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Arbitration Nation: While Arbitration Grows, Judicial Review of Arbitral Awards May Be Shrinking

*Sands v. Menard, Inc.*¹

I. INTRODUCTION

In recent years, arbitration has been embraced with almost “religious fervor” by federal courts, particularly the U.S. Supreme Court.² Whether this support is due to confidence in the arbitration model or a desire to reduce the federal docket, it is undeniable that arbitration has become a favored tool, especially in the employment law context.³ In order to serve the main purposes of arbitration and provide a “quick, efficient, and final means of resolving disputes,” judicial review of arbitration, in both state and federal courts, remains quite limited.⁴ Even mistakes of fact or law are generally not subject to re-examination.⁵

In *Sands v. Menard, Inc.*, the Court of Appeals of Wisconsin upheld an arbitration award reinstating a discharged attorney to her position as in-house counsel.⁶ On appeal, the court refused to vacate the reinstatement order, notwithstanding the fact that reinstatement was not requested or desired by either party, the effect of reinstatement was likely to violate the ethical rules that bind attorneys, and other remedies were available to compensate the aggrieved party.⁷

This note explores the limited but important role that judicial review plays, and will continue to play, in arbitration and how this role affected the outcome of *Sands v. Menard*.

II. FACTS AND HOLDING

In *Sands v. Menard, Inc.*, Dawn Sands (Sands) was terminated from her position as vice president and executive general counsel for Menard, Inc. (Menard) following a dispute regarding her compensation.⁸ Sands believed Menard was paying her less than similarly situated male employees, thus engaging in gender-based pay discrimination.⁹ Pursuant to a binding arbitration clause in the em-

1. 767 N.W.2d 332 (Wis. Ct. App. 2009).

2. Alfred G. Feliu, *Contracts of Employment: The Scope of the FAA's Exclusion*, in HANDBOOK ON EMPLOYMENT ARBITRATION & ADR 233, 233 (Thomas E. Carbonneau & Philip J. McConaughay eds., 2007).

3. *Id.*

4. Charles H. Smith, *The Public Policy Exception to the General Rule of Limited Judicial Review of an Arbitration Award*, 19 MIDWEST L. REV. 177, 177 (2004) (quoting *Porter v. Golden Eagle Ins. Co.*, 51 Cal. Rptr. 2d 338, 341 (Cal. Ct. App. 1996)).

5. *Id.*

6. *Sands*, 767 N.W.2d at 334-36.

7. *Id.* at 333, 336.

8. *Id.* at 333.

9. *Id.*

ployment contract, the dispute was submitted to a three-person arbitration panel.¹⁰ The panel determined that in paying Sands less than male co-workers in similar positions, Menard violated the Equal Pay Act (EPA).¹¹ In addition, Menard retaliated against Sands for asserting her rights, violating the EPA,¹² Title VII of the Civil Rights Act of 1964,¹³ and the Wisconsin Fair Employment Act,¹⁴ so the panel found.¹⁵

Following these determinations, the panel awarded Sands compensatory and punitive damages.¹⁶ Despite the fact that neither party requested it, the panel also ordered Menard to reinstate Sands to her position as vice president and general counsel of Menard, with a specified salary and bonus.¹⁷ The arbitrators reasoned that not to reinstate Sands would in some ways “reward the company for its mistreatment of her.”¹⁸ The panel also noted that both the EPA¹⁹ and Title VII²⁰ specifically provide for reinstatement as an available remedy for violation of those acts.²¹ The panel stated that deciding whether to award reinstatement was difficult.²² It recognized that hostility existed between the parties and that, due to the company’s conduct toward her, Sands felt reinstatement was an inappropriate remedy.²³ However, citing *Hybert v. Hearst*,²⁴ a case involving a violation of the Age Discrimination in Employment Act (ADEA), the panel concluded that reinstatement, as the favored remedy under the law, was appropriate.²⁵

Menard refused to comply with the arbitration panel’s decision and moved to vacate the reinstatement order in the circuit court.²⁶ Menard argued that the arbitration panel manifestly disregarded the law by awarding reinstatement in lieu of front pay.²⁷ Applying the deferential standard customarily employed for review of

10. *Id.*

11. *Id.*; 29 U.S.C. § 206(d)(1) (2006) (“No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work . . .”).

12. 29 U.S.C. § 215(a)(3) (2006) (It shall be unlawful for any person “to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.”).

13. 42 U.S.C. § 2000e-3(a) (2006) (“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . .”).

14. WIS. STAT. ANN. § 111.36(1)(d)(2) (West current through 2009) (It is unlawful for any employer to “discharge or otherwise discriminate against any person because he or she has opposed any discriminatory practices . . .”).

15. *Sands*, 767 N.W.2d at 333.

16. *Id.*

17. *Id.* at 333-34.

18. *Id.* at 334.

19. 29 U.S.C. § 216(b) (2006).

20. 42 U.S.C. § 2000e-5(g)(1) (2006).

21. *Sands*, 767 N.W.2d at 333.

22. *Id.* at 334.

23. *Id.* at 333-34.

24. 900 F.2d 1050, 1055 (7th Cir. 1990).

25. *Sands*, 767 N.W.2d at 334.

