following sentence where the restrictive *that* should be substituted for the nonrestrictive *which*: "It was fun to carom around the golf course *which* [read: *that*] had inspired such awe in me as a young boy." As Strunk and White explain, "it would be a convenience to all if [*which* and *that*] were used with precision. Careful writers, watchful for small conveniences, go *which*-hunting, remove the defining *whiches*, and by so doing improve their work." (Strunk & White, *The Elements of Style*, at 59).

Matthew R. Salzwedel is an attorney at Lockridge Grindal Nauen P.L.L.P., and a former law clerk for the Honorable G. Barry Anderson on the Minnesota Court of Appeals.