An Employer-Defendant's Actions May Constitute an Implied Waiver of the Right to Compel Arbitration

By: Ty Hyderally, Esq. & Alex D'Amico, Esq. **December 2013 Newsletter**

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Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), a unanimous decision issued by the New Jersey Supreme Court in August, provides a look at the rare circumstances under which a court may deny the invocation of an employee-employer arbitration agreement.

Liberty Anesthesia Associates, LLC, a provider of anesthesia services, engaged plaintiff Karen Cole to carry out anesthesia services at Jersey City Medical Center. Cole's contract with Liberty included an arbitration clause. When Cole lost her work privileges at Jersey City Medical, Liberty terminated her employment. Cole sued Jersey City Medical, and on June 3, 2008, Cole amended her complaint to include Liberty as a defendant. Liberty's answer asserted thirty-five affirmative defenses, with no reference to arbitration. During the course of the litigation, the parties conducted discovery and both defendants moved for summary judgment. Cole settled her claims with Jersey City Medical, and the court's partial summary judgment order reduced Cole's claims against Liberty to two for a trial scheduled for March 22, 2010. On March 19, 2010, three days before trial and twenty-one months after Cole filed her complaint against Liberty, Liberty filed a motion to compel arbitration under the arbitration clause in Cole's employment contract.

Liberty asserted that it had delayed its motion to compel arbitration because Jersey City Medical was not a party to the agreement, and it did not want to risk contrasting decisions by a jury and an arbitrator. Cole asserted that Liberty's failure to compel arbitration during its twenty-one months of active involvement in the litigation constituted a waiver of its right to compel arbitration. The trial court granted Liberty's motion to compel arbitration, citing several factors: 1) discovery that occurred between Cole and Jersey City Medical would have taken place whether or not Liberty and Cole pursued arbitration; 2) Liberty did not purposely abuse the litigation process; 3) participation by a third party in the litigation justified Liberty's failure to compel arbitration under the employment agreement; and 4) Liberty acted to compel arbitration shortly after it learned of the Jersey City Medical settlement. The Appellate Division concluded that Liberty was equitably estopped from compelling arbitration and reversed. *See Cole v. Jersey City Med. Ctr.*, 425 N.J. Super. 48 (App. Div. 2012).

The New Jersey Supreme Court chose to address the issue in terms of waiver rather than equitable estoppel. Despite precedents regarding waiver ("waiver is the voluntary and intentional relinquishment of a known right." *Knorr v. Smeal*, 178 N.J. 169, 177 (2003)) and arbitration ("An arbitration agreement is a contract and is subject, in general, to the legal rules governing the construction of contracts." *McKeeby v. Arthur*, 7 N.J. 174, 181 (1951)), the Court noted that it had never addressed the issue of an implicit waiver of the right to arbitration. *See Cole*, 215 N.J. at 276. Nevertheless, "the same principles govern waiver of a right to arbitrate as waiver of any other right." *Id.*

The Court noted that in *Hoxworth v. Blinder & Co.*, the Third Circuit described a multi-factor test to determine whether a waiver of the right to arbitrate had occurred. *See Cole*, 215 N.J. at 279 (citing 980 F.2d 912, 925-27 (3d Cir. 1992)). The *Hoxworth* Court found that eleven months of litigation, during which the parties engaged in

extensive motion practice and comprehensive discovery, constituted an adequate basis for an implicit waiver of the right to arbitrate. *See id*. However, in *PaineWebber Inc. v. Faragalli*, the Third Circuit found no waiver when Defendant filed its motion to compel arbitration within two months of the complaint being filed, the parties had yet to file briefs on the merits, the parties did not engage in discovery, and the plaintiff did not show prejudice. *See Cole*, 215 N.J. at 279 (citing 61 F.3d 1063, 1068-69 (3d Cir. 1995)).