26. *Id.*

27. *Id.*

arbitration awards,²⁸ the circuit court refused to vacate the reinstatement order and concluded that any error would only be error of fact or law, neither of which is sufficient to vacate an arbitration award.²⁹

In the instant case, the Court of Appeals of Wisconsin affirmed the lower court's decision, following precedent and the general practice of giving deference to arbitration awards.³⁰ The court of appeals determined that its role was "supervisory in nature" and stated, as the circuit court had, that courts do not overturn an arbitrator's decision for mere errors of fact or law.³¹ The court then laid out the circumstances under which a Wisconsin court may overturn an arbitration award and ultimately held that the arbitrators had not manifestly disregarded the law and that there existed no basis for vacating the arbitration award.³²

III. LEGAL BACKGROUND

A. Arbitration Generally—Broad Discretion and Limited Judicial Review

The Federal Arbitration Act (FAA),³³ enacted in 1925, was enacted to combat the then-existing judicial hostility towards compelling arbitration, even when a contract between parties called for it. Quite ironically, considering courts' historical reluctance to compel arbitration, once arbitration has produced a decision, courts have given extreme deference to those decisions and generally conduct modest, sometimes perfunctory review of arbitral awards.³⁴ As a result, a nearly irrebuttable presumption exists that arbitral awards, once rendered, are legally enforceable.³⁵ One of the purposes of the limitation on review is that arbitration is meant to offer "a quick, efficient, and final means of resolving disputes."³⁶ As a result, arbitration is seen as a good alternative to an already crowded court system. Thomas Carbonneau, a noted scholar on arbitration, contends, "[T]he [Supreme] Court has made arbitration agreements nothing less than the means for remedying a dysfunctionality of judicial adjudication in American society."³⁷

Even before the enactment of the Federal Arbitration Act (FAA) in 1925, courts were open to enforcing arbitration awards.³⁸ As early as 1854, the Supreme Court determined that the grounds for challenging an arbitration award should be

28. H. David Kelley, Jr., *Practical Concerns Affecting the Arbitration of Statutory Claims*, in HANDBOOK ON EMPLOYMENT ARBITRATION & ADR, *supra* note 2, at 341, 350-51 (noting that judicial review of arbitration awards is very limited, and that generally, awards are not overturned for errors of law or fact but only when there is "manifest disregard of the law" or a statutory basis for vacatur).

29. *Sands*, 767 N.W.2d at 334.

30. *Id.* at 334-36.

31. *Id.* at 334.

32. *Id.* at 335.

33. 9 U.S.C §§ 1-16 (2006).

34. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 125 (World Arbitration and Mediation Review ed., 2d ed. 2007) (2004).

35. *Id.*

36. Smith, *supra*, note 4, at 177 (citing *Porter v. Golden Eagle Ins. Co.*, 51 Cal. Rptr. 2d 338, 341 (Cal Ct. App. 1996)).

37. CARBONNEAU, *supra* note 34, at xvi.

38. Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 516 (2009).

severely limited.³⁹ One legal source contends, “A review of the case law . . . reveals that whatever the ground or excuse offered for avoiding an arbitration award, the results are usually the same—the award stands as originally issued.”⁴⁰ This is generally true of arbitration awards today.

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,⁴¹ the Supreme Court was asked to determine “whether statutory grounds for prompt vacatur and modification of arbitration awards could be supplemented by contract.”⁴² The dispute in *Hall Street* occurred following a disagreement between a lessor and lessee of commercial real estate.⁴³ The matter between the parties concerned indemnification for the clean-up of leased property and the lessee’s ability to vacate the property.⁴⁴ The parties ultimately decided to arbitrate the indemnity portion of their claim.⁴⁵ In the resulting arbitration agreement, the parties included a provision expanding the scope of judicial review for errors of law made by the arbitrator.⁴⁶ The Supreme Court, deciding the case under the FAA, held this expansion invalid.⁴⁷ The Court stated that statutory grounds provided by the FAA were exclusive and could not be expanded by contract.⁴⁸ The Court noted that Congress “enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it].’”⁴⁹ In addition, the FAA was to place arbitration agreements on equal footing with all other contracts.⁵⁰ Citing section 9 of the FAA,⁵¹ the Court noted that “a court ‘must’ confirm an arbitration award ‘unless’ it is vacated, modified, or corrected ‘as prescribed’ in sections 10 and 11.”⁵² The Court went on to hold that sections 10 and 11 provided the *exclusive* grounds for expedited judicial vacatur and modification of arbitration decisions.⁵³

Hall Street effectively narrowed the number of situations in which an arbitrator’s decision may be overturned or modified and precluded parties from contracting for expanded judicial review. Although the Court limited its holding to cases brought under the FAA, its decision indicates movement in the law toward contracting judicial review of arbitration awards. This change is likely to affect the

39. *Id.*; Burchell v. Marsh, 58 U.S. 344, 349 (1854) (“If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.”).

40. PHILIP L. BRUNER & PATRICK J. O’CONNOR, JR., BRUNER & O’CONNOR ON CONSTRUCTION LAW § 20:118 (2010).

41. 552 U.S. 576 (2008).

42. *Id.* at 578.

43. *Id.* at 579.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 584.

48. *Id.* at 585-86.

49. *Id.* at 581 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 500 U.S. 440, 443 (2006)).

50. *Id.*

51. See 9 U.S.C. §§ 9, 10, 11 (2006). Section 10(a)(4) provides:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . .

. . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(4).

52. *Hall Street*, 552 U.S. at 587.

53. *Id.* at 584.

entire judicial landscape, both federal and state. Federal arbitration law influences all arbitration law and the Supreme Court seems to have used the FAA to elaborate a larger judicial doctrine on arbitration.⁵⁴ To illustrate just how influential the FAA is, consider that the FAA is binding in diversity cases in which state law applies and upon state courts in state law cases that may be linked in some way to interstate commerce.⁵⁵ In addition, the FAA preempts state laws that contradict its content. In reality, the FAA is the national law of arbitration.⁵⁶

B. Wisconsin Law

In *Madison Teacher's Inc. v. Madison Metropolitan School District*,⁵⁷ Madison Teachers, Inc. (MTI) filed a grievance on behalf of three teachers regarding a problem with "overload and planning time."⁵⁸ Discussions between MTI and the Madison Metropolitan School District (District) produced an agreement to establish a joint committee to tackle the problem.⁵⁹ Additionally, a memorandum embodying the agreement was created.⁶⁰ The District regarded the above decisions as a resolution of MTI's grievance.⁶¹ However, MTI did not consider the initial grievances resolved.⁶² Pursuant to a binding agreement, the issue of whether the dispute had been resolved was submitted for arbitration.⁶³ Agreeing with the District, the arbitrator determined that the creation of the committee and the written memorandum served as a settlement between the parties and that the arbitrator was without jurisdiction to address the issue further.⁶⁴ MTI appealed in the circuit court and the court ordered vacatur of the arbitration order.⁶⁵ The District then appealed the vacatur to the Court of Appeals of Wisconsin.

