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Is Silence Golden?

Courts consider whether an employee's failure to reject an offer to arbitrate creates a binding agreement.

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A GROWING number of companies are instituting large-scale dispute resolution and arbitration programs for all disputes that employees may have with their employer. An estimated 15 to 20 percent of businesses, including some of the nation's largest employers, now require employees to arbitrate employment disputes, in contrast to less than 10 percent of companies in 1995.[1] As part of this trend, companies are providing notice of their arbitration policy in information sessions with their employees and advising employees that this policy is controlling upon them unless they opt out of it in a pre-determined way. Is the employee bound by the arbitration policy, however, if he or she does not affirmatively opt out of it? In other words, is silence golden?

It is a fundamental principle of contract law that there is no agreement if the only facts are that one party makes an offer and the offeree remains silent. The district court for the Eastern District of New York recently revisited this principle in a pair of decisions, with seemingly conflicting results.

In those cases, *Manigault v. Macy's East, LLC*[2] and *Dubois v. Macy's East Inc.*,[3] the court addressed whether an employee who had received notice of her employer's policy requiring that all employment disputes be submitted to arbitration became bound to arbitrate employment disputes by virtue of the employee's failure to affirmatively opt out of that policy. In *Dubois*, consistent with decisions from other jurisdictions considering analogous situations, Judge Nicholas Garaufis held that the employee had become bound to arbitrate disputes with Macy's, his employer, by failing to opt out of the policy. In *Manigault*, however, Judge Frederic Block held that the employee's "silence" did not constitute acceptance of Macy's offer to enter into an arbitration agreement. Macy's has appealed the *Manigault* decision.

This article discusses the conflicting holdings in *Manigault* and *Dubois* and the issues the U.S. Court of Appeals for the Second Circuit will need to tackle when it considers Macy's appeal.

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Agreements to Arbitrate

Both *Manigault* and *Dubois* involved agreements to arbitrate. Arbitration clauses in employment contracts are generally governed by the Federal Arbitration Act (FAA). Under the FAA, there is a strong federal policy favoring arbitration as a means for resolving disputes.[4] But an employee cannot be compelled to arbitrate a dispute in the absence of an agreement to do so. Whether there is an agreement to arbitrate is determined by state law governing the formation of contracts. In *Manigault* and *Dubois*, New York law governed.

Under New York law, there must be an offer to arbitrate and acceptance of the offer. The agreement to arbitrate must also be in writing.[5] The agreement, however, does not have to be signed by the party against whom arbitration is sought if that party's conduct evinces intent to be bound by the agreement.[6] Courts will examine the "manifestation or expression of assent…by word, act or conduct"[7] in order to determine whether or not the parties agreed to arbitrate. Courts will also consider the past conduct of the parties and custom and practice in the industry.[8] The application of these factors accounts for the different results in *Manigault* and *Dubois*.

'Manigault'

In *Manigault*, Carla Manigault filed a sexual harassment and retaliation lawsuit against Macy's, her employer. Macy's brought a motion to compel arbitration because a company-wide dispute resolution policy called Solutions InSTORE (SIS) required the arbitration of all employment disputes.[9] Ms. Manigault had notice of this policy and had not opted out of it.

Before SIS took effect, Ms. Manigault, along with all other employees, had to attend an informational meeting in which SIS was explained. The speakers at the meeting informed the employees of the procedure for opting out of SIS's arbitration provision. Macy's also mailed to each employee a packet of information explaining SIS, including an election form that the employee had to complete and return to Macy's SIS office in order to opt out of the arbitration provision. Since Ms. Manigault never returned the election form, Macy's argued that she had, in effect, accepted Macy's offer to arbitrate all employment-related disputes.

Ms. Manigault argued that she was not bound to arbitrate her employment-related claims because she never accepted Macy's dispute resolution policy. She did not argue that she had opted out of the program by mailing in the election form. Instead, she contended that she had never received the package explaining SIS, and, therefore, was not on notice that she had to opt out of the arbitration provision if she did not want to be bound by it. But Macy's records showed that the SIS package was in fact mailed to Ms. Manigault and that she had also received notice of SIS and the opt-out procedure when she attended the informational meeting.

