# THE IMPACT OF THE DUE PROCESS PROTOCOL PRINCIPLES ON ARBITRATION OF STATUTORY EMPLOYMENT DISPUTES IN MICHIGAN

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## I. INTRODUCTION

This article reviews the impact of the recommendations of the 1995 "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" on the arbitration of statutory employment claims in Michigan (the Protocol).

In response to the development of predispute employment arbitration and at the prompting of the National Academy of Arbitrators, the Task Force on Alternative Dispute Resolution in Employment was created. The Task Force consisted of representatives of the American Bar Association, American Civil Liberties Union, Federal Mediation & Conciliation Service, National Academy of Arbitrators, National Employment Lawyers Association, and Society of Professionals in Dispute Resolution.

On May 9, 1995, the Task Force issued recommendations known as "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship."

Arnold M Zack, President of the National Academy of Arbitrators in 1994-1995, considered the Protocol "a rather modest undertaking to protect the credibility of labor management arbitration and to provide guidance to NAA arbitrators who might be undertaking such [employment arbitration] work." "The Due Process Protocol: Getting There and Getting Over It," *Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution*,

NAA Conference, Chicago, April 13-14, 2007 (*Beyond*).

## II THE PROTOCOL

### A. Statutory Employment Disputes.

The Protocol is limited to the arbitration of statutory employment disputes, and provides that arbitration of statutory disputes which are conducted under proper due process safeguards should be encouraged in order to provide expeditious, inexpensive, and fair private enforcement of statutory disputes.

### B. Timing of Agreement to Arbitrate.

Because of the conflicting interests of the participating organizations, the Protocol did not achieve consensus on the issue of the timing of an agreement to arbitrate statutory disputes.

Nevertheless, the Protocol achieved consensus concerning some procedural due process issues.

### C. Representation by Counsel.

The Protocol provides:

1. Employees utilizing arbitration procedures should have the right to be represented by a spokesperson of their own choosing and this right should be specified in the arbitration agreement.

2. Payment for representation should be determined between the claimant and the representative. The employer should reimburse a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for

fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

D. Neutral Arbitrator.

The Protocol provides that:

1. Arbitrators should have hearing conduct skills, statutory issue knowledge, and "familiarity with the workplace and employment environment." Arbitrator rosters should be established on a non-discriminatory and diverse basis in order to satisfy the parties that their interests and objectives will be respected.

2. Arbitrators whom both parties trust should be selected. Regardless of the arbitrator's prior experience, she must be unbiased. Arbitrators should reject cases if they believe the procedure lacks requisite due process.

3. Upon request of the parties, the designating agency should utilize a procedure such as that of the American Arbitration Association. The selection process could empower the designating agency to appoint an arbitrator if the striking procedure is unacceptable or unsuccessful.

4. The arbitrator has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The arbitrator should be required to sign an oath affirming the absence

of such present or preexisting ties.

5. Arbitrator impartiality is best assured by the parties sharing the arbitrator fees and expenses. If economic conditions do not permit equal sharing, the parties should agree on an appropriate split. In the absence of such an agreement, the arbitrator should determine the payment allocation.

E. Discovery.

The Protocol provides for access to information and encourages adequate but limited pre-trial discovery. Employees should have reasonable pre-hearing and hearing access to all information reasonably relevant to their claims. Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

F. Fair Hearing.

The Protocol provides that the arbitrator should be bound by applicable agreements, statutes, and procedural rules, including the authority to determine the hearing time and place; permit reasonable discovery; issue subpoenas; decide arbitrability; preserve hearing order and privacy; rule on evidentiary issues; and determine the close of the hearing and procedures for post-hearing submissions. The arbitrator should be empowered to award whatever relief would be available in court.

G. Written Opinion.

The Protocol further states that the arbitrator should issue an opinion and award resolving the submitted dispute. The opinion should contain

1. a summary of the issues, including types of disputes, damages and other relief requested and awarded,

2. a statement of any other issues resolved, and

3. a statement regarding the disposition of any statutory claims.

The Protocol provides that the arbitrator's award should be final and binding and the scope of review should be limited.