The Court of Appeals of Wisconsin made clear the scope of review of an arbitrator's decision.⁶⁶ The court stated, "We presume the arbitrator's decision is valid, and we disturb it only where invalidity is shown by clear and convincing evidence."⁶⁷ The court went on to explain that "[c]ourts may not overturn an arbitrator's decision for mere errors of fact or law."⁶⁸ The court stated that courts may overturn an arbitrator's decision only when there is "perverse misconstruction," "positive misconduct, . . . manifest disregard of the law, or if the award itself is illegal or violates strong public policy."⁶⁹ The court rationalized that, in agreeing

54. CARBONNEAU, *supra* note 34, at xv, 80.

55. *Id.* at 80.

56. *Id.*

57. 678 N.W.2d 311 (Wis. Ct. App. 2004).

58. *Id.* at 313.

59. *Id.* at 314.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 314-15.

64. *Id.* at 315.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (internal quotation omitted).

69. *Id.*; see also *Baldwin-Woodville Area Sch. Dist. v. W. Cent. Educ. Ass'n-Baldwin Woodville Unit*, 766 N.W.2d 591, 596 (Wis. 2009) (Noting that courts are to vacate an arbitration award where "arbitrators exceeded their powers [by] 'perverse misconstruction,' positive misconduct, a manifest

to arbitrate, the parties “agreed to be bound by the arbitrator’s judgment, whether correct or incorrect as a matter of fact or law.”⁷⁰ This justified the broad discretion given to arbitrator’s decisions.

According to Wisconsin statutory law, there are some situations where vacatur of an arbitration award *must* be made.⁷¹ The relevant part of the statute states that courts must make an order vacating an arbitration award when “the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.”⁷² This, however, addresses a different situation than the one presented in *Madison*, where the court was not required to vacate the award.

Hybert v. Hearst Corp.,⁷³ is a case that deals with the issue of whether to award front pay in lieu of reinstatement.⁷⁴ In *Hybert*, the plaintiff brought an action against his former employer, Hearst Corporation, for wrongful discharge in violation of the Age Discrimination in Employment Act.⁷⁵ The plaintiff was awarded front pay but appealed the amount of the award.⁷⁶ In its discussion, the Court of Appeals for the Seventh Circuit in *Hybert*, citing *McNeil v. Economic Laboratory, Inc.*,⁷⁷ stated that reinstatement is usually the preferred remedy in such a situation.⁷⁸ In addition, the court, quoting *McNeil*, stated, “In determining whether to award front pay, the court should consider all of the circumstances of the case. . . . [A] plaintiff need not request reinstatement as a prerequisite to recovering front pay when reinstatement would be inappropriate.”⁷⁹ In addition, the court in *Hybert* quoted the following from *McNeil*: “reinstatement is not always appropriate. For example, . . . the employer-employee relationship may be pervaded by hostility. When reinstatement is infeasible or inappropriate, front pay may be appropriate to make the plaintiff whole.”⁸⁰ This statement suggests that there are some situations where reinstatement is not the preferred remedy and is in fact wholly inappropriate.

C. Ethical Considerations: Non-attorney Employees v. In-house Attorney Employees

An understanding of the differing roles of in-house attorney-employees and non-attorney employees is necessary to appreciate the implications of the *Sands* decision. This illumination can be found by exploring the Rules of Professional Conduct that bind attorneys, in conjunction with a line of cases dealing with

disregard of the law, or when the award is illegal or in violation of strong public policy”); *Racine County v. Int’l Ass’n of Mach. & Aerospace Workers* (Wis. 2008).

70. *Madison Teachers, Inc.*, 678 N.W.2d at 315.

71. WIS. STAT. ANN. § 788.10(1)(a)-(d) (West, current through 2009).

72. WIS. STAT. ANN. § 788.10(1)(d).

73. 900 F.2d 1050 (7th Cir. 1990). This case was also cited by the arbitration panel. *Sands v. Me-nard, Inc.*, 767 N.W.2d 332, 334 (2009).

74. *Hybert*, 900 F.2d at 1051.

75. *Id.*

76. *Id.* at 1054-55.

77. 800 F.2d 111, 118 (7th Cir. 1986).

78. *Hybert*, 900 F.2d at 1055.

79. *Id.*

80. *Id.*

“whistle-blowing” attorneys and the public policy concerns regarding any wrongful termination cases they may bring.

Attorneys are bound by the Rules of Professional Conduct⁸¹ and, thus, are constrained in ways that other employees are not. The Wisconsin Rules of Professional Conduct state that an attorney is not to represent a client if the representation would result in a violation of any of the Rules or if the lawyer has been discharged.⁸² The rules state that an attorney is not to represent a client if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer.⁸³ In addition, the Wisconsin Constitution states that clients are free to choose their own attorneys.⁸⁴ These additional limitations, imposed only on attorneys, can complicate issues of reinstatement and employment law issues generally.

In *Balla v. Gambro, Inc.*,⁸⁵ Roger Balla, former in-house counsel for Gambro, Inc., brought a retaliatory discharge action against the company.⁸⁶ Balla, who also acted as manager of regulatory affairs for Gambro, learned that a shipment of kidney dialysis machines did not fit FDA requirements and told the president of Gambro to reject the shipment.⁸⁷ When he did not, Balla told the president that he would do “whatever [was] necessary to stop the sale of the dialyzers.”⁸⁸ Balla was discharged from his position shortly thereafter and brought a retaliatory discharge suit.⁸⁹

The circuit court entered summary judgment in favor of Gambro, and Balla appealed.⁹⁰ The appeals court reversed the summary judgment and remanded the

81. Each state has its own set of rules, but most are based on the Model Rules of Professional Conduct and contain rules addressing attorney discharge.