Despite Macy's records, the court held that Ms. Manigault could not be compelled to arbitrate because her silence and inaction could not be construed as acceptance of Macy's dispute resolution program. The court based its ruling on the "fundamental tenet of contract law that '[w]here the recipient of an offer is under no duty to speak, silence, when not misleading, may not be translated into acceptance merely because the offer purports to attach that effect to it.'"[10]

Restatement (Second) of Contracts §69(1) sets forth three scenarios in which acceptance may be implied based upon a party's conduct even though the party is silent as to the offer. An offeree's silence and inaction will operate as acceptance when (1) the offeree takes the benefit of the offered services with reasonable opportunity to reject them and reason to know that they

were offered with the expectation of compensation, (2) the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer, and (3) the offeree should be in a position to notify the offeror if he or she does not intend to accept the offer because of previous dealings or otherwise.[11]

Macy's argued that Ms. Manigault should be bound to arbitrate her claims because of criteria (2) and (3) above: Macy's had given Ms. Manigault notice of its arbitration policy so that her assent could be manifested by silence or inaction, and because based upon the course of dealing between Macy's and Ms. Manigault, it was reasonable for Macy's to expect Ms. Manigault to notify it if she did not accept the offer to arbitrate.

Judge Block disagreed. The court held that Ms. Manigault's conduct did not amount to a course of dealing sufficient to be deemed acquiescence to SIS. Although Macy's exhibited conduct sufficient to evince an agreement to arbitrate, the only conduct attributable to Ms. Manigault was her attendance at a compulsory informational meeting. The court reasoned that such conduct did not give rise to a course of dealing for the simple reason that Ms. Manigault did not say or do anything that could have given Macy's reason to understand that her silence would constitute acceptance.[12]

'Dubois'

Dubois considered the same question of whether an employee who had failed to opt out of Macy's SIS policy had thereby agreed to arbitrate all employment disputes. Serge Dubois filed a sexual harassment lawsuit against Macy's, alleging that he was terminated because he refused his superior's sexual advances. Macy's moved to compel arbitration because Mr. Dubois had failed to opt out of SIS. Mr. Dubois argued that he did not intend to be bound by SIS's arbitration provision even though he had failed to return the opt-out form to Macy's and had written a letter specifically requesting SIS's assistance in resolving his dispute.

In contrast to the holding in *Manigault*, Magistrate Judge Lois Bloom held that Mr. Dubois was indeed bound to arbitrate his claims. The court found Mr. Dubois' failure to affirmatively opt out of SIS and his affirmative act of seeking SIS's assistance demonstrated his intent to be bound by SIS's arbitration policy.[13] Mr. Dubois could not, on the one hand, actively seek help from the program, and simultaneously claim, on the other hand, that the program's dispute resolution policy did not apply to him. In sum, the court concluded that Macy's had demonstrated that there was "some objective inconsistent conduct or other indicia of intent to accept the offer."[14]

Judge Garaufis adopted Magistrate Judge Bloom's recommendations in their entirety.[15] Judge Garaufis held that there was ample evidence evincing Mr. Dubois' intent to be bound to SIS.

Cases Outside of New York

Most jurisdictions addressing this question have found that an employee's failure to opt out of a dispute resolution policy is equivalent to acceptance of the policy. For example in *Circuit City Stores Inc. v. Najd*,[16] a decision by the U.S. Court of Appeals for the Ninth Circuit, an employee, Monir Najd, of Circuit City brought an employment discrimination lawsuit against his employer. Circuit City, similar to Macy's, had adopted an alternative dispute resolution program known as the Associate Issue Resolution Program (AIRP).

AIRP provided a process including final and binding arbitration through which Circuit City employees could resolve employment-related disputes. Circuit City, also similar to Macy's, required its employees to attend informational meetings at which AIRP was explained and at which the employees received written materials about AIRP. At these meetings, Circuit City informed employees that if they did not wish to participate in the program, they had to complete and mail in an opt-out form within 30 days of notification of the program.

