Arbitration Law Review

Volume 8 *Yearbook on Arbitration and Mediation* Article 11

5-1-2016

Sixth Circuit Deferential Treatment of Notice in Employment Arbitration Agreements: A Comment on *Tillman v. Macy's Inc.*

Caroline Myrdek

SIXTH CIRCUIT DEFERENTIAL TREATMENT OF NOTICE IN EMPLOYMENT ARBITRATION AGREEMENTS: A COMMENT ON *TILLMAN V. MACY'S, INC.*

By
Caroline Myrdek*

I. INTRODUCTION

In *Tillman v. Macy's Inc.*[1] the Sixth Circuit clarified the employee notice requirement in work place arbitration agreements.[2] The court conducted a fact focused review of the case before it in order to limit its prior holding in *Hergenreder v. Bickford Senior Living Group*.[3] The court overruled the district court and found sufficient evidence within the language of brochures and mailers to conclude that the Plaintiff, Tillman, had been provided sufficient notice of an opt-out arbitration agreement with Macy's.[4] The Sixth Circuit's deferential treatment of opt-out arbitration agreements in the employment field will likely encourage other businesses to follow the lead of Macy's and adopt opt-out arbitration procedures for all possible suits arising from employment.

II. BACKGROUND

Plaintiff, Tillman, became a Macy's employee in May 2005 when her previous employer, May Department Stores, merged with Macy's.[5] After the merger, Macy's introduced the new employees to its Solution InSTORE program, a dispute resolution system.[6] The program was a four step process with the fourth and final step consisting of binding arbitration.[7] Employees could opt-out of the fourth step without penalty.[8]

Macy's educated its employees about the Solution InSTORE program in several different fashions. First, Macy's sent an informational mailer to the employees' residences.[9] Next the employees attended an informational session where they watched a

---

* Caroline Myrdek is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2017 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

[1] Tillman v. Macy's, Inc., 735 F.3d 453 (6th Cir. Mich. 2013).

[2] *Id.* at 459.

[3] Hergenreder v. Bickford Senior Living Group, LLC, 656 F.3d 411 (6th Cir. Mich. 2011).

[4] *Tillman*, 735 F.3d at 460.

[5] *Id.* at 455.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 457.

[9] *Tillman*, 735 F.3d at 455-56.

video on the program, and a confirmation mailer was sent afterwards.[10] Finally, an electronic form on the program was sent.[11] Furthermore, at the session, employees received an informational brochure on the Solution InSTORE program.[12]

Although Tillman stated that she never received the mailings, they were sent to her address and were not returned as undelivered.[13] Tillman admitted to attending the informational session when the video was shown.[14] Tillman had the opportunity to fill out the opt-out paperwork several times, but failed to do so.[15] Since Tillman did not opt-out, she received an electronic communication confirming her enrollment in the program and provided further information on the Solution InSTORE program as well.[16]

Tillman filed a race discrimination suit against Macy's in the district court for the Eastern District of Michigan based on an alleged violation of Title VII of the Civil Rights Act of 1964 after her termination of employment in 2009.[17] Macy's then filed a motion to compel arbitration and to stay the action pending arbitration.[18] Macy's argued to the district court that arbitration should be compelled in accordance with the Solution InSTORE agreement in place between Tillman and Macy's.[19] Tillman argued that the opt-out system in the Solution InSTORE program "did not amount to an offer to enter into an agreement to arbitrate, and that she did not accept any such offer."[20] The district court agreed with Tillman, relying heavily on the prior Sixth Circuit case of *Hergenreder v. Bickford Senior Living Group, LLC*[21] and denied Macy's motion to compel arbitration.[22]

Since Tillman stated that she did not read the Solution InSTORE program, the district court held that "Tillman did not knowingly and voluntarily waive her right to a jury trial."[23] The district court also denied Macy's motion to stay proceedings during the

---

[10] *Id.*

[11] *Id.*

[12] *Id.* at 456.

[13] *Id.*

[14] *Tillman*, 735 F.3d at 455-56.

[15] *Id.* at 455-56.

[16] *Id.* at 456.

[17] *Tillman*, 735 F.3d at 455.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 456.

[21] Hergenreder v. Bickford Senior Living Group, LLC, 656 F.3d 411 (6th Cir. Mich. 2011).

[22] *Tillman*, 735 F.3d at 456.