82. WIS. SUP. CT. R. 20:1.16 (West, Westlaw through Feb. 1, 2010) (“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or other law; or . . . (3) the lawyer is discharged.”). In addition, the ABA comment section that coincides with that part of the analogous model rule makes clear the fact that “a client has the right to discharge a lawyer at any time, with or without cause, but subject to payment for the lawyer’s services.” MODEL RULES OF PROF’L CONDUCT R. 1.16 cmt. 4 (2009).

83. WIS. SUP. CT. R. 20:1.7 (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third party or by a personal interest of the lawyer.”) In addition, the ABA comment section that coincides with the analogous model rule states,

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. . . . The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 8 (2009).

84. WIS. CONST. art. I, § 21, cl. 2. (West, Westlaw through Feb. 1, 2010) (“In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice.”)

85. 584 N.E.2d 104 (Ill. 1991).

86. *Id.* at 105.

87. *Id.* at 106.

88. *Id.*

89. *Id.*

90. *Id.* at 107.

case for further proceedings.⁹¹ On appeal to the Supreme Court of Illinois, the court found that Balla did not have a cause of action against Gambro for retaliatory discharge.⁹² The court observed that the requirements to bring a retaliatory discharge claim were that the “employer discharge[d] the employee in retaliation for the employee’s activities, and that the discharge [was] in contravention of a clearly mandated public policy.”⁹³ The court determined that Balla fulfilled both of these requirements.⁹⁴

However, the court stated, “[I]n this case, appellee was not just an employee of Gambro, but also general counsel for Gambro.”⁹⁵ The court cited *Herbster v. North American Co. for Life & Health Insurance*,⁹⁶ a case that recognized the “unique position attorneys occupy in our society.”⁹⁷ The *Herbster* court listed factors that make the attorney-client relationship special.⁹⁸ The *Balla* court stated, “We agree with the conclusion reached in *Herbster* that, generally, in-house counsel do not have a claim under the tort of retaliatory discharge.”⁹⁹ The court in *Balla* went on to explore the effect on the attorney-client relationship of allowing retaliatory discharge claims for in-house counsel.¹⁰⁰ Again relying on *Herbster*, the court noted that attorneys are in a unique position to receive secrets, disclosures, and information from their clients.¹⁰¹ The court worried that allowing retaliatory discharge claims for in-house attorneys would upset the attorney-client relationship of trust and potentially break down attorney-client communication.¹⁰² Thus, it concluded that retaliatory discharge claims should not be extended to in-house counsel.¹⁰³

The *Balla* court also pointed out that because Balla was discharged by Gambro, his continued representation of Gambro would have resulted in a violation of the Rules of Professional Conduct.¹⁰⁴ The court went on to state, “In this case, appellee, in addition to being an employee at Gambro, is *first and foremost an attorney bound by the Rules of Professional Conduct.*”¹⁰⁵

Not all courts have taken the same approach as the court in *Balla*. This is evidenced by the holding in *General Dynamics Corp. v. Superior Court*.¹⁰⁶ In

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Palmateer v. Int’l Harvester Co.*, 421 N.E.2d 876, 881 (Ill. 1981)).

94. *Id.*

95. *Id.* at 108.

96. 501 N.E.2d 343 (Ill. App. Ct. 1986).

97. *Balla*, 584 N.E.2d at 108 (quoting *Herbster*, 501 N.E.2d at 348).

98. *Herbster*, 501 N.E.2d at 346-48. The court’s list included the attorney-client privilege regarding confidential communications, the fiduciary duty an attorney owes to a client, the right of the client to terminate the relationship with or without cause, and the fact that a client has exclusive control over the subject matter of the litigation and may dismiss or settle a cause of action regardless of the attorney’s advice. *Id.*

99. *Balla*, 584 N.E.2d at 108.

100. *Id.* at 108-09.

101. *Id.*

102. *Id.* at 109-10.

103. *Id.* at 110.

104. *Id.*; see ILL. SUP. CT. R. OF PROF’L CONDUCT 1.16(a)(1) (West, Westlaw through 1/15/2010) (stating an attorney is required to withdraw from representation if continued representation would result in violation of the Rules of Professional Conduct).

105. *Balla*, 584 N.E.2d at 111 (emphasis added).

106. 876 P.2d 487 (Cal. 1994).

General Dynamics, Andrew Rose, in-house counsel for General Dynamics, was terminated from his position.¹⁰⁷ According to Rose, he was discharged because he spearheaded an investigation into employee drug use at one of the company's plants, protested the bugging of the office of the chief of security, and advised General Dynamics that its salary policy may be in violation of the federal Fair Labor Standards Act.¹⁰⁸ Rose alleged that the reasons for his firing were in violation of public policy and brought a wrongful termination suit.¹⁰⁹ General Dynamics filed a general demurrer stating that, because Rose was employed as an in-house attorney, he was subject to discharge at any time, "for any reason or for no reason" at all.¹¹⁰ The trial court overruled the demurrer and the court of appeals denied General Dynamics's petition for a writ of mandate.¹¹¹

Upon appeal, the Supreme Court of California acknowledged a proliferation of in-house attorneys in the last two decades.¹¹² In addition, the court noted that, unlike their law firm counterparts, in-house attorneys' economic fates are tied directly to a single employer.¹¹³ The court stated, "[D]ependence of in-house counsel is indistinguishable from that of other corporate managers or senior executives who also owe their livelihoods . . . to a single organizational employer."¹¹⁴ However, the court noted, unlike other employees, in-house attorneys "labor under unique ethical imperatives that *exceed* those of the corporate executive . . ."¹¹⁵