The Court cited multi-factor tests in the Second Circuit and at least nine other states which those jurisdictions used to contemplate an implied waiver of the right to arbitrate. The Court then outlined its own multi-factor test by which New Jersey courts should evaluate: 1) the delay in making the arbitration request; 2) the filing of any motions, particularly dispositive motions, and their outcomes; 3) whether the delay in seeking arbitration was part of the party's litigation strategy; 4) the extent of discovery conducted; 5) whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration; 6) the proximity of the date on which the party sought arbitration to the date of trial; and 7) the resulting prejudice suffered by the other party, if any, with no one factor being dispositive. *See Cole* at 280-81.

Applying its test to the facts, the Court determined that Liberty engaged in litigation conduct inconsistent with its right to arbitrate. In its reasoning, the Court cited Liberty's twenty-one months of litigation prior to filing the motion to compel arbitration, the timing shortly before trial, the failure to raise arbitration as an affirmative defense, the failure to give notice of intent to compel arbitration, the fact that both parties had engaged in substantial discovery prior to the invocation of the arbitration clause, and the engagement of both parties in motion practice. *See Cole* at 283.

In light of the status of arbitration as a favored form of dispute resolution by the courts, the *Cole* decision represents a significant precedent in the opposite direction, for an employee to avoid arbitration. Notably, the *Cole* Court cracks down on the strategic use of arbitration by an employer as a weapon to prejudice a plaintiff employee by compelling arbitration after the parties have already substantially litigated the matter in court.

The Appellate Division Weighs in on the State of New Jersey's At-Will Employment Doctrine

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Halpern v. Marion P. Thomas Charter Sch., 2013 N.J. Super. Unpub. LEXIS 2168, an August 2013 opinion by the Superior Court Appellate Division, sheds light on the current status of the doctrine governing at-will employment in the State of New Jersey.

Plaintiff Robin Halpern was employed by Marion P. Thomas Charter School in 2008-09 and 2009-10 as Director of Special Services and Director of Special Education and Counseling respectively. For the 2010-11 school year, the School entered an agreement with Halpern for her to serve as the Coordinator of Special Services. On August 16 2010, the School notified Halpern that it "could no longer afford her" and that it was terminating her employment. Halpern subsequently brought a breach of contract claim against the School for her salary for the 2010-11 school year.

On defendant's motion for summary judgment, the key issue was whether the School employed Halpern at-will. Contending that her employment was not at-will, Halpern noted the

inclusion of a definitive duration for her employment and the exclusion of a termination provision in her agreement with the School.

"In New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine. An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise." *Halpern*, at *7 (quoting *Wade v. Kessler Inst.*, 172 N.J. 327, 338-39 (2002) (citation omitted)). An exception to the employment at-will doctrine may arise from a contractual right or an implied contract based on an employee manual. *See Halpern*, at *7 (citing *Wade*, 172 N.J. at 339). Halpern's case invokes this contractual right or implied contract exception. *See Halpern*, at *7, 11.

In reviewing Halpern's prior and current employment agreements, the Appellate Division paid special attention to the express indication of the School's status as an at-will employer in the 2008-09 and 2009-10 agreements and the exclusion of such a reference in the 2010-11 agreement. Also, the contracts from the two previous years contained termination clauses for the School for cause and without cause, whereas the 2010-11 contract did not contain such termination clauses. Additionally, the Appellate Division referenced provisions in the School's employee handbook which failed to clarify the employment status of Halpern.

Under the summary judgment standard by which the court must view all facts in the light most favorable to the plaintiff, the Appellate Division determined that the inconsistencies between the employment agreements from different years and the inconsistency between the 2010-11 employment agreement and the employee handbook produced genuine issues of material fact sufficient for a reasonable jury to conclude that Halpern is not an at-will employee. The takeaway from this, that the lack of clarity as to Halpern's employment status, whether at-will or otherwise, and the School's failure to explicitly characterize Halpern's employment as at-will suffices for a plaintiff's breach of employment contract claim to survive summary judgment, is a positive for plaintiff employees bringing breach of contract claims based on their termination. At the same time, *Halpern* serves as yet another reminder for employers to insert at-will employment language into their employment agreements and to otherwise avoid any inconsistency or ambiguity as to the at-will status of their employees.

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