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EARNING IT;Workers Who Signed Away a Day in Court

By ROY FURCHGOTT JULY 28, 1996

WHEN Michele Peacock left the Great Western Mortgage Corporaton in January 1996, she and her lawyers thought they had an ironclad sexual harassment suit, one rife with examples of on-the-job innuendo. At an Atlantic City convention, she said, one executive tried to maneuver her into bed as a chance "to get to know you better." Ms. Peacock sued. "I wanted my trial by jury," she said. "There is no doubt in my mind that I would win. None."

But like an increasing number of American workers, she will probably never have her day in court. When Ms. Peacock, 31, joined Great Western she was required to sign a contract that mandated that any dispute with the company would be settled through binding arbitration. The human resources manual contained the rules for arbitration: the company would pick the arbitrator, whose fees would largely be paid by Great Western; Ms. Peacock could not win punitive damages or recover lawyers' fees; her lawyers could not question opponents and she would get no documents before the hearing. Ms. Peacock is now suing for the right to take her case to court. Tim McGarry, a spokesman for Great Western, said the company did not comment on pending litigation.

Ms. Peacock is not alone. Employers increasingly use employment contracts not only for traditional purposes -- protecting trade secrets and limiting competition from former employees -- but to be able to dismiss employees without being sued and to insulate themselves from discrimination suits. A poll commissioned in 1995 by Robert Half International, a headhunting firm, found that 30 percent of United States companies with 20 or more employees planned to increase their use of employment contracts, compared with 17 percent that said they would decrease the use of the contracts.

These contracts for lower-level workers are a far cry from what "employment contract" often brings to mind when applied to top executives -- million-dollar bonuses and golden parachute severance agreements. "People are signing away their right to take their claims to Federal court, and they are signing away their right not to be discriminated against," said Ellen J. Vargyas, a lawyer for the Equal Employment Opportunity Commission.

Employers counter that employees have abused rights granted under a 1991 amendment to the Civil Rights Act of 1964. The law, called Title VII, provides for jury trials and allows punitive damages in discrimination cases. But dismissed workers, employers say, often claim sex, age, race and religious discrimination unfairly.

"An employee who loses a job just has to find one of those cubbyholes to fit their claim in," said John Robinson, the chairman of the American Bar Association's Employment and Labor Relations Litigation Committee in Tampa, Fla, "Everyone is a protected something. Even a white male can claim reverse discrimination."

Employers say that without mandating arbitration, employees would choose jury trials, which are expensive for both parties. "Arbitration brings the recurring costs of discovery and appeals under control," said Mr. McGarry of Great Western. He also said arbitration "levels the playing field."

"A company with vast resources can't wear down an opponent with fewer resources," he said.

Lawyers say courts have been blurring distinctions between "at will" employees, who can be dismissed without being told a reason, and "just cause" employees, who can be let go only for poor work or misconduct. "What's changed is courts in several states find bland statements in handbooks, comments on growing up together and making lots of money in the future, two good reviews and a comment at the company Christmas party" and accept these as a contract, said William F. Highberger, a lawyer at Gibson, Dunn & Crutcher, which often represents employers.

Such contracts were born in the securities industry, which has long required all employees to sign an arbitration agreement. This practice has withstood several attacks in court, forcing employees into arbitration, where they frequently fare less well than before a jury.

Paul De Nisco of Staten Island is a former trader for Merrill Lynch who signed a mandatory arbitration agreement in 1990. He wanted to sue his employer for age discrimination in 1991 when, at 48, despite years of good employee reviews, he was dismissed during what Merrill Lynch said was a reorganization of Mr. De Nisco's department. In 1995, Mr. De Nisco went into arbitration with what he thought was a strong piece of evidence: a page of notes written in 1992 by a 30-year-old manager.

Nancy Smith of West Orange, N.J., one of Mr. De Nisco's lawyers, said the page was notes taken from a conversation the manager had with Mr. De Nisco's equally young boss. She said the note showed that the manager had been directed to hire someone "our age -- male" for another department and showed a predisposition of the company to hire young workers.

Timothy Gilles, a spokesman for Merrill Lynch, said on Thursday, "These notes do not indicate any discriminatory intent or conduct at Merrill Lynch, and the claimant did not attempt to present any evidence to the contrary."

Arbitrators denied Mr. De Nisco's claim.

"I wrote a letter asking the arbitrators for their rationale," Mr. De Nisco said. "They said they don't have to tell me and they don't want to." No appeal is allowed.

Arbitrators need not use previous cases in rendering a decision, and they do not have to provide a written decision, as judges do, or provide for appeals. Arbitrators must make judgments under any rules laid down by the company, and that has caused some arbitrators to turn down these assignments.

"I personally have a problem with it," said Arnold Zack, an arbitrator and past president of the National Academy of Arbitrators. Employers often stack the deck, he said, "and we are for fair play." The National Employment Lawyers Association, made up of lawyers who represent employees, had threatened to boycott arbitration companies that hear mandatory arbitration disputes. The group has since worked out guidelines with arbitrators that halt some practices, like arbitrations in which employees cannot collect lawyers' fees if they win, but may have to pay employers' legal fees if they lose.

Many judges seem to have no problem with arbitration. Not only have they upheld

arbitration decisions, but arbitration keeps many disputes out of crowded courts. Some judges are being enticed off the bench by the high pay of arbitration. One employee lawyer, Cliff Palefsky, said arbitrators charged up to $500 an hour and commonly earned $300,000 to $400,000 a year.

Not all courts uphold arbitration, though, and employee lawyers continue to probe for a chink in the armor. One successful challenge was mounted by Jane Letwin, a lawyer in Fort Lauderdale, Fla., on behalf of her husband, Bob. According to Mrs. Letwin, when his employer, the Bentley's Luggage Corporation, demanded that all employees, even part-timers like Mr. Letwin, sign a contract agreeing to mandatory arbitration, he balked.

The Letwins said that when he refused to sign, Mr. Letwin was dismissed after eight months at the company. But Mrs. Letwin pressed her husband's claim with the National Labor Relations Board, contending unfair labor practices because the arbitration threat could be used to prevent labor from organizing. Mr. Letwin was reinstated with full back pay. Officials at Bentley's did not respond to requests for comment..

The trend in contracts has not escaped notice in Washington. Senator Russell D. Feingold of Wisconsin and Representatives Patricia Schroeder of Colorado and Edward J. Markey of Massachusetts, all Democrats, have proposed bills to protect employees. The Senate version says it would "prevent the involuntary application of arbitration to claims that arise from unlawful employment discrimination."

For now, experts expect the mandatory-arbitration trend to grow. And employees faced with the requirement on employment contracts appear to have two choices: take it or leave it.