[23] *Id.*

appeal.[24] Macy's then filed a motion with the Court of Appeals for the Sixth Circuit to stay the trial proceedings during the appeal, and the court granted that motion on June 19, 2012.[25]

III. COURT'S ANALYSIS

The Sixth Circuit began its analysis by stating that only "[a] limited review is required before compelling an unwilling party to arbitrate."[26] The court then stated that since arbitration agreements are a special kind of contract, it would "review the enforceability of [the] arbitration agreement according to the applicable state law of contract formation."[27]

A. *Macy's gave ample notice of its Solution InSTORE program to Tillman.*

The Sixth Circuit disagreed with the district court and held that Macy's did adequately notify Tillman of the arbitration program. Although Tillman alleged that she did not receive the mailers, the court proceeded "on the assumption that she received the materials sent to her, because properly addressed and posted mail is presumed to have been delivered and received by the person to whom it was addressed."[28] Tillman also argued that while she was present at the meeting where the informational video was shown, the process was "breezed over."[29] The court countered Tillman's statements with the fact that she was given brochures regarding the process and was even encouraged to conduct her own research on arbitration.[30]

The court also relied on the actual language of The Plan Document, finding that it was clear and informative on the rights of the employees and the nature of the agreement.[31] Further, the court found that the language the program directly stated how employees could opt-out of the program by signing and returning the form.[32]

The Sixth Circuit also disagreed with the district court's interpretation of the notice requirements in *Hergenreder*.[33] The court emphasized the factual distinctions

---

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Tillman,* 735 F.3d at 456; *see also* Seawright v. Am. Gen. Fin. Servs., Inc., 507 F.3d 967, 972 (6th Cir. 2007).

[28] *Id.* at 457 n.1.

[29] *Id.* at 455.

[30] *Tillman, 735* F.3d at 457.

[31] *Id.* at 459.

[32] *Id.*

[33] *Id.*

between the arbitration agreement in *Hergenreder* and in the Solution InSTORE program.[34] In *Hergenreder*, the "dispute-resolution policy [] was not provided by the employer or made available save for a vague reference in an employee handbook that did not explicitly mention arbitration."[35]

The court likened Tillman's case to the case of *Mannix v. County of Monroe,*[36] where an employment arbitration agreement was enforced.[37] In *Mannix*, the County "posted the revised [employment policies] at least four months before the [plaintiff's] termination . . . on an internal database available to employees [and held] meetings between department heads and employees and put the policies on the County's email system."[38] The court concluded that the discussions in both *Hergenreder* and *Mannix* supported its holding that Macy's provided sufficient notice to Tillman to which Macy's demonstrated its intent to enter into an arbitration agreement with Tillman.[39]

B. Tillman's conduct following the communication of the Solution InSTORE communications constitute acceptance of the arbitration agreement.

The Sixth Circuit stated that "[t]he manifestation of mutual assent may be made wholly or partly by . . . acts or conduct."[40] The court further noted that there is much support in Michigan case law that an offer may be accepted through continued employment.[41] Therefore, Tillman's conduct after receiving the communications of the offer demonstrably suggested that she assented to the arbitration agreement by continuing her employment and not returning the opt-out form at any point during her employment.[42]

The court stated that "[t]he burden was on Tillman to show that she did not voluntarily and knowingly waive her right to a jury trial."[43] The court used the plain language of the agreement to find that Tillman did not meet her burden, and that the district court erred in finding otherwise.[44] The Plan Document stated in part:

---

[34] *Id.*

[35] *Tillman, 735* F.3d at 459.; *see also Hergenreder*, 656 F.3d at 414-16.

[36] Mannix v. County of Monroe, 348 F.3d 526 (6th Cir. 2003).

[37] *Id.*

[38] *Tillman*, 735 F.3d at 459 (quoting *Mannix*, 348 F.3d at 536).

[39] *Id.* at 459-60.

[40] *Id.* (quoting Ludowici-Celadon Co. v. McKinley, 307 Mich. 149, 11 N.W.2d 839, 840 (Mich. 1943)).

[41] *Tillman*, 735 F.3d at 460.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 461.

