

Employment Law Notes

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RULING EXPANDS EMPLOYEES' OPTIONS FOR AVOIDING ARBITRATION

The 9th Circuit Court of Appeals has ruled that an employer cannot enforce an arbitration agreement if the employer improperly delays responding to the employee's demand for arbitration. The case is Brown v. Dillard's Inc., decided December 6, 2005, available at www.dehnlaw.com.

Legal Background

Many employers require their employees to sign agreements to arbitrate work-related disputes. Arbitration has many advantages for employers. The process is confidential and discovery is usually managed by arbitrators to prevent "fishing expeditions." Best of all from the employer's perspective, no jury is involved. Employers probably have a better chance of winning with an arbitrator than with a jury, and when employers lose, juries are much harder on them. For example, in discrimination cases the median jury verdict is \$218,000 compared to a median of \$40,000 awarded by judges. In order to be enforceable, arbitration agreements must meet strict standards governing how they are drafted and executed.

The Case

Dillard's, Inc. requires its employees to arbitrate all employment-related disputes under something called "Dillard's Fairness in Action Program." Stephanie Brown was employed in a Dillard's Department Store in California until she was fired for allegedly falsifying her time records. Ms. Brown denied falsifying anything, and said Dillard's really fired her because it found out she planned to take a second job.

Brown filed an arbitration demand claiming

wrongful termination, and she paid her share of the arbitrator's fee. Dillard's did not respond or pay its share of the fee, and for over two months Brown tried unsuccessfully to get someone at Dillard's to speak to her. When Brown finally reached someone at Dillard's, they told her Dillard's was refusing to arbitrate because it considered her claim to be without merit. Dillard's may have felt safe stonewalling Brown, because all the controlling court decisions concerning waiver by a defendant of its right to arbitrate involve defendants who were found to have waited too long to demand arbitration after first being sued, which was not the situation in this case.

Six months later, Brown filed a lawsuit against Dillard's containing 12 counts, including claims for fraud, misrepresentation and defamation, among others. Dillard's promptly filed a motion to compel Brown to arbitrate her claim, but the court denied the motion. Dillard's appealed the ruling to the 9th Circuit, which affirmed the trial court. The appeals court said that Dillard's initial refusal to arbitrate constituted a breach of the agreement to arbitrate, and after having breached the agreement Dillard's could not enforce it. The court rejected Dillard's argument that it had not waived its right because it had demanded arbitration immediately after being sued.

Conclusion

Plaintiffs' attorneys may attempt to extend the ruling in the Dillard's case and argue that any stalling or bad faith on the employer's part in arbitration may be a breach of contract, entitling the plaintiff to go to court. Whether they do or not, employers must uphold their end of the bargain when employees file a demand pursuant to an arbitration agreement. ✍

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