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Arbitration Award Reinstating Former General Counsel in Employment Discrimination and Retaliation Case Vacated

On July 21, 2010, the Wisconsin Supreme Court held that an arbitration award reinstating the former general counsel of a well-known home improvement retailer violated Wisconsin public policy “because reinstatement of Sands would cause her to violate her ethical obligations as an attorney.” Sands v. Menard, Inc., 2010 Wisc. LEXIS 174, **31 (Wis. Sup. Ct. July 21, 2010). The Court found that the relationship between Sands and Menard was so irretrievably damaged, there was no way she could honor the attorney-client privilege and continue to act as the company’s chief in-house lawyer. The Court vacated the prior arbitration award and instead granted front pay, ruling “we cannot countenance an award that forces an attorney to represent a client when it is clear that the complete disintegration of mutual goodwill, trust, and loyalty renders ethical representation by that attorney impossible.” Id. at **32-33.

This case is significant not only because of the large monetary damages awarded to Sands by the arbitration panel (more than \$1.6 million), but also because the Sands decision provides guidance to other courts attempting to balance the importance of the attorney-client relationship against the deference given to arbitration in employment discrimination and retaliation cases brought by in-house counsel – and, importantly, lawyers working in law firms.

Key Facts and Points of Law

Dawn Sands was the former general counsel of Menard, Inc. until her termination in connection with a compensation dispute. Pursuant to an arbitration agreement previously entered into by Sands and Menard, Sands submitted to arbitration claims of gender discrimination under the Equal Pay Act and retaliation under the Equal Pay Act, Title VII and the Wisconsin Fair Employment Act. The arbitration panel found that Sands was paid less than similarly situated male co-workers and that Menard retaliated against Sands for complaining about this pay discrepancy. See, our Client Alert dated March 1, 2010 at www.socw.com.

The arbitration panel awarded Sands over \$1.6 million in damages, including \$900,000 in punitive damages, and attorney’s fees, and reinstatement at a new adjusted salary. Menard argued that the substantial monetary damages adequately compensated Sands and that “the attorney-client relationship is vital to a company, as is the right to choose counsel, and that because of their broken relationship, Sands could no longer represent Menard, Inc., the Menard brothers, or their interests.” Id. at **18. The Wisconsin trial and appellate courts were unmoved by Menard’s argument and refused to vacate or adjust the arbitration award. Sands v. Menard, Inc., 318 Wis. 2d 206 (Wis. App. Ct. 2009).

The Wisconsin Supreme Court, however, reversed, finding that the arbitration panel exceeded its authority in ordering Sands' reinstatement. The Court, instead, vacated the award of reinstatement and remanded the case to the circuit court to determine an appropriate front pay award.

The Court determined that reinstatement was impossible in light of the "especially bitter litigation marked by personal and professional animosity," particularly given Sands' sensitive and high-level position as chief legal counsel and spokesperson for the company. *Id.* at **38. The Court based its decision to vacate the arbitration award on an attorney's ethical obligations, particularly the duty of loyalty to clients, embodied in case law, the Rules of Professional Conduct and Wisconsin public policy. The Court stressed that, "[t]hrough the panel's decision was otherwise thorough, nowhere did the panel consider the applicability of Sands' ethical obligations as an attorney. It never examined whether Sands could ethically perform her role if it awarded her reinstatement." *Id.* at **40.

Implications for Employers

- The Court's decision to vacate the arbitration award and to give Sands appropriate front pay in lieu of reinstatement places boundaries on the relief available in arbitration and indicates that the substantial deference courts give to arbitration is not limitless unless unusual or special facts or circumstances apply.
- The Sands holding creates a powerful defense for employers defending legal departments or law firms in discrimination and retaliation cases that reinstatement is not an appropriate remedy.
- In addition to the damages awarded by the arbitration panel – \$1.6 million, including \$900,000 in punitive damages, plus prevailing party attorney's fees, the Wisconsin Supreme Court awarded Sands front pay (at a new salary of \$175,000). These significant monetary damages undercut critics who claim employees alleging discrimination or retaliation are disadvantaged in forums other than jury trials.

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October 1, 2010

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