

Ninth Circuit Allows Parties to Arbitrate Dispute Which had been Litigated for Years

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By: David Ian Dalby

In this recent arbitration decision out of the Ninth Circuit, the employee brought an action against her employer, alleging violations of California's overtime laws and sought to assert claims on behalf of a class. After several years of litigation, the employee moved to certify a class. The District Court granted the motion in part, narrowing the class which the employee represented. In the same order, the court denied the employer's motion to compel arbitration, which was after the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). The District Court found that the employer had waived its right to arbitration by litigating the action for years without raising the binding arbitration clause contained in the employee's employment agreement.

On appeal, the Ninth Circuit Court of Appeals reversed, holding that the employee had not established any prejudice as a result of the employer's alleged delay in asserting its right to arbitration and ordered the District Court to enforce the arbitration provision.

The Ninth Circuit panel observed that waiver of a contractual right to arbitration is not favored and any party arguing waiver of arbitration bears a heavy burden of proof. The employee had argued that she was prejudiced because there was litigation on the merits and as a result, some of her claims were dismissed. The court rejected this argument because one of the employee's claims for failure to provide meal and rest breaks was dismissed without prejudice, which is not a decision on the merits, and the employee's claim for injunctive relief was dismissed by the District Court on the basis lack of standing. Since this particular employee was a former employee, she could not benefit from prospective relief, and therefore, she did not have standing to assert the claim, which means there was no decision on the merits.

The employee also maintained that she had been prejudiced because her employer conducted discovery that caused her to incur expenses during years of litigation prior to the motion to compel. However, the court observed that the employee did not contend that the employer used discovery to gain information about her case that it could not have gained in arbitration. The court also rejected the notion of "self-inflicted expenses" as

evidence of prejudice. The employee was a party to an arbitration agreement and any extra expense incurred as a result of the employee's choice of an improper forum in contravention of the contract could be charged to the employer.

The Court of Appeals also rejected the employee's argument that the Court of Appeals should affirm the District Court's decision based upon the National Labor Relations Board decision in *D.R. Horton* which rejected an arbitration clause. The Court of Appeal observed that the employee did not assert that the arbitration agreement was unenforceable under the NLRB until after the parties had briefed the motion and the District Court had denied the motion to compel. Moreover, the overwhelming majority of courts to have considered the issue have declined to defer to the NLRB decision because it conflicts with explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act.

This decision is significant, demonstrating the strong federal policy of enforcing arbitration agreements, even in the employment context. This policy is another factor weighing favor of removing employment cases to the U. S. District Courts from state courts if possible.

For more information read [Richards v. Ernst & Young, LLP, No. 11-17530 \(9th Cir., August 21, 2013\)](#).

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