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CLIENT ALERT

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Ninth Circuit Again Clarifies that Arbitration Is Creature of Contract: Employee's Agreement to Abide by Company Manual Is Sufficient to Send Title VII Claims to Arbitrator

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THE COURT'S OPINION INSTRUCTS THAT EMPLOYEE AGREEMENTS TO ARBITRATE MAY BE OBTAINED THROUGH WRITTEN ACKNOWLEDGMENTS REFERENCING COMPANY MANUALS.

Arbitration remains a preferred forum for many employers, yet courts are often wary of enforcing arbitration agreements against employee-plaintiffs. This has often been the case where employees made claims under Title VII of the Civil Rights Act of 1964, which provides for a statutory jury right that potentially conflicts with the Federal Arbitration Act. This is also especially true where the purported written agreement to arbitrate consists of the employee's written acknowledgment referencing a separate company manual that contains an arbitration policy. In *Ashbey v. Archstone Property Management, Inc.*(available at http://cdn.ca9.uscourts.gov/datastore/opinions/2015/05/12/12-55912.pdf), No. 12-55912, 2015 U.S. App. LEXIS 7819 (9th Cir. May 12, 2015), however, the U.S. Court of Appeals for the Ninth Circuit enforced just such an agreement, providing positive guidance on what has traditionally been a thorny issue.

Background

In *Ashbey*, the plaintiff sued his former employer, Archstone Property Management, in California state court, alleging unlawful retaliation and wrongful termination under Title VII and state law equivalents. Specifically, Mr. Ashbey alleged that he and his wife, who also had worked at Archstone, were subjected to altered employment status and ultimately terminated in retaliation for her complaints that a third employee unlawfully harassed her.

Mr. Ashbey had worked for Archstone from 1996 until his termination in November 2010. One year before, in 2009, Mr. Ashbey had signed an acknowledgement stating he had "received directions as to how [to] access the Archstone Company Policy Manual, including the Dispute Resolution Policy." The acknowledgement said Mr. Ashbey bore the "responsibility to understand the Archstone Company Policy Manual, including the Dispute Resolution Policy" and that Mr. Ashbey agreed to abide by the Company Policy Manual's provisions.

As the acknowledgement had warned, the Company Policy Manual for 2009 did, in fact, contain a mandatory arbitration policy. The policy covered, among other things, all disputes arising out of the employment relationship, explicitly including claims under the Civil Rights Act of 1964 and its state law equivalents. The Policy also was expressly governed by the Federal Arbitration Act. Thus, after removing to federal district court, Archstone filed a motion to compel arbitration.

The Ninth Circuit's Decision

Typically, under the Federal Arbitration Act, a party seeking to compel arbitration need only show a written agreement to arbitrate the dispute. But the Ninth Circuit has con-

sistently held that, for Title VII claims, as well as their state law equivalents, the moving party must also show the plaintiff "knowingly" waived his or her right to a judicial forum. As the court repeated in *Ashbey*, any "bargain to waive the right to a judicial form for civil rights claims . . . in exchange for employment or continued employment must a the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question."

Relying on two prior Ninth Circuit cases involving plaintiffs who had similarly signed acknowledgments referencing company manuals that contained mandatory arbitration provisions, Mr. Ashbey argued that he did not knowingly waive his Title VII right to a jury trial. The Ninth Circuit disagreed.

In the plaintiff's two precedents, *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) and *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998), the signed acknowledgment forms contained no express references to the manuals' dispute resolution provisions. As such, the plaintiffs in those cases had not explicitly agreed to waive the right in question.[1] Mr. Ashbey, on the other hand, signed an acknowledgment that twice notified him that the Archstone Company Policy Manual contained a dispute resolution agreement, and Mr. Ashbey explicitly agreed to adhere to the manual's policies.

Just as important, the arbitration provision itself unambiguously covered the civil rights at issue. To show this, the court called out two significant aspects of the arbitration provision. The Federal Arbitration Act expressly applied, and the provision clearly listed claims arising under the Civil Rights Act of 1964 as within the arbitration provision's scope. Consequently, the court concluded that "[a]nyone who reviewed the Dispute Resolution Policy would immediately realize he was entering into an agreement to waive a specific statutory remedy afforded him by a civil rights statute."

Implications

At bottom, *Ashbey* instructs that employee agreements to arbitrate may be obtained through written acknowledgments referencing company manuals, but employers should ensure at least four things. First, written acknowledgments should explicitly (and conspicuously) reference the manual's dispute resolution provision. Second, the Federal Arbitration Act should explicitly govern. Third, the arbitration's scope should explicitly cover statutory civil rights under Title VII and its state law equivalents. Finally, as highlighted in an unpublished concurrence to the opinion, the acknowledgement must be contractual,

rather than informational. That is, the employee must explicitly agree to abide by the manual's policies, not simply acknowledge its existence or its receipt. After all, arbitration is still a matter of contract.

Endnotes

1. In 2014, the Ninth Circuit came to the same conclusion in the Internet commerce context, finding that conspicuous hyperlinks to terms of use were insufficient to garner users' agreement to arbitrate. For more information, see our Client Alert, "Ninth Circuit Affirms District Court's Refusal to Enforce Arbitration Clause in Barnes & Noble's Browsewrap Agreement—Conspicuous Hyperlinks to Terms of Use, 'Without More,' Is Insufficient," available at http://www.pepperlaw.com/publications/ninth-circuit-affirms-district-courts-refusal-to-enforce-arbitration-clause-in-barnes-nobles-browsewrap-agreementconspicuous-hyperlinks-to-terms-of-use-without-more-is-insufficient-2014-08-25/.