## III. DESIGNATING AGENCIES' RESPONSES TO THE PROTOCOL

### A. American Arbitration Association.

According to the AAA, the Protocol seeks to ensure fairness and encourages arbitration of statutory disputes, provided there are due process safeguards. *AAA Employment Arbitration Rules and Mediation Procedures*, July 1, 2006 *(AAA Rules).* The AAA Rules provide for:

1. The right to representation by counsel or other authorized representative. AAA Rule 19.

2. A neutral arbitrator. This includes providing for appointment of neutral arbitrators, party appointed arbitrators, appointment of chairperson, disclosure, disqualification of arbitrator, communication with arbitrator, and arbitrator vacancies. The employer pays the arbitrator's compensation for disputes arising out of an employer-promulgated plan. AAA Rules 12-18.

3. Reasonable discovery. This includes providing for discovery of

witness information and discovery authority. AAA Rules 8- 9.

4. A fair arbitral hearing. This includes providing for administrative conferences, arbitration management conferences, hearing locale, stenographic record, oath requirements, order of proceedings, evidence requirements. and closing of hearing. AAA Rules 7-8, 10-11, 20, 25, 28, 30, and 33.

5. A written award and opinion. AAA Rule 39.

B. National Academy of Arbitrators.

The NAA has Guidelines for Employment Arbitration. The NAA indicates that its Guidelines, "together with the Due Process Protocol endorsed by the Academy," are intended to assist arbitrators in deciding whether to take a case and to fairly conduct and conclude a case. The NAA Guidelines provide for:

1. Adequate rights of representation.

2. A fair manner for the selection of a neutral arbitrator. Arbitrator compensation arrangements should also be fair.

3. Arbitrator authority to ensure reasonable discovery.

4. A fair arbitral hearing. This includes arbitrator remedial authority equal to that provided by statute, and no unfair hearing restrictions.

5. A written opinion and award.

C. National Association of Securities Dealers (consolidated into Financial

Industry Regulatory Authority, FINRA, in July 2007).

Although the NASD previously required arbitration of statutory employment claims, the agency no longer requires arbitration of such claims. *Hooters v Phillips*, 39 F Supp 2d 582, 621 (D SC 1985); "Basic Facts of Arbitration of Statutory Discrimination/Employment Cases at NASD," *Beyond*. NASD Code of Arbitration Procedure, April 16, 2007. NASD Rule 13201. Statutory employment claims may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. If the parties agree to arbitration, the claim will be administered under NASD Rule 13802. The NASD Rules provide for:

1. Right to representation by counsel. NASD Rule 13208.

2. Neutral public arbitrators. NASD Rule 13802.3.

3. Discovery. NASD Rules 13505-13514.

4. Fair arbitral hearing. NASD Rules 13600-13609. This includes any relief that would be available in court. NASD Rule 13802(e).

5. The Arbitrator must issue an award setting forth a summary of the issues, including the types of disputes, the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claims. NASD Rule 13802(e).

D. JAMS.

JAMS has promulgated its Policy on Employment Arbitration Minimum Standards of Procedural Fairness (JAMS Policy). JAMS supports the application of the Protocol and intends

that its Arbitration Rules and Procedures for Employment Disputes be consistent with the Protocol. The JAMS Policy provides for:

1. The right to representation by counsel. Standard No 3. JAMS Rule 12.

2. Arbitrator neutrality. Standard No 2. JAMS Rules 16 and 17.

3. Discovery. This includes providing for exchange of core information and some depositions. Standard No 4.

4. A fair arbitral hearing. This includes all remedies available in a court, presentation of evidence, hearing location, and mutuality, Standard No's 1, 5, and 6-7. JAMS Rules 19, 20, 21, and 22.

5. A written opinion. Standard No 8. JAMS Rule 24.

## IV. INITIAL COURT DISCUSSION OF PROTOCOL

Initially the Protocol was cited by some courts in considering arbitration due process issues. Jacquelin F Drucker, "The Protocol in Practice: Reflections, Assessments, Issues for Discussion, and Suggested Actions," *Beyond*.

The District Court in *Hooters v Phillips*, 39 F Supp 2d 582 (D SC 1985), aff'd 173 F3d 933 (4th Cir 1999), alluded to the Protocol as part of the plaintiff's contentions.