This being said, the court recognized that the unilateral right of a client to discharge its attorney is a central tenet of the lawyer-client relationship, but it is not unqualified.¹¹⁶ The court pointed out that federal civil rights laws, for example, apply to law firm partnership decisions.¹¹⁷ The court relied on *Golightly-Howell v. Oil Workers*,¹¹⁸ which stated, "[B]ecause Title VII prohibits discrimination based on race or sex, it prohibits such discrimination against one employed as in-house counsel."¹¹⁹ The *General Dynamics* court concluded that, while the right of a client to discharge his attorney at any time is an important value that should usually be upheld, sometimes competing interests will overcome that right.¹²⁰ The court determined that such interests existed in Rose's situation and allowed the wrongful discharge claim.¹²¹ In addition, and especially interesting considering the court's holding in *Sands*, the court determined that a client's power to rid itself of unwanted counsel is not thwarted because "under circumscribed conditions, an in-house attorney may pursue a wrongful discharge claim for damages against his

107. *Id.* at 490.

108. *Id.* at 490-91.

109. *Id.* at 490.

110. *Id.* at 491.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 492 (emphasis in original).

116. *Id.* at 493.

117. *Id.*

118. 806 F. Supp. 921 (D. Colo. 1992).

119. *General Dynamics*, 876 P.2d at 493 (quoting *Golightly-Howell*, 806 F. Supp. at 924).

120. *Id.* at 494.

121. *Id.* at 495.

corporate employer *even though* a judgment ordering his reinstatement is *not* an available remedy.”¹²²

Although the *Balla* and *General Dynamics* courts ultimately came to different conclusions regarding whether an in-house attorney should be allowed to bring a retaliatory discharge claim, both courts acknowledged a difference between in-house attorneys and non-attorneys in the context of retaliatory discharge.

IV. INSTANT DECISION

In *Sands*, the Court of Appeals of Wisconsin refused to vacate the arbitration award ordering reinstatement of plaintiff Dawn Sands to her position as vice president and general counsel for Menard.¹²³ The court, applying the highly deferential standard usually given to arbitration awards, found that the arbitrators had not manifestly disregarded the law, as claimed by Menard.¹²⁴

Menard posited three arguments to support its claim that the arbitrators manifestly disregarded the law.¹²⁵ First, Menard contended that the arbitrators manifestly disregarded Wisconsin law allowing clients to choose their own attorneys.¹²⁶ In addition, Menard claimed that the reinstatement order violated the Rules of Professional Conduct, citing both conflict of interest provisions and provisions that determine when an attorney must decline or withdraw from representation.¹²⁷ Finally, Menard argued that the arbitrators manifestly disregarded the law by not taking into consideration the hostility which existed between the parties.¹²⁸ Before addressing Menard’s claims, the Court of Appeals examined the current state of Wisconsin law regarding vacatur of an arbitration award for manifest disregard of the law.¹²⁹

Prompted by Sands’ claim that manifest disregard of the law was no longer a basis for vacating an arbitration award, the court examined the state of Wisconsin law regarding “manifest disregard of the law.”¹³⁰ The court of appeals expressly stated that the recent Supreme Court decision in *Hall Street Associates, LLC. v. Mattel, Inc.*, which limited judicial review under the FAA to the statutory grounds listed in the statute,¹³¹ was not controlling.¹³² The court of appeals noted that the Court in *Hall Street* limited its holding and was speaking “only to the scope of the expeditious judicial review under [the FAA].”¹³³ Further, the appeals court recognized that the *Hall Street* decision indicated that the FAA was not the only way into court for parties seeking review of arbitration awards and that state statutory

122. *Id.* at 495 (emphasis in original).

123. *Sands v. Menard, Inc.*, 767 N.W.2d 332, 333 (Wis. Ct. App. 2009).

124. *Id.* at 335.

125. *Id.* at 334-35.

126. *Id.* at 334.

127. *Id.* at 335.

128. *Id.*

129. *Id.*

130. *Id.*

131. 552 U.S. 576, 583 (2008).

132. *Sands*, 767 N.W.2d at 335 (“We are satisfied that manifest disregard of the law remains a basis for vacating arbitration awards in Wisconsin.”).

133. *Id.*

law or common law may offer judicial review of a different scope.¹³⁴ Thus, the court of appeals concluded that manifest disregard of the law was still a basis for vacating arbitration awards under Wisconsin law.¹³⁵

Having determined that manifest disregard of the law was still a possible basis for vacating an arbitration award in Wisconsin, the court moved on to Menard's claim.¹³⁶ The court concluded that Menard had not demonstrated that the arbitrators manifestly disregarded the law.¹³⁷ The court noted that it was undisputed that reinstatement is a remedy under the EPA and Title VII and that neither provides an exception for in-house attorneys.¹³⁸ In addition, the court pointed out that Menard had no governing case law to support its contention that reinstatement was not available as a remedy for in-house attorneys who were wrongfully terminated under either the EPA or Title VII.¹³⁹ The court concluded that both acts provided "substantial authority" for the arbitrators' award.¹⁴⁰

The court indicated that it was unwilling to create new law stating that reinstatement was not a remedy for in-house attorneys wrongly discharged under the EPA or Title VII "when the employer contest[ed] reinstatement or when the attorney *might* be violating the rules of professional conduct."¹⁴¹ Additionally, the court noted that it could not conclude that the arbitrators had manifestly disregarded law that did not exist at the time the award was determined.¹⁴²

The court also stated that Menard failed to show reason why Wisconsin law or the Rules of Professional Conduct should trump federal law that provides remedies for wrongfully terminated employees.¹⁴³ In addition, the court pointed out that rules of professional conduct apply to attorneys, not to employers of attorneys.¹⁴⁴ It stated, "[W]hile the rules may limit the utility of a reinstatement award for an attorney who may have to decline or withdraw from representation, they do not prohibit an employer from reinstating an attorney."¹⁴⁵

The court of appeals then pointed out that whether to award front pay or reinstatement is a discretionary matter to be left up to the arbitrators.¹⁴⁶ According to the court, Menard's argument boiled down to an assertion that the arbitrators "erroneously exercised their discretion" in failing to consider that Menard may not want to reinstate Sands, that Sands may be violating the Rules of Professional Conduct, and that the arbitrators failed to give adequate weight to the hostility between the parties.¹⁴⁷ The court stated that erroneous exercise of discretion

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (emphasis added).

