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■ Expert Analysis

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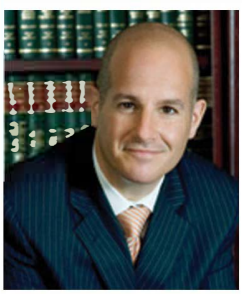
NJ Arbitration Ruling Puts Burden On Employers



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Sending an email to a recipient is insufficient proof that it has been read. That was the ruling by U.S. District Judge Anne E. Thompson of the District of New Jersey, who recently rejected Morgan Stanley's claim that a former financial adviser could not pursue his discrimination lawsuit in court but must submit to binding arbitration as outlined in an email the company sent to the adviser prior to his termination.

Morgan Stanley says that an email sent in 2015 bound the adviser to arbitrate any disputes, and that by continuing his employment at the firm, he gave his consent. Judge Thompson found otherwise. Rather, she reaffirmed that it is the employer's burden to demonstrate an employee's explicitly affirmed assent to an arbitration agreement in order to enforce it. Sending an email without proof it has been read is not sufficient.

Affirmation Required

In Schmell v. Morgan Stanley & Co. Inc., the court held that there must be no genuine issue of material fact as to whether the employee manifested an intent to be bound by the arbitration agreement. In this instance, the court confirmed that Morgan Stanley could not enforce the arbitration agreement, which its former employee says he never saw, simply because it emailed it to him once and inferred that by continuing his employment, he had consented to arbitration.

The court further addressed the factors necessary to establish an employee's "willingness and intent to be bound by the arbitration provision" that would permit the court to be "satisfied that a plaintiff actually intended to waive his statutory rights."

This decision has far-reaching implications, particularly regarding the enforceability of arbitration agreements in New Jersey, because it confirms an employer cannot unilaterally impose arbitration without obtaining an employee's affirmative assent. Showing up for work the next day, as Morgan Stanley argued, is insufficient.

Substance Abuse v. Reputational Risk

The plaintiff, Craig Schmell, worked as a senior vice president with Morgan Stanley from 2006 until his dismissal earlier in 2018. He gained notoriety for his ability to place himself at the center of major events, such as the Stanley Cup when the New York Rangers won in 1994, and the Grammys. He wrote a memoir titled, "The Uninvited: How I Crashed My Way into Finding Myself," recounting his misadventures and the role substance abuse played in his being "uninvited" onto the world's stage. Schmell has been sober for nearly three decades.

At Morgan Stanley's request, Schmell removed all mention of the firm and a reference to an arrest when he was 16. The book published, and at that time Morgan Stanley said it was terminating his employment because the content created "reputational risk" for the company.

In his suit, Schmell contends that the real reason for his dismissal was prior drug and alcohol abuse and his status as a recovering alcoholic.

Compelled Arbitration

Morgan Stanley removed the case to federal court and then sought to compel arbitration. The company relied on an email it sent to Schmell, which included a link to an arbitration agreement. The arbitration agreement required Schmell to affirmatively opt out of the arbitration option. Morgan Stanley argued that by continuing to report to work, without opting out, Schmell manifested his assent. Schmell challenged his notice of the agreement and his corresponding assent. He certified that he had no recollection of receiving, viewing or opening the email or of accessing the online portal to view the arbitration agreement. Thus, he never manifested his affirmative assent to arbitrate.

Morgan Stanley produced evidence that the email had been sent to Schmell. However, it failed to produce evidence that Schmell opened or viewed the email or accessed the online portal to review the arbitration agreement.

Mutual Assent Required

In determining whether an employee has waived the right to trial by jury, the court applied New Jersey contract law, finding that "arbitration agreements 'must be the product of mutual assent,' such that 'parties have an understanding of the terms to which they have agreed.'"[1] As such, an arbitration agreement "must be 'entered into knowingly and voluntarily' after receiving notice."[2]

To evaluate whether an employee provided the required affirmative assent, the court adopted the standard set forth in Leodori v. Cigna Corp.,[3] which provides that "an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it." Although this does not require an actual signature, the employer must demonstrate the employee's "willingness and intent to be bound by the arbitration provision."[4] Generally, the court "should be satisfied that a plaintiff 'actually intended to waive his statutory rights.'"[5]