The District Court cited the Protocol in *Rosenberg v Merrill Lynch Pierce Fenner & Smith*, 995 F Supp 190, 208 n 23 (D Mass 1998), *aff'd* 170 F3d 1 (1st Cir 1999).

*Cole v Burns Int'l Security Services*, 105 F3d 1465 (1997), cited the Protocol in dissent

concerning the arbitrator fee payment issue. *Id* pp 1490-1491. *Cole* held that an arbitration agreement must (1) provide for neutral arbitrators, (2) provide for appropriate discovery, (3) require a written award, (4) provide for all relief available in court, and (5) not require employees to pay either unreasonable costs or any arbitrators' fees as a condition of access to the arbitration tribunal. *Id* at 1482.

## V. ARBITRATION DUE PROCESS IN MICHIGAN COURTS

The Michigan Supreme Court had previously reviewed arbitration procedural due process issues in *Renny v Port Huron Hosp*, 427 Mich 415 (1986). In *Renny*, the Court held that:

> "where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless the court finds as a matter of law that the procedures used did not comport with elementary fairness." *Id* at 418.

In *Renny* the employee was not permitted to have counsel present or see the complaint against her, and was not informed of the identity of witnesses testifying at the hearing. She was not present during the testimony or during opening remarks. There were no records or transcripts of the discharge hearing, and the tribunal made no finding. No witnesses could be called without the tribunal's consent. A witness's appearance was voluntary. An employee had no right to cross-examine or rebut testimony or to make closing arguments. *Id* at 423-424.

*Renny* held that essential elements necessary to fair arbitration proceedings are:

"1) Adequate notice to persons who are to be bound by the adjudication;

2) The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;

3) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction,

situation, or status;

4) A rule specifying the point in the proceeding when a final decision is rendered; and,

5) Other procedural elements as may be necessary to ensure a means to determine the matter in question. ... ." *Id* at 437.

A Conflicts Panel of the Court of Appeals subsequently reviewed arbitration procedural due process issues in *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, *lv den*, 461 Mich 923 (1999).

*Rembert* did not cite the Protocol although it comes close when it cites the AAA National Rules for the Resolution of Employment Disputes. *Id* at 160 n 32. *Rembert* indicated that:

> "While our decision upholds the principle of freedom of contract and advances the public policy that strongly favors arbitration, it does so subject to two conditions generally accepted in the common law: that the agreement waives no substantive rights, and that the agreement affords fair procedures." *Id* at 124.

*Rembert* noted that *Renny* and *Cole*, as well as leading ADR organizations, "suggest certain baseline fundamentals to ensure fairness in an arbitral process for discrimination claims." *Id* at 161. *Rembert* held that to satisfy *Renny* and MCR 3.602, the arbitration procedures must provide:

1. Clear notice that the employee is waiving the right to adjudicate claims in court and is instead opting for arbitration,

2. The right to representation by counsel,

3. A neutral arbitrator,

4. Reasonable discovery,

3. A fair arbitral hearing, and

4. Written awards containing findings of fact and conclusions of law. *Id* at 163-165.

*Saveski v Tisco Architects, Inc,* 261 Mich App 553, 556 (2004), indicated that the *Rembert* record requirements are "more stringent" because a court reviewing a "civil rights claim" must have a means of analyzing whether the arbitrator properly "preserved" the employee's statutory rights.

There are no other published Michigan cases discussing the *Rembert* due process requirements. In *Miller v Miller*, 474 Mich 27 (2005), the Supreme Court ruled that in an arbitration under the Michigan Domestic Relations Arbitration Act, MCL 600.5701 *et seq*, a hearing does not have to be a formal hearing if "the parties and the arbitrator" agree that it does not have to be a formal hearing. *Id* at 33. Any possible tension between *Miller* and *Rembert* is probably inconsequential in employment arbitration cases since parties are extremely unlikely to agree to an informal hearing.

## VI. CONCLUSION

Consequently, in light of *Rembert* and MCR 3.602, Michigan case law is largely consistent with the Protocol requirements of right to representation, reasonable discovery, impartial arbitrators, fair hearing, and written awards. *Rembert* does not adopt the Protocol theory of the employer paying part of the employee's attorney fees, absent statutory requirement. *Miller's* permission of an informal hearing, if agreed to by the parties and the arbitrator, will probably not affect the *Rembert* due process rules.