> By agreeing to arbitration, the Associate and the Company agree to resolve through arbitration all claims described in or contemplated by Article 2 above. This means that neither the Associate nor the Company can file a civil lawsuit in court against the other party relating to such claims. If a party files a lawsuit in court to resolve claims subject to arbitration, both agree that the court shall dismiss the lawsuit and require the claim to be resolved through the Solutions InSTORE program.[45]

The Sixth Circuit concluded that "because the information conveyed in the Plan Document and brochure was part of a valid offer, and because Tillman accepted that offer by continuing her employment at Macy's without returning an opt-out form, it follows that Tillman knowingly and voluntarily assented to all of its terms, including this clearly stated waiver of the right to trial by jury."[46]

C. *Tillman knowingly and voluntarily waived her prospective civil rights claims through Macy's Solution InSTORE program.*

The Sixth Circuit used five factors to evaluate if there had been a knowing and voluntary wavier of prospective civil rights claims:

> (1) plaintiff's experience, background, and education; (2) the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had the opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) consideration for the waiver; as well as (5) the totality of the circumstances.[47]

Under the first factor Tillman argued that her high-school education was insufficient to provide the "experience, background, and education" necessary to knowingly waive her rights.[48] The court rejected Tillman's argument by emphasizing that the plain language of the agreement was written in a non-technical, easily comprehendible fashion.[49]

The court also stated that one factor alone is not dispositive.[50] Under the second factor, Tillman had over a year to opt-out of arbitration.[51] Under the fourth factor,

---

[45] *Id. at* 453.

[46] *Tillman*, 735 F.3d at 453.

[47] *Tillman*, 735 F.3d at 461.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

Tillman made no argument for lack of consideration.[52] Lastly, under the totality of the circumstances, considering the specific factual circumstances of the case, the court found that Tillman had made a knowing and voluntary waiver of her prospective civil-rights clams.[53]

Before concluding, the court noted that "opt-out schemes for accepting arbitration contain a risk greater than in opt-in systems that some employees do not know what they have agreed to."[54] But the court added that under Michigan law and under the circumstances in this case, the opt-out system was sufficient.[55] The Sixth Circuit reversed the denial of the motion to compel arbitration and remanded for further proceedings consistent with its opinion.[56]

IV. SIGNIFICANCE

As arbitration continues to grow in the United States as an effective alternative to litigation, businesses such as Macy's have been quick to adopt arbitration agreements with their employees. The Sixth Circuit has addressed the issue of "notice" in employment-related arbitration agreements several times in the past few years,[57] demonstrating the importance of adequate notice for adhesive arbitral contracts. This line of cases has established that the Sixth Circuit will take a highly factual look into the circumstances surrounding the arbitration agreement, concentrating on the fundamental fairness of the situation.

The Sixth Circuit focuses on general feelings of fairness and clarity when determining if an employee was given sufficient notice, in other words, whether it would be fair to enforce the agreement against the employee. In *Tillman*, the Sixth Circuit went into great detail about its prior holdings regarding notice. Emphasizing that its holding in *Hergenreder* was confined to its facts, employees were not directly told about the arbitration program.[58] This limiting focus on prior adverse case law points to the emerging, expansive view of adequate notice for the Sixth Circuit.

The Sixth Circuit only took two sentences in its entire opinion to address an alternative to an opt-out agreement, an opt-in agreement.[59] The court took a timid stance,

---

[52] *Tillman*, 735 F.3d at 461.

[53] *Id.*

[54] *Id.* at 462.

[55] *Id.*

[56] *Id.*

[57] *See generally* Kettles v. Rent-Way, Inc., No. 1:09-cv-230, 2009 U.S. Dist. LEXIS 42921, 2009 WL 1406670 (W.D. Mich. May 18, 2009); *Mannix* 348 F.3d 526; *Hergenreder*, 656 F.3d 411.

[58] *Tillman,* 735 F.3d at 459.

[59] John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 289 (defining an opt-in agreement where participants must take affirmative action to enter into a binding arbitration agreement with another party).

indicating that there is inherently more risk in opt-out agreements. The risk is that a party will be bound by an arbitral agreement that the party was not aware of prior. But the court stated it could not say opt-out agreements are insufficient under Michigan law, thereby indirectly supporting the use of opt-out agreements in the state of Michigan.[60]

In-house attorneys for corporations will likely point to this language for support of their choice to make opt-out arbitration clauses common in employment contracts. The only viable defense left to those opposing opt-out employment agreements is to argue lack of notice. This lack of notice can be due to unfair procedures by the opposing party that do not sufficiently educate and inform the opposing party of the arbitral agreement. This defense has been limited by the Sixth Circuit.[61] If the minimum notice requirements, as stated in *Tillman,* are met the "lack of notice" defense will not prevail.

