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REPLY TO PROFESSOR FINKIN

SAMUEL ESTREICHER*

Professor Matthew W. Finkin is an able, productive scholar in the field and I appreciate the care and attention he has paid to my article.¹ Without responding to each point of substance or tone in Professor Finkin's commentary, I do think it useful to offer a few general observations by way of rejoinder.

I.

Professor Finkin does not clearly offer an affirmative view of his own. I take it that he would approve of arbitration of disputes under employment agreements entered into by sophisticated employees, but would not enforce arbitration promises that extend to claims arising under federal and state protective labor legislation. This is to be accomplished by a literal reading of Section 1 of the Federal Arbitration Act (FAA) and cognate state laws to exclude all employment agreements from their reach. Moreover, even for wholly contractual claims, he would urge courts to ignore arbitration promises contained in standard-form agreements, at least where the employees in questions can be considered "unsophisticated" and lacking some undefined level of bargaining power. Apparently, courts will be able to embark on the latter program even where they are unprepared to invalidate the agreements on grounds of duress or unconscionability.

As my article hopefully makes clear, proper consideration of the role of arbitration in employment disputes must address the role of external public policy and the problem of unsophisticated claimants. The question, and I guess the central point of disagreement with Professor Finkin, is how best to address these concerns. My view is that such concerns are best addressed by a combination of respect for the realm of private contract (subject to the traditional grounds for voiding agreements) and accommodation of the public policies embodied in federal and state protective labor laws.

Professor Finkin's position, in contrast, would substantially dampen the willingness of firms to enter into arbitration agreements since arbitra-

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1. Finkin, *Commentary on "Arbitration of Employment Disputes Without Unions,"* 66 CHI.-KENT L. REV. 799 (1990).

tion will hold out little promise of precluding de novo relitigation of the underlying dispute in the civil courts. It is not clear that employee-claimants as a class are better off under Professor Finkin's regime. Not all claimants will be able to secure counsel to mount civil litigation or will have equal claim on the limited resources of administrative agencies. Even where counsel or administrative enforcement can be secured, the delay and reputational costs of a public litigation may be less preferable than a relatively quick, informal arbitration. This tradeoff is no less present in the case of unsophisticated claimants. Requiring resort to civil litigation in lieu of arbitration does not improve the lot of such claimants unless one also ensures availability of counsel and assurance can be given that delay and publicity costs are immaterial to the affected individuals.

Although Professor Finkin criticizes my account of the *Gardner-Denver* line of cases, he does not affirmatively make out the case for his insistence on "reserv[ing] public law questions for de novo judicial determination . . ." ² Certainly, the National Labor Relations Board has traditionally taken a different view of arbitral competence. So has the Supreme Court in a string of FAA rulings requiring arbitration of claims under the federal antitrust, securities and racketeering laws. As developed more fully in the article, where arbitrators sit to resolve disputes governed by public law, certain procedures are required to ensure that these external policies are not disserved. Such procedures include exhaustion of applicable administrative filing requirements, a written award and an accessible record of the proceedings, and judicial review of the award for conformity with external law.

Does the FAA matter? A literal reading of the Section 1 exclusion would certainly be a defensible outcome. It would, however, require some repudiation of the prior ruling in *Perry v. Thomas* ³ as well as an interpretation divorced from the animating concern of the 1925 Congress to exempt collective bargaining agreements. More importantly, such an outcome would not resolve the underlying issue—whether, as a presumptive matter, the parties to an employment relationship can agree to arbitrate *all* claims arising out of that relationship, whether governed by state or federal law. Professor Finkin assures us that this issue can still be addressed by state courts in those jurisdictions that follow that Uniform Arbitration Act. There are a number of problems with the suggestion, not the least of which are the supremacy clause difficulties in having some state courts decide whether their arbitration acts embrace claims

2. *Id.* at 808.

3. 482 U.S. 483 (1987).

arising under federal laws. Certainly, state courts would find it exceedingly difficult to implement the accommodation approach outlined in my article. They are most likely to take the path of least resistance and preclude arbitration of federal-law claims. This resolution may please Professor Finkin, but it will be purchased at the cost of discouraging arbitration agreements.

II.

Professor Finkin offers an extended essay on the status of unilateral contracts in an effort to persuade the reader that a meaningful line cannot be drawn between unilateral employer policies and bilateral employment agreements. My purpose in drawing the distinction was not to suggest that arbitration clauses in unilateral policies are unenforceable against employers while such policies are in effect. Rather, my argument was that such policies are enforceable on grounds other than traditional principles of contract law, and hence should not be read as "agreement[s] in writing" within the meaning of the FAA and cognate state laws. Courts that have enforced such unilateral employer policies have done so in the absence of bargained-for consideration or employee reliance or even awareness of the terms of such policies, and in the face of explicit reservation of the power of unilateral modification or revocation. The implications of my position are that arbitration clauses in such policies should be confined to claims arising under those policies. Moreover, employers have a certain latitude in these unilateral promulgations to specify the procedure to be followed in the resolution of claims governed by the policy.

Professor Finkin's purpose here is largely rhetorical. He is not seriously advocating the view that even in the case of sophisticated employees arbitration clauses in such unilateral promulgations could extend to claims that have their source in some independent agreement or provision of state or federal external law.