Applying these standards, the court rejected Morgan Stanley's argument, finding the authority it relied upon involved more than:

Passive acquiescence, whereby a plaintiff's review and acceptance of the Agreement was clearly recorded and dated in the defendants' electronic systems. In each cited case, the employee was required to move through a series of forms or webpages and ultimately completed some acknowledgment referencing arbitration or alternative dispute resolution requirements.[6]

Moreover, the court rejected Morgan Stanley's argument that Schmell's continued employment following the email constituted assent to the arbitration agreement. The court found the case distinguishable from those relied upon by Morgan Stanley because, "here there is an underlying dispute as to whether [Schmell] had notice of the agreement."[7] Relying on Schmell's certification that "he has no recollection of receiving, viewing, or opening the [ ] email or accessing the [online portal]," the court found that Morgan's Stanley's evidence that an email was sent to Schmell's account was insufficient to overcome the "genuine dispute of material fact as to whether [Schmell] was on notice of the agreement to arbitrate such that there was a meeting of the minds and he could mutually assent to the terms of the [arbitration agreement]."[8]

Without establishing that Schmell had adequate notice, the court opined that "there is a genuine dispute of material fact as to whether the alleged assent through continued employment without opt-out was knowing and voluntary."[9]

Accordingly, the court was unable to "find that [Schmell] is bound to arbitrate" and denied Morgan Stanley's motion to compel arbitration.

The decision will have a far-reaching impact on the enforceability of employment-related arbitration agreements in New Jersey. It has become customary for employers to provide notice or copies of an arbitration agreement to employees via email or an online portal. Where employers provide for an opt-out period or specifically state that continued employment is all that is required to be bound by the agreement, employers rarely document whether the employees actually reviewed the notice or the arbitration agreement.

By relying solely on email communications, it appears that employers hope that employees will remain ignorant of their constitutional rights and be bound to an agreement of which the employees have little or no knowledge. Indeed, employers simply could request employees reply to the email or provide other electronic means to confirm assent but, as here, prefer to clandestinely impose arbitration upon unsuspecting employees.

It is now firmly established that merely sending an email referencing an arbitration agreement to employees and providing for an opt-out period is insufficient in and of itself to enforce the agreement. The employer must now take steps to at least document that its employees viewed the notice, had an adequate opportunity to review the arbitration agreement, and agreed to be bound thereby either by executing the agreement or failing to opt out

in the time provided. This added burden on their employers will provide employees with more knowledge prior to waiver of their rights and give employees a greater voice in deciding whether they want to arbitrate disputes with their employers.

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DISCLOSURE: Ansell Grimm & Aaron PC and the authors represent the plaintiff, Craig Schmell, in Schmell v. Morgan Stanley & Co. Inc., Case No. 17-cv- 13080.

[1] Schmell v. Morgan Stanley & Co., No. CV 17-13080, 2018 WL 1128502, at *2 (D.N.J. Mar. 1, 2018) (quoting Atalese v. U.S. Legal Servs. Grp. LP, 99 A.3d 306, 312–13 (2014))

[2] Schmell, No. CV 17-13080, 2018 WL 1128502, at *2 (quoting Descafano v. BJ's Wholesale Club Inc., 2016 WL 1718677, at *2 (D.N.J. Apr. 28, 2016))

[3] Leodori v. Cigna Corp., 814 A.2d 1098, 1106 (2003)

[4] Schmell, No. CV 17-13080, 2018 WL 1128502, at *2 (citing Ricci v. Sears Holding Corp., 2015 WL 333312, at *4 (D.N.J. Jan. 23, 2015))

[5] Schmell, No. CV 17-13080, 2018 WL 1128502, at *2 (quoting Uddin v. Sears, Roebuck & Co., 2014 WL 130292, at * 5 (D.N.J. Mar. 31, 2014))

[6] Schmell, No. CV 17-13080, 2018 WL 1128502, at *3

[7] Schmell, No. CV 17-13080, 2018 WL 1128502, at *3

[8] Schmell, No. CV 17-13080, 2018 WL 1128502, at *3-4

[9] Schmell, No. CV 17-13080, 2018 WL 1128502, at *4