



**FEDERAL BAR ASSOCIATION
FIFTEENTH ANNUAL THURGOOD A. MARSHALL
MEMORIAL MOOT COURT COMPETITION
2012 OFFICIAL
COMPETITION PROBLEM**

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Simple Wisdom, Inc. is a publishing company that specializes in self-help books. It is incorporated under Tennessee law and has its corporate headquarters in Knoxville. Until recently, all of Simple Wisdom's employees worked at the corporate headquarters. A few years ago, however, Simple Wisdom decided to expand its marketing efforts to include solicitation via-direct mail and telephone and opened an office in Knighton, a mid-size city in the state of Radnor, to handle those new efforts.

Simple Wisdom hired Sarah Burton as its human resources manager in Knighton. As the only full-time human resources employee in Knighton, Burton was responsible for all local human resources administration, including employee classification, compensation, recruitment, on-boarding, benefits, employee relations, performance reviews, and leaves of absence. She reported directly to Simple Wisdom's director of human resources in Knoxville.

When Burton began working at Simple Wisdom, she signed an acknowledgement form indicating that she had read and agreed to all the terms contained in Simple Wisdom's employee handbook. She also signed a separate Dispute Resolution Agreement, in which she agreed to submit to binding arbitration any dispute arising out of her employment relationship with Simple Wisdom. The arbitration clause of the Dispute Resolution Agreement provided:

Arbitration: Employer and Employee agree that any claim, dispute, or controversy between them arising out of, relating to, or concerning any aspect of the parties' employment relationship or the interpretation,

construction, performance, or breach of this Agreement, shall be resolved by binding arbitration by and under the Code of Procedures of the Employment Arbitration Forum (“EAF”) at the time the claim is filed. Rules and forms of the EAF may be obtained and all claims shall be filed at any EAF office. Any arbitration hearing, if one is held, will take place at a location near Employee’s residence.

This arbitration agreement constitutes a waiver of Employee’s right to a jury trial and relates to the resolution of all disputes relating to all aspects of the employer/employee relationship, including, but not limited to:

(1) Any and all claims for wrongful discharge of employment, breach of contract, breach of the covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, negligent or intentional misrepresentation, negligent or intentional interference with contract or prospective economic advantage, and defamation;

(2) Any and all claims for violation of any federal, state, or municipal statute, including, but not limited to, Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Employee Retirement Income Security Act of 1974, The Americans with Disabilities Act of 1990, and The Fair Labor Standards Act.

(3) Any and all claims arising out of any other laws and regulations relating to employment or employment discrimination.

This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–18. Judgment upon the award may be entered by any party in a court having jurisdiction.

All full-time Simple Wisdom employees are eligible to participate in Simple Wisdom’s 401(k) retirement program. Employees can contribute a portion of their earnings to a 401(k) account, which is fully vested from the time of the initial contribution. Simple Wisdom’s 401(k) plan meets the requirements of a qualified plan under the Employee Retirement Income Security Act of 1974 (“ERISA”).

Employees may enroll when they begin working for Simple Wisdom or any time thereafter. Employees enroll by filling out a paper form, which is processed by the human resources department, or by completing an electronic enrollment form through Simple Wisdom's intranet. In the Knighton office, Sarah Burton is responsible for providing information regarding the 401(k) plan to Simple Wisdom employees and for processing any paper enrollments. The deductions and contributions, however, were traditionally handled by the human resources department in Knoxville, Tennessee.

In November 2009, Simple Wisdom outsourced the payroll function formerly handled by its human resources department to a third-party provider named Operations Consultants, Inc. At the time of the transition, several employees in Simple Wisdom's Knighton office complained to Sarah Burton that the 401(k) deductions made from their paychecks were not reflected in their 401(k) accounts. Burton passed along those complaints to Henry Cooper, Simple Wisdom's director of human resources. Cooper told Burton that the failure to remit certain deductions to the appropriate 401(k) accounts was an accounting error on the part of Operations Consultants and would be rectified within a few days.

But when the next pay period came two weeks later, the same Knighton employees who had complained to Burton before once again said that they had not received appropriate deposits in their 401(k) accounts. After listening to several employees' complaints, Burton concluded that Operations Consultants had failed to

make deposits into the 401(k) accounts for any of the non-exempt employees in the direct mail department.