Not only will there be an increase in employment arbitration agreements, there will be an increase in employment arbitration. The Sixth Circuit's opinion in *Tillman* will further provide support for the growing involvement of arbitration in the world of business.

V. CRITIQUE

The Sixth Circuit decision in *Tillman* addressed several aspects of arbitration. First, the court discussed the issue of jurisdiction, the decision of whether or not an arbitral agreement exists. Next, the court discussed at length the process and procedures used by Macy's in order to notify its employees of the Solution InSTORE program, this program was in essence an adhesive arbitral contract.[62]Lastly, the court briefly discussed the advantages and disadvantages of opt-in and opt-out arbitral agreements. Although the *Tillman* decision was informative on the issue of notice in adhesive arbitration contracts, questions still remain regarding what in fact qualifies as adequate notice.

A. Jurisdiction in Tillman was not determined under kompetenz-kompetence.

The decision in *Tillman* involved the threshold question of whether an arbitration agreement existed. Under the principle of *kompetenz-kompetenz*[63] the court would not have answered this jurisdictional question, the arbitrator(s) would have done so.[64]

The court could have given even more deference to arbitration by concluding that the arbitrator, not the court, should decide if the opt-out agreement was valid. When arbitrators are given the power to determine their own jurisdiction (*i.e.*, whether an

---

[60] *Tillman,* 735 F.3d at 462.

[61] *Id.*

[62] *Tillman,* 735 F.3d at 457.

[63] Kompetenz-kompetenz is a principle which parties may choose to incorporate into their arbitration agreements, but which is not part of U.S. law *per se*. *See* China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 287 (3d Cir. N.J. 2003).

[64] *Id.* at 276 (holding that under kompetenz-kompetenz an arbitrator can examine his or her own jurisdiction without interference by a court).

arbitration agreement exists), they will be more likely to find an agreement, or else they would lose the opportunity to arbitrate the claim.

B. The Solution InSTORE program is an example of an adhesive contract.

Adhesive contracts have been a point of controversy in the progression of arbitration.[65] The Sixth Circuit did not address the concept of adhesion when it discussed the arbitration agreement in *Tillman*. Although, the agreement in *Tillman* is adhesive, it was placed on the weaker party, the employee, by the much stronger and sophisticated party, the employer. While the agreement did have the option of opting out of arbitration, without consequence to employment, employees did not have the power or ability to change any terms of the agreement.[66] The agreement was offered to employees on a take-it-or-leave-it basis, mimicking the characteristics of an adhesive contract.

The court focused on the circumstances surrounding the agreement to determine if notice was fair, similar to the determination of whether a contract is conscionable.[67] In adhesive arbitration contacts, courts look to the procedural and substantive conscionability of the contract to determine if the contract is enforceable.[68] Procedural conscionability looks to the circumstances and the process of contract formation.[69] Substantive conscionability looks to the terms the agreement itself and whether deception or ambiguous language was used.[70] Although the Sixth Circuit did not state that it was using a conscionability test, its process mirrored such a test. The court looked to the circumstances exposing Tillman to the arbitration agreement.[71] The court also used the language of the agreement to find that it was written clearly to convey what the agreement was.[72]

The Sixth Circuit focused on how "fair" the formation of the arbitration agreement was, but did not consider the terms of the arbitration agreement. Although

---

[65] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (holding that the FAA preempts state law and allows for class action waivers in adhesive arbitral agreements).

[66] *Tillman,* 735 F.3d at 457.

[67] *Id.*

[68] *See generally* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Nyulassy v. Lockheed Martin Corp., 120 Cal. App. 4th 1267, 1268 (Cal. App. 6th Dist. 2004); Skirchak v. Dynamics Research Corp., 508 F.3d 49, 51 (1st Cir. Mass. 2007).

[69] *Nyulassy*, 120 Cal. App. 4th at 1268 (stating that "[a] mandatory employment arbitration agreement that contained a unilateral agreement requiring only the employee, not the employer, to arbitrate any and all of his employment claims, required the employee to submit to discussions with his supervisors as a condition precedent to arbitration, and placed a maximum time limit of 180 days from employment termination or when the dispute arouse lacked mutuality and rendered the agreement substantively unconscionable.").