A fully satisfactory theory for explaining the so-called "handbook exception" to the employment-at-will doctrine has yet to be developed. What is clear is that unilateral-contract theory, as conventionally understood, will not do the trick. That is certainly the view of the Supreme Court of Michigan, the jurisdiction that in *Toussaint*⁴ first developed the "handbook exception" to the employment-at-will doctrine. As that court recently explained, in responding to a certified question from the

4. See *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980).

Sixth Circuit in *Bankey v. Storer Broadcasting Co.*,⁵ a unilateral-contract theory is inconsistent with the initial recognition of a contractual obligation that arises “without mutual assent” and is subject to revocation without such assent: “Under circumstances where ‘contractual rights’ have arisen *outside the operation of normal contract principles*, the application of strict rules of contractual modification may not be appropriate.”⁶ According to the Michigan high court, the employer is bound by its unilateral policies because it derives a benefit from seeking “to promote an environment conducive to collective productivity”; it is not an obligation derived from “the traditional contract-forming mechanisms of mutual assent or individual detrimental reliance”⁷ Hence, even without expressly reserving the power of unilateral revocation, when “the employer changes its discharge-for-cause policy to one of employment-at-will, the employer’s benefit is correspondingly extinguished, as is the rationale for the court’s enforcement of the discharge-for-cause policy.”⁸

I believe that an analogy to administrative estoppel best explains this line of cases. Perhaps there is better theory “out there.” Despite Professor Finkin’s valiant effort, what cannot be disputed is that the employer’s obligation falls “outside the operation of normal contract principles.”

Professor Finkin further suggests that the unilateral promulgation by the employer of a for-cause limitation on discharge necessarily requires a *de novo* adjudication in the civil courts, with appropriate deference given to an internal-dispute resolution mechanism that terminates before a “truly neutral external adjudicator.”⁹ No authority is offered in support of this proposition. There is a vast gulf between this conclusion and the illusory-promise scrutiny with which Professor Finkin begins the discussion. This is, moreover, paternalism without purpose. In a context where courts recognize an implied power in the employer unilaterally to modify or even revoke the for-cause limitation, judicial adoption of Professor Finkin’s suggestion would fairly swiftly result in widespread revocation. Again, who gains by insisting on such an either-or choice?

III.

In my section on the “Company Union Objection,” I suggested that

5. 432 Mich. 438, 443 N.W.2d 112 (1989).

6. *Id.* at 447-48, 443 N.W.2d at 116 (emphasis supplied). Professor Finkin authorizes me to note that he believes that the *Bankey* decision represents a judicial “failure of nerve.”

7. *Id.* at 454, 443 N.W.2d at 119.

8. *Id.*

9. Finkin, *supra* note 1, at 811.

nothing in our federal labor laws bars employers from using employees as members of an internal adjudicative body or from giving employees the choice of either representing themselves or taking advantage of an employee-advocate, whether chosen from the employee's ranks or management. While conceding that the former might be permissible, Professor Finkin maintains that the use of employee-advocates runs afoul of the prohibition of employer-dominated or -assisted "labor organizations" in section 8(a)(2) of the National Labor Relations Act. Unfortunately, Professor Finkin offers no authority directly on point in support of his fairly aggressive formulation of the "institutional autonomy" interpretation of section 8(a)(2). The dearth of authority is telling in view of the rather widespread use of employee-counselors in many of the nonunion systems referenced in footnotes 5 through 7 of my article. The fragments of legislative history marshalled by Professor Finkin simply have been taken out of context to suggest that the use of employee-advocates, standing alone, violates the section 8(a)(2) prohibition. One such instance is quoted in full in the margin to indicate that what the labor movement was objecting to was a "form of collective bargaining" without unions.¹⁰

10. Concerning the Chrysler Corporation plan referenced in footnote 66 of Professor Finkin's commentary, *supra* note 1, William Green, president of the American Federation of Labor, testified:

The route outlined for the adjustment of any matter which in the opinion of any employee of the company requires adjustment is:

- (1) To the foreman in charge of the work;
- (2) To the employee representative of his voting district who takes it up again with the foreman;
- (3) To the management's special representative who will help the employee representative and the foreman prepare a joint statement to be taken up with—
- (4) The foreman's superior officers;
- (5) To the joint council who may call the employee before it to give information regarding the matter under consideration and may go in a body with the management's special representative to any part of the plant to make an investigation "after making arrangements for so doing with the management's special representative." After complete investigation and full discussion, the joint council votes. The employees['] representatives and the management's representatives have equal voting power and a two-thirds vote is necessary to reach a decision. If a decision is not reached by the joint council at the second meeting following the meeting at which the case was first brought up, the matter goes—
- (6) To the president of the company, who may confer with the joint council or any committee or any group of employee representatives. Within 10 days he must propose a settlement or refer the matter to—
- (7) Arbitration; this consists of an employee representative selected by the employee members of the joint council, the president himself, and an impartial and disinterested arbitrator selected by these two. If the president and the employees' representative cannot agree upon an arbitrator, each selects one. If these two arbitrators agree, their decision is final. If they do not agree within 20 days, they select and call in a third arbitrator, and a decision of a majority of these three shall be binding in the matter.

It has been estimated by an officer of the compliance division of the W.R.A. that this procedure would occupy at least 100 days after the employee originally presented a matter for adjustment. Note, too, that at every stage of the procedure representatives of manage-

IV.

I end on a point of mood. For a variety of reasons, the labor movement is in decline in this country. Some of the causes of decline are correctable by legislation; some derive from structural changes in the workforce and the implications of a system of decentralized, competitive labor relations. Whatever one's views on that larger question, however, I would urge that the proper legal treatment of arbitration of individual employment disputes should be considered on its own terms.

ment are present, exercising that subtle control over decisions which is inherent in the power to pay and the power to discharge.

SENATOR DAVIS: From hearing the statements that you are making, Mr. Green, I take it for granted that you are opposing that form of collective bargaining?

MR. GREEN: Senator, I could be arrested for what I think about it and for what I would like to say about it.

1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 125-26 (Commemorative ed. 1985).