Burton again called Cooper to tell him that the problem with employees' 401(k) accounts had not been remedied. When Cooper tried to reassure Burton that the error would be rectified, Burton stated that she did not believe him and that she believed the human resources department in Knoxville simply did not care about the employees in Knighton. Cooper told Burton that she was wrong and asked her not to make similar statements to any of the employees in Knighton. Cooper reminded Burton that Simple Wisdom had reprimanded her shortly after the Knighton office opened for stating during an employee orientation meeting that she did not have much confidence in the management team in Knoxville.

Two weeks later, shortly before leaving for Simple Wisdom's holiday party in Knoxville, Burton learned that several employees still had not received deposits in their 401(k) accounts. Burton then called a manager at Operations Consultants to ask why the problem was not resolved. The manager stated that Cooper had alerted her to the problem, but that she was still waiting on certain information for some employees. Burton then became angry, shouted that neither Operations Consultants nor Cooper cared about the employees in Knighton, and hung up.

When Burton arrived at the holiday party in Knoxville, she immediately sought out Cooper and began to berate him in front of several executive-level employees. Cooper asked to speak with Burton privately, but she refused and sought Simple Wisdom's president, Tyler Simpson. Burton told Simpson that she

needed to speak with him about a serious matter involving employee retirement accounts. Simpson heard Burton out and assured her that Simple Wisdom would remedy the problem immediately. Burton then shouted that she had heard too many empty promises and that she did not believe that anyone in Knoxville cared about the Knighton employees. She then left the party.

When Burton returned to her Knighton office the following Monday, she had a voice mail message from Cooper asking her to call him. When she called Cooper, he told her that she was being terminated because of her uncivil and insubordinate conduct.

Shortly after her termination, Burton filed a lawsuit in the United States District Court of the District of Knighton, alleging that her termination violated the anti-retaliation provision set forth in section 510 of ERISA, 29 U.S.C. § 1140. Simple Wisdom moved to stay the district court proceedings and to compel Burton to submit her dispute to arbitration, in accordance with the Dispute Resolution Agreement she signed. Burton opposed Simple Wisdom's motion on the ground that the parties' arbitration agreement was now impossible to perform, because the Employment Arbitration Forum no longer provided arbitration services.

For several years, the Radnor Attorney General had been investigating complaints that the EAF was biased against employees. That investigation culminated in the Attorney General's filing suit against the EAF in 2009. In October 2009, the EAF entered into a consent decree with the Radnor Attorney

General in which it agreed not to administer, process, or in any manner participate in any arbitration of employment disputes after October 31, 2009.

Despite the EAF's unavailability, the district court granted Simple Wisdom's motion to compel arbitration. The district court held that it had the authority under Section 5 of the Federal Arbitration Act ("FAA") to appoint a substitute arbitrator. Burton immediately appealed the district court's decision to the United States Court of Appeals for the Twelfth Circuit, which reversed the district court's decision. The Twelfth Circuit held that Section 5 of the FAA did not permit a court to appoint a substitute arbitrator where the selection of the arbitrator was integral to the parties' agreement. The Supreme Court denied Simple Wisdom's petition for certiorari.

On remand, the district court considered the merits of Burton's case and entered summary judgment in Simple Wisdom's favor. The court held that internal complaints to supervisors, such as Burton made, could not form the basis for an ERISA retaliation claim. The court noted that Section 510 protects an employee who "has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140. The court held that the plain meaning of the words "inquiry or proceeding" did not extend to unsolicited internal complaints employees make to supervisors.

Burton appealed the district court's decision to the Twelfth Circuit, which reversed. The Twelfth Circuit held that the word "inquiry" was broad enough to

encompass intra-company complaints. It also noted that if internal complaints were not protected, employers could circumvent the protections afforded by ERISA by terminating employees before an investigation concerning an ERISA plan reached a more formal stage.

Simple Wisdom filed a petition for certiorari with the United States Supreme Court, presenting the following two issues:

- 1) Does Section 5 of the Federal Arbitration Act permit a federal district court to name a substitute arbitrator even where the parties' arbitration agreement specifies, in mandatory language, which arbitrator the parties will use?
- 2) Does ERISA's anti-retaliation provision protect unsolicited, internal complaints made by employees to their supervisors?

The Supreme Court granted Simple Wisdom's petition on both issues.