

IF YOU WANT YOUR EMPLOYEES TO ARBITRATE, BE SURE TO TELL THEM

September 2011 By Steve Palazzolo

I'm not sure how many of you have arbitration agreements tucked away in your employee handbooks anymore, but if you do you might want to take a look at an opinion from the 6th Circuit issued Tuesday.

In *Hergenreder v. Bickford Senior Living Group, LLC*, which was decided on August 30, 2011, the 6th Circuit found that a reference to an arbitration requirement contained in an employee handbook did not bind an employee who sued Bickford for violation of the Americans with Disabilities Act. The court stated: "Because there is no indication that Hergenreder was notified of the existence of the arbitration agreement, much less that she manifested an intent to agree to its terms" Ms. Hergenreder could not be held to its terms and she was allowed to sue in federal court rather than arbitrate.

When she was hired, Ms. Hergenreder was asked to sign a bunch of documents, including an acknowledgment that she had read and understood the employee handbook. According to the court: "The Handbook is divided into sixteen different sections, covering a wide variety of topics relevant to Hergenreder's employment. It begins by stating in Section I that it will acquaint you with the policies and procedures that apply to your employment," but also that this handbook is intended as a summary only and is not a contract between Bickford Cottage and its employees. A full copy of Bickford Cottage's Personnel Policies is located in the Director's office and may be viewed by any employee." Both parties to the suit agreed that the Handbook was not a contract of employment.

"What the parties did not agree on, however, is the significance of one sentence within Section XII, which is entitled "Employee Actions," and which provides, in full, as follows: "Dispute Resolution Process: Please refer to the Eby Companies Dispute Resolution Procedure (DRP) for details."

Bickford argued that this sentence in the handbook, which referred to a policy that was not in the handbook, compelled Ms. Hergenreder to arbitrate any employment dispute she had with Bickford, including her ADA claim.

The court agreed with Hergenreder and basically held that an agreement to arbitrate was not formed because there was neither an offer to enter into an arbitration agreement nor an acceptance of that offer. The language in the handbook and the handbook acknowledgment simply did not, according to the court, amount to a valid contract to arbitrate.

So, what is the moral of this story? If you want your employees to be required to arbitrate disputes, don't bury that requirement in your employee handbook. Instead, have a separate agreement to arbitrate and make sure the employee signs that agreement.

You can find the 6th Circuit's full opinion at <http://www.ca6.uscourts.gov/opinions.pdf/11a0247p-06.pdf>