[70] *Id.*

[71] *Tillman*, 735 F.3d at 457.

[72] *Id.*

employees had the option of opting-out, ninety-seven percent of employees did not.[73] In order to have an adhesive contract, like the one in *Tillman* upheld, more about the agreement should be known. For an arbitral employment agreement like this one to be considered "fair," the stronger party should bear most of the expenses of arbitration; selection of the arbitrator(s) should not favor the stronger party; and the location of the arbitration should be convenient for the weaker party.

C. Opt-out and opt-in contracts benefit opposite parties to arbitration.

The alternative to an opt-out arbitration agreement is an opt-in arbitration agreement. There is more of a burden on the employer if an opt-in agreement is used. The likelihood of participation in the agreement will most likely be less than an opt-out agreement, since a party must take some sort of independent action in order to opt-out. But there is more protection to employees in opt-in agreements, these employees must make a conscience decision to choose arbitration and then act on their decision. The Sixth Circuit in *Tillman* did not attempt to balance these considerations. The court in *Tillman* only addressed opt-in contracts to state that opt-out contracts are acceptable under Michigan law.[74]

The arbitration agreement in *Tillman* specifically stated that employment discrimination claims were to be arbitrated. [75] The Sixth Circuit used a five factor test to determine if the Plaintiff had knowingly and voluntarily waived her right to litigate civil rights claims arising from her employment.[76] Although arbitration has been expanded to legally cover statutory claims, even civil rights claims,[77] this decision expands arbitration's coverage even further. Under *Tillman*, employees can waive their right to litigate civil rights claims through an adhesive opt-out arbitration clause.[78]

D. Unanswered questions after Tillman.

The Sixth Circuit reasoned that the time frame Tillman had to opt-out gave her ample time to consult an attorney.[79] This language seems to support that employees have a duty to consult an attorney when given paperwork from their employment on arbitration. This seems to be a large burden for low level employees.

---

[73] *Id.* at 455.

[74] *Id.* at 462.

[75] *Id.* at 461.

[76] *Id.*

[77] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

[78] *Tillman* 735 F.3d at 462.

[79] *Id.*

Attorneys are not cheap, and the time to find and consult an attorney can be costly as well. It is an easier task to do personal research on the topic of arbitration, which the court also encouraged.[80] The *Tillman* court noted that the agreement itself included resources for learning information on arbitration.[81] What is unclear from this decision is the extent to which an employee has a duty to pursue information on arbitration and to which an employer is responsible for providing that information.

In *Tillman*, Macy's took four steps in order to notify the Plaintiff of the opt-out arbitration agreement.[82] These steps included mailers, a video, an informational meeting, and electronic communication.[83] The court held that combined, these steps provided sufficient notification to the Plaintiff of the arbitral clause.[84]

What is unclear from this decision is how many steps and what kind of communications are necessary, at a bare minimum, to provide notice of an opt-out arbitration agreement in the Sixth Circuit. The Sixth Circuit has had several opinions addressing notice, but if the court adopted a bright line rule for notice, it would not have to continue addressing the issue. After this decision, employers may adopt an identical or very similar process to Macy's Solution InSTORE program in order to ensure that, if challenged on notice, the Sixth Circuit will uphold the arbitration agreement.

VI. CONCLUSION

In *Tillman*, the Sixth Circuit upheld an adhesive opt-out arbitral agreement between a highly sophisticated employer and its employee. The court stated that the inclusive agreement covered arbitration of all matters pertaining to employment, including civil rights claims.[85] This decision favors employers and corporations, allowing for employees to waive their right to a jury trial for all possible future claims arising from their employment. Based on the decision in *Tillman,* employers, specifically in the Sixth Circuit, will likely adopt opt-out arbitration clauses with their employees. If these employers follow a basic and fair notification policy, as outlined in *Tillman*, these arbitration clauses are likely to be binding.[86]

---

[80] *Id.*at 457.

[81] *Id.*

[82] *Id.* at 456-57.

[83] *Tillman,* 735 F.3d at 456-57.

[84] *Id.* at 456.

[85] *Tillman,* 735 F.3d at 462.

[86] *Id.* at 457.