Federal Court Appoints a Traditional Labor and Pension Arbitrator, Rather Than a Former Federal Judge, to Resolve $205 Million Withdrawal Liability Dispute

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Under ERISA, withdrawal liability disputes are subject to mandatory arbitration. The parties are tasked with mutually selecting the arbitrator, but if they reach an impasse in the selection process, a federal district court will choose the arbitrator. Actions for appointment of an arbitrator are rare because the parties usually come to an agreement. In *General Electric Co. v. Boilermaker-Blacksmith National Pension Trust*, No. 2:19-cv-2780, 2020 WL 2113209 (D. Kan. May 4, 2020) ("GE"), however, the court provided a noteworthy analysis regarding this important issue.

The underlying dispute in *GE* involved two partial withdrawal liability claims worth over $200 million. Although the individuals who arbitrate such withdrawal liability disputes often have specialized knowledge of federal labor and pension law, GE pushed for the case to be arbitrated by one of three former federal judges who only possessed a general understanding of withdrawal liability. Despite their lack of specialized knowledge, GE argued that no one was more qualified than a former federal judge to arbitrate the parties' case because it involved the interpretation of a single statutory provision known as the building and construction industry exemption. The court, however, found that "[t]he parties' interests would be better served by having an individual with experience in withdrawal liability arbitrate the case."

The court noted that, contrary to GE's assertion that the case turned on a single issue of statutory interpretation, GE's demand for arbitration showed that the case actually involved at least three other withdrawal liability issues besides the building and construction industry exemption and that the case involved several factual disputes too. While the court acknowledged that the former federal judges that GE proposed were capable of learning the statutory scheme, the court concluded that "the time it will take them to do so will increase the overall cost to the parties and lengthen the time required for resolution." Overall, the court found that having preexisting expertise of withdrawal liability was important because it would enable the arbitrator to "assess non-recurring, fact-specific issues not only efficiently but realistically."

The court also rejected GE's argument that a former federal judge will always treat parties more fairly than a traditional withdrawal liability arbitrator. GE claimed that traditional withdrawal liability arbitrators are inherently biased towards pension funds, given that pension funds are involved in withdrawal liability arbitrations regularly, whereas most employers withdraw from a pension fund only once. GE reasoned that "an arbitrator wanting to build his or her customer base thus has a subconscious incentive to rule in favor of the pension fund." According to the court, however, GE's assertions of bias were "pure speculation."

GE offered "no authority or facts in support of this argument," and, moreover, the argument "ignore[d] the fact that … withdrawal liability arbitrators with significant experience," including ones proposed by the Fund, "have ruled against such pension funds in the past." On the other hand, the court was "slightly concerned" with the impartiality of GE's proposed former federal judges. During the parties' negotiations regarding the selection of an arbitrator, GE engaged in *ex parte* communications with all of its proposed arbitrators without notifying the Fund or obtaining the Fund's consent to do so. In contrast to GE's speculative assertions of bias, the court found that GE's *ex parte* communications with its proposed arbitrators "would cast a cloud of unfairness over the arbitration of the case" if it were to appoint one of them.

In sum, the lessons from the *GE* case are as follows:

- Courts prefer that withdrawal liability arbitrations be resolved by individuals with relevant expertise in the field, regardless of whether the individuals are former federal judges;
- Courts are not persuaded by a party's speculative assertions of bias; and
- Engaging in *ex parte* communications with a potential arbitrator during the arbitrator selection process may disqualify that individual from being selected.

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