142. *Id.* at 335-36.

143. *Id.* at 336.

144. *Id.* at 336 n.4.

145. *Id.*

146. *Id.* at 336.

147. *Id.*

was not a ground for review.¹⁴⁸ In addition, the court pointed out that it was clear from the arbitrators' reasoning they considered the hostility between the parties.¹⁴⁹

Lastly, the court addressed Menard's claim that failing to *consider* the law can amount to manifest disregard of the law.¹⁵⁰ The court stated that, while not considering the law may constitute manifest disregard of the law in some cases,¹⁵¹ for purposes of a discretionary determination, failing to consider the law is not a manifest disregard of the law.¹⁵² The court concluded that the arbitrators had not manifestly disregarded the law and that adequate authority supported awarding reinstatement.¹⁵³ The court affirmed the award reinstating Sands to her position as in-house counsel.¹⁵⁴

V. COMMENT

In *Sands v. Menard*,¹⁵⁵ the Court of Appeals of Wisconsin failed to address a number of important issues and, as a result, upheld a clearly impractical arbitration award. First, in deferring to the arbitration panel's decision, the court endorsed an entirely unworkable award. Secondly, the court failed to recognize or consider persuasive authority suggesting that reinstatement is never an accepted remedy for wrongfully terminated in-house attorneys. The decision in *McNeil v. General Dynamics, Inc. v. Superior Court*¹⁵⁶ advocated for the conclusion that in-house attorneys, due to the special role they occupy, should be precluded from reinstatement in wrongful or retaliatory discharge suits.¹⁵⁷ Lastly, the court failed to adequately address Menard's contention that the Rules of Professional Conduct and Wisconsin law allowing clients to choose their own attorneys precluded the reinstatement award. The court failed to analyze the practical effect and implications of treating Sands, an in-house attorney, the same as a non-attorney for purposes of reinstatement. As a result of these oversights, the court upheld an award that was practically unworkable and altogether unfair to both parties.

As will be stated in further detail below, it is crucial that courts have the means to vacate arbitral awards that are clearly erroneous. Parties should not give up their right to a workable award simply because the arbitrators misunderstood the law. Not only is it vital that courts have the authority to overturn awards that they believe are at odds with the law, but it is also necessary that courts use the authority they have. A national policy of restricting judicial review may lead courts to mechanically affirm awards when they would otherwise engage in a more careful analysis. This "rubber stamping" erodes public confidence in the judiciary and negates the fundamental role that courts play in interpreting and clarifying the law.

148. *Id.*

149. *Id.* at 336 n.5.

150. *Id.* at 336.

151. *See, e.g., Racine County v. Int'l Assoc. of Machinists*, 751 N.W.2d 312 (Wis. 2008).

152. *Sands*, 767 N.W.2d at 336.

153. *Id.* at 335.

154. *Id.* at 336.

155. 767 N.W.2d 332 (Wis. Ct. App. 2009).

156. 876 P.2d 487 (Cal. 1994).

157. *Id.* at 494-95.

A. Discretionary Limitations

It is widely understood that arbitration awards are subject to only narrow judicial review and that great deference is paid an arbitrator's decision.¹⁵⁸ There are a number of reasons for this. Arbitration is meant to provide parties with a quick and efficient means of resolving disputes and benefits parties in that it is generally faster and less expensive than litigation.¹⁵⁹ If arbitration awards were subject to broad judicial review, the benefit to the parties would effectively be vitiated in many situations.¹⁶⁰

In addition, by subjecting arbitral decisions to only limited judicial review, the caseload for both state and federal courts is lightened.¹⁶¹ A court seeking to decrease the number of cases on its docket can do so by reducing the situations in which review and vacatur of arbitration awards is allowed. If the impetus behind federal courts' support of arbitration is to lighten the federal docket, as has been suggested,¹⁶² it is easy to see why the Supreme Court, as in *Hall Street*, narrowed rather than expanded judicial review of arbitration awards, and it is likely that state courts will follow suit.

Although retaining the benefits offered to parties through arbitration is paramount to assuring that arbitration continues as a viable alternative dispute resolution tool, it is also important that courts have the power to vacate clearly unworkable awards. If parties cannot be assured that clearly unreasonable awards will be reviewable, arbitration may lose its appeal. It is arguable that *expanding*, rather than narrowing the scope of judicial review of arbitration awards, is the direction courts should be moving in. Stephen K. Huber, a noted scholar in the field of arbitration, states:

In view of the dramatically expanded role of arbitration in the American legal system during the last quarter century, and the numerous concerns about these developments, expanding state court review of arbitration awards offers a promising route for those who believe that arbitration needs to be checked—both in the sense of limiting arbitration and in quality control of arbitral awards.¹⁶³

Huber suggests that state law standards will be increasingly important in the reformation of arbitration practice and that states possess the power to adopt standards for review of arbitration awards that are significantly different from federal standards.¹⁶⁴ He says, "Perhaps, America should move toward a more thorough and thoughtful review of arbitration awards . . ." ¹⁶⁵

158. Smith, *supra* note 4, at 177 (2004).

159. *Id.*

160. Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 740 (2007).

161. Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 4.