Circuit City brought a motion to compel arbitration, arguing that Mr. Najd had agreed to submit his employment-related claims to arbitration because he had notice of AIRP and had never returned the opt-out form. Mr. Najd had received informational materials about AIRP and had signed an acknowledgement form. The court concluded that that form "clearly set out in writing the significance of [the employee's] failure to opt out and described in detail the mechanism by which he could express his disagreement."[17] Under such circumstances, the Ninth Circuit concluded that Mr. Najd's failure to return the opt-out form was "indistinguishable from overt acceptance."[18]

It is a fundamental principle of contract law that there is no agreement if the only facts are that one party makes an offer and the offeree remains silent. The district court for the Eastern District of New York recently revisited this principle in a pair of decisions, with seemingly conflicting results.

Likewise, in *Nguyen v. Federated Dep't Stores Inc.*,[19] the district court for the Northern District of Georgia compelled an employee of Federated Department Stores to arbitrate his employment-related claims against his employer because it found that the employee's failure to opt out of SIS's arbitration provision created a binding agreement to arbitrate. The evidence contradicted Tam Nguyen's claim that he had not received notice of SIS and, therefore, had not received the election form. Mr. Nguyen admitted to attending at least one informational session in which SIS was explained, and at which he was informed of the offer to arbitrate and the process by which the offer could be declined. Contrary to the *Manigault* court, the *Nguyen* court found that, under such circumstances, silence or inaction constituted acceptance.[20]

Conclusion

The *Manigault* court's holding that silence or inaction does not constitute acceptance of an offer to submit all employment claims to arbitration conflicts with the other decisions on this issue. One reason that other courts faced with analogous facts have found that binding agreements to arbitrate existed is the strong public policy favoring arbitration. But a primary reason for those decisions was that the offeror (the employer) had provided the offeree (the employee) specific notice that explained that assent may be manifested by silence or inaction.

The *Manigault* court acknowledged that its opinion conflicted with these other decisions, but found that other courts had "compromised the time-honored principle of contract law that '[i]t is certain that, if the only facts are that A makes an offer to B and B remains silent, there is no contract.'"[21] Further, the *Manigault* court expressed concern that silence could mean several things other than acceptance of the offer to arbitrate. Citing to Professor Arthur Linton Corbin's treatise on contract law, the court found that silence could indicate that the offeree did not hear or understand the offer, or that the offer was still under consideration.[22] Macy's even conceded that some of its employees may not be fluent in English and, therefore, may not have understood the mailing describing SIS and the procedure for opting out of its arbitration provision.

The Second Circuit's decision in *Manigault* could have a significant impact on companies with arbitration policies. In any event, employers should recognize that obtaining an employee's affirmative acceptance to an offer to arbitrate, rather than relying on the employee's silence, is the best way to ensure that the employee is bound to an arbitration agreement.

1. Nathan Koppel, "When Suing Your Boss Is Not an Option—More Companies Are Requiring Employees to Settle Disputes by Going Into Arbitration," The Wall Street Journal, Dec. 18, 2007, at D1.
2. 506 F.Supp.2d 156 (EDNY 2007).
3. 2007 U.S. Dist. LEXIS 66500 (EDNY July 13, 2007) (Magistrate Judge Lois Bloom), adopted by *Dubois v. Macy's East Inc.*, No. 06 Civ. 6522 (NGG) (LB), 2007 U.S. Dist. LEXIS 87039 (EDNY Nov. 27, 2007) (U.S.D.J. Nicolas G. Garaufis).
4 *JLM Indus. Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 171 (2d Cir. 2004).
5 New York Civil Practice Laws and Rules §7501.
6. *Rudolph & Bear, LLP v. Roberts*, 260 A.D.2d 274, 275 (1st Dept. 1999).
7. *Dubois*, 2007 U.S. Dist. LEXIS 66500, at *13 (quoting *Register.com Inc. v. Verio Inc.*, 356 F.3d 393, 427 (2d Cir. 2004)) (quoting 22 N.Y. Jur.2d Contracts §29).
8. *Just-In-Material Designs, Ltd. v. I.T.A.D. Assocs. Inc.*, 61 NY2d 882 (1984); *Schubtex Inