An Overview of Two Recent Court Rulings on Employment Law Issues

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Employers should take note of two recent court rulings with potentially far-reaching implications related to eligibility for unemployment benefits and employee participation in the arbitration of employment disputes.

NJ Appellate Division Expands Circumstances in Which Employee May Voluntarily Resign Position and Still Be Eligible for Unemployment
Cottman v. Board of Review, Department of Labor and Workforce Development

In a March 29, 2018 published decision, the Superior Court of New Jersey Appellate Division held that an employee who resigns after being threatened with termination due to child care related absences may still be eligible to receive unemployment benefits.

Plaintiff Tamyra Cottman worked the overnight shift as a residential counselor for Quality Management Associates, Inc. The parent of three children with special needs, Cottman, in accordance with her employer's policy, attempted to find a co-worker who was willing to cover her shift after her babysitter quit unexpectedly, but was unable to do so. After notifying her supervisor that she was unable to come to work, and being told that she might be fired, Cottman decided to resign her position.

Cottman's application for unemployment benefits was denied, as she left work voluntarily without good cause. In affirming the denial of unemployment benefits, the Appeal Tribunal invoked a provision of the New Jersey Administrative Code (N.J.A.C.) which explicitly includes "care of children or other relatives" in the list of reasons that should disqualify applicants from receiving unemployment benefits. The Board of Review of the Department of Labor and Workforce Development affirmed the Appeal Tribunal's decision, which Cottman appealed pro se.

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In reversing the Board's decision, the Appellate Division focused on a provision of the N.J.A.C., and case law interpreting that provision, which states that when an employee is notified of an imminent layoff or discharge and is separated from work within 60 days thereof, he or she will not be deemed disqualified from receiving unemployment benefits. The Court also drew heavily upon an earlier Appellate Division ruling in *Shuster v. Board of Review*, in which a veterinarian, who was told that she was going to be replaced, resigned in order to protect her professional reputation.

In *Cottman*, given the threat of termination (albeit somewhat less definitive – as expressed by the terminology "might" be fired) and the fact that the plaintiff was previously placed on probation and was also told "not to play with her time," the Court reasoned that from the employee's perspective, resigning rather than waiting to be discharged reduced harm to her future employability. Ultimately, the Court held that under the circumstances, Cottman was not required to wait to be discharged in order to qualify for unemployment and was protected under the N.J.A.C.

The Court's ruling in *Cottman* will undoubtedly expand unemployment benefits eligibility for parents and caretakers who face the threat of imminent termination in response to absences or tardiness necessitated by child care needs. For employers, the practical impact of the decision will be a greater need to differentiate between situations in which a parent or caregiver is dealing with a true exigency, as opposed to situations in which an employee exhibits a pattern of absenteeism and tardiness and uses child care needs as an excuse. Moreover, the decision puts employers on notice that a threat of imminent discharge may be sufficient to remove an employee's resulting resignation out of the ambit of disqualifying situations in which the employee leaves work without good cause.

U.S. District Court Reinforces Heavy Burden on Employers to Make Sure Employees Explicitly Agree to Arbitrate
Schmell v. Morgan Stanley & Co.

A March 1, 2018 unpublished opinion out of the United States District Court for the District of New Jersey reinforces a growing trend in both state and federal courts to only enforce arbitration agreements upon a clear showing that all parties agreed to arbitrate and waive their right to a jury trial.

In *Schmell*, the Court declined to compel arbitration of a terminated Morgan Stanley employee's New Jersey Law Against Discrimination (NJLAD) claim because genuine issues of material fact existed as to whether the employee explicitly agreed to arbitrate the claim. Notwithstanding its acknowledgement that there is "an emphatic federal policy" in favor of arbitration, the Court reinforced the importance of a threshold inquiry into whether an enforceable contract to arbitrate exists between the parties.

In *Schmell*, employer Morgan Stanley argued that its former employee had agreed to arbitrate employment disputes, including his NJLAD claim, because the employee "received" notice of the subject Arbitration Agreement via an email to all employees informing them of changes to the Convenient Access to Resolutions for Employees (CARE) program. The email, which included a link to the new CARE Guidebook and Arbitration Agreement, carried the subject line "Expansion of CARE Arbitration Program" and was sent by Morgan Stanley's Human Resources Department. The email informed employees that the

program was mandatory unless they opted out, and that their continued employment without opting out constituted acceptance of the Arbitration Agreement. The new CARE Guidebook and Arbitration Agreement were also available on Morgan Stanley's internal portal and library of human resources files. Morgan Stanley employees had thirty days to opt out of the Arbitration Agreement.

The Court, in declining to enforce the CARE Arbitration Agreement, distinguished the employee's passive acquiescence against those cases where electronic acceptance was upheld, noting that in the other cases, "'[p]laintiff's review and acceptance of the Agreement [was] clearly recorded and dated' in the defendants' electronic systems." In those cases where electronic acceptance was sufficient to demonstrate explicit agreement, the employee was required to move through a series of forms or webpages and affirmatively complete some acknowledgement referencing arbitration or alternative dispute resolution requirements.

The Court acknowledged that, under New Jersey law, "'where an arbitration agreement states an employee accepts its terms by continued employment, the agreement will bind an employee who continues employment beyond the agreement's effective date.'" (see *Jaworski v. Ernst & Young, LLP*).

However, in *Schmell*, under the legal standard governing an employer's motion to enforce an arbitration agreement, the agreement was not enforced because there was a genuine issue of fact as to whether the employee had notice of the agreement. The employee presented a certified statement that he had no recollection of receiving, viewing, or opening the CARE email or accessing the link to the CARE system. The Court ruled that the employee's certification "presents a genuine issue of material fact as to whether he 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 CARE program." And without such adequate notice, "there is a genuine dispute of material fact as to whether the alleged assent through continued employment without opt-out was knowing and voluntary." Therefore the Court did not find that the plaintiff was bound to arbitrate pursuant to the Arbitration Agreement.

As state and federal courts continue to test the limits of knowing and voluntary assent by employees to be bound by arbitration agreements, employers should err on the side of caution in obtaining acknowledgements from employees that they have reviewed and agree to be bound by arbitration agreements.

Please contact the authors, **Maja M. Obradovic** and **Jemi Goulian Lucey**, to learn more about the issues discussed in this Alert or with any inquiries related to employment law and related litigation.