162. See Feliu, *supra* note 2, at 233.

163. Huber, *supra* note 38, at 512-13.

164. *Id.* at 512.

165. *Id.* at 520.

Following *Hall Street*, state courts are coming to different conclusions as to whether parties may contract for expanded judicial review.¹⁶⁶ In addition, dicta in *Hall Street*¹⁶⁷ has led courts to question the viability of common law bases for vacating arbitration awards, such as “manifest disregard of the law.”¹⁶⁸ Manifest disregard has, in some form or another, been widely adopted by both federal and state courts and has been considered an important means for vacating arbitration awards that are “egregiously wrong.”¹⁶⁹ Policing arbitration decisions that are at odds with what a court would likely find is an accepted function for courts reviewing arbitral awards and trial court decisions.¹⁷⁰ If the *Hall Street* decision ultimately leads state courts to discard common law grounds for vacatur and, as federal courts have, refuse to uphold clauses expanding judicial review of arbitration awards, the supervisory function courts serve may be seriously compromised.

In addition to having authority to vacate flawed arbitral awards, it is crucial that courts *use* this authority when faced with an award that should not stand. Although the court in *Sands* ultimately determined that common law grounds such as “manifest disregard of the law” and “violation of strong public policy” were still valid options for vacating an arbitration award in Wisconsin, the court did not effectively employ them.¹⁷¹ Refusing to vacate the award for manifest disregard of the law, the court essentially determined that it was without authority to upset the arbitration award.¹⁷²

However, the court also stated that failing to consider the law could constitute manifest disregard of the law.¹⁷³ It is arguable that the arbitration panel’s decision *was* in manifest disregard of the law. The issue of reinstatement in *Sands* was unique and somewhat nuanced due to the fact that *Sands* was an in-house attorney. The effect that the professional rules have on attorney conduct and the role of in-house attorneys was likely better understood and accounted for by the court of appeals than by the arbitration panel. For this reason, the court could have reasonably concluded that the combination of *Sands*’ role as in-house counsel and the limitations imposed on her by the professional rules of conduct rendered the reinstatement order in manifest disregard of the law.

Furthermore, while *Menard* did not offer a public policy argument, it would have been no great leap for the court to have determined that reinstating *Sands* violated public policy.¹⁷⁴ The court did not seriously consider the possibility of

166. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J. L. & BUS. 745, 773 (2009).

167. *Hall Street Assocs., L.L.C. v. Mattel*, 552 U.S. 576, 585 (2008) (“[M]anifest disregard’ can be read as merely referring to the § 10 grounds collectively, rather than adding to them.”).

168. Huber, *supra* note 38, at 558.

169. *Id.* at 558, 562.

170. *Id.* at 562.

171. *Sands v. Menard, Inc.*, 767 N.W.2d 332, 334-36 (Wis. Ct. App. 2009).

172. *Id.* The court stated that, “Courts have limited power to vacate arbitration awards.” *Id.* at 333. Proceeding to the manifest disregard claim, the court stated that it could not “create law stating that reinstatement is not a remedy for in-house attorneys” and that it could not “conclude the arbitrators manifestly disregarded law that was nonexistent at the time of the arbitrators’ decision.” *Id.* at 335-336.

173. *Id.* at 336 (citing *Racine County v. Int’l Ass’n of Mach. & Aerospace Workers*, 751 N.W.2d 312, 324 (Wis. 2008)).

174. Although *Menard* did not offer a solid public policy argument, the court stated, “While *Menard* makes scattered references to the arbitrators’ award being contrary to public policy, *Menard* does not develop a distinct argument in that regard.” *Id.* at 335 n.2. (citing authority for the proposition that

overturning the award on grounds of public policy, but it should have. “[P]ublic policy” provides “an independent basis for vacating an arbitration award that does not fit within . . . other established categories.”¹⁷⁵ Public policy, at least in the federal context, is most often used in the context of vacating orders reinstating terminated employees in labor-management cases.¹⁷⁶ The court in *Sands* could have recognized the importance of upholding the legitimacy of the attorney-client relationship, both in actuality and perception, and vacated the reinstatement order on public policy grounds. In large part, the ethical rules of conduct that attorneys abide by are built on the idea of maintaining the legitimacy and strength of the attorney-client relationship.¹⁷⁷ In addition, to protect the legitimacy of the judicial process, it is important that courts do not endorse worthless, illusory awards. Professor Christopher R. Drahozal suggests that the real issue in such situations is the integrity of the judicial process.¹⁷⁸ He notes that it is important to find a way to enable “courts to avoid putting their power and authority behind arbitral awards that openly flaunt the law.”¹⁷⁹

In *Sands* the court even alluded to the fact that contravention of public policy may have provided grounds for vacatur of the award, had Menard attempted such an argument.¹⁸⁰ The result reached in *Sands*, that an organization be forced to reinstate terminated in-house counsel, is likely shocking to anyone who understands the attorney-client relationship. If, rather than deferring to the arbitration panel’s decision, the court had effectively used its powers of judicial review, an impracticable decision could have been avoided.

B. In-house Attorneys and Reinstatement

The court in *Sands* cites to *Hybert v. Hearst Corp.*¹⁸¹ for the proposition that an award of front pay or reinstatement is discretionary, left up to the court.¹⁸² It is important to note that the Seventh Circuit Court of Appeals explicitly stated in *Hybert* that there were situations where reinstatement was inappropriate.¹⁸³ In these situations, such as when the employer-employee relationship is “pervaded by hostility,” the *Hybert* court suggested that front pay is the appropriate remedy.¹⁸⁴ The court in *Sands* seems to have ignored this part of the *Hybert* opinion, which is clearly contrary to the ultimate holding in *Sands*.

Additional authority, specifically dealing with discharged in-house attorneys, suggests that reinstatement for in-house attorneys is *never* an appropriate remedy.

courts need not address undeveloped arguments). This suggests that a persuasive public policy argument may have affected the court’s decision.

175. Huber, *supra* note 38, at 569.

176. *Id.*

177. The entire first section of the “model rules” is dedicated to the client lawyer relationship. MODEL RULES OF PROF’L CONDUCT R. 1.0-.18 (2009).

178. Huber, *supra* note 38, at 561; Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 250 (2007).

179. Drahozal, *supra* note 178, at 250.

180. *Sands v. Menard Inc.*, 767 N.W.2d 332, 335 n.2 (Wisc. Ct. App. 2009); *see supra* note 174 and accompanying text.

181. 900 F.2d 1050 (7th Cir. 1990).

182. *Sands*, 767 N.W.2d at 336 (citing *Hybert*, 900 F.2d at 1054-55).

183. *Hybert*, 900 F.2d at 1055.

184. *Id.*

In *General Dynamics Corp. v. Superior Court*,¹⁸⁵ the Supreme Court of California determined that an in-house attorney could bring a retaliatory discharge claim in certain situations.¹⁸⁶ However, the court stated that allowing a retaliatory discharge claim does not thwart a client's ability to rid itself of unwanted counsel because "under circumscribed conditions, an in-house attorney may pursue a wrongful discharge claim for damages against his corporate employer, *even though* a judgment ordering his reinstatement is *not* an available remedy."¹⁸⁷

Sands' standing to bring a retaliatory discharge claim is not at issue here, and the *Sands* court never suggests that it is. However, as evidenced by the holdings in *Hybert* and *General Dynamics*, there is a question as to whether reinstatement is ever an option for discharged in-house attorneys. This is especially so where the relationship between the discharged attorney and her former employer is "permeated with hostility," as was the case in *Sands*.

C. Ethical Considerations: In-house Attorneys and the Special Role They Serve

An interesting consideration, and one not addressed by the *Sands* court, is the practical effect of treating in-house attorney-employees and non-attorney employees similarly in reinstatement situations. Attorneys, governed by the Rules of Professional Conduct, have different ethical obligations to their employers than non-attorney employees. The court declined to address the fact that an attorney in *Sands*' situation, bound by the Rules of Professional Conduct, has little choice but to decline reinstatement.

Grace Geisel's article, *The Ethics or Employment Dilemma of In-House Counsel*, illustrates the unique issues that in-house counsel face.¹⁸⁸ Although Geisel's article generally contemplates ethical issues faced by in-house attorneys while still employed, the distinction she makes between in-house counsel and other attorneys works in *Sands*' case nonetheless. Like other attorneys, in-house counsel are bound to "withdraw from representation if 'the representation will result in violation of the rules of professional conduct or other law.'"¹⁸⁹ Unlike most attorneys, in-house counsel depend solely on one client, their employer, for income.¹⁹⁰ Loss of that one client "reduces profitability to zero."¹⁹¹

In *Sands*' case, losing her job reduced profitability to zero. In addition, ethical obligations more than likely require her to decline the remedy she was offered: reinstatement. As a result, the reinstatement award, meant to benefit her, is rendered meaningless. Moreover, in taking the place of front pay, the unenforceable reinstatement award robbed her of a workable remedy. Had *Sands* decided to accept the reinstatement, she risked sanctions and forced withdrawal from her

185. 876 P.2d 487 (Cal. 1994).

186. *Id.* at 501.

187. *Id.* at 495 (emphasis in original).

188. Grace M. Geisel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535 (1992).

189. *Id.* at 545 (quoting MODEL RULES OF PROF'L CONDUCT 1.16(a)(1) (1983)).

190. *Id.* at 536.

191. *Id.*

position, based on violation of the ethical rules. Neither option would have been especially appealing for Sands.

While it may be true, as the *Sands* court states, that the Rules do not explicitly prohibit reinstatement of an attorney in Sands' situation, equity would suggest that prohibition should be implied.¹⁹² The special relationship that exists between in-house counsel and his or her employer requires that in-house counsel be treated differently than non-attorney employees in certain situations. In addition, forcing a company to retain counsel against its will is a blatant violation of a principle considered essential in the legal profession.

Decisions from the highest courts in both Illinois and California support the contention that in-house attorneys should be treated differently for purposes of discharge and reinstatement. The courts in *Balla* and *General Dynamics* came to different conclusions regarding whether or not a discharged attorney should be allowed to bring a retaliatory discharge claim. However, both courts recognized the fact that in-house attorneys occupy a unique role in our society and that issues regarding their discharge require a unique analysis. This is especially true when issues of reinstatement arise. It is clear that neither court would have endorsed a decision to reinstate a discharged in-house attorney.

VI. CONCLUSION

The decision in *Sands* ultimately resulted in an unworkable arbitral award that either deprived an injured party of a portion of her remedy or deprived a client of its fundamental right to discharge its attorney, forcing the attorney back to work in violation of the rules of professional conduct. Either way, the award is inequitable. The *Sands* holding demonstrates the need for courts to conduct careful review of arbitration awards and effectively employ their powers of judicial review. Courts are the mechanism by which awards that are clearly incorrect and unworkable may be vacated.

While there is not much room for expansion of judicial review under federal law, there is a "vast potential scope" for expanding the regulation of arbitrators and arbitration awards under state law.¹⁹³ As a result, "[s]tate law standards will be of increasing importance in the reformation of arbitration" in the United States.¹⁹⁴ Hopefully the *Sands* decision will reaffirm the fact that judicial review of arbitral awards, while necessarily narrow, is also indispensable. As the reach of arbitration in the United States expands, it is vital that the role judicial review plays in arbitration is better understood, defined, and implemented.

F. SHABNAM NOURAI

192. *Sands v. Menard, Inc.*, 767 N.W.2d 332, 336 n.4 (Wis. Ct. App. 2009).

193. See Huber, *supra* note 38, at 513.

194. *Id.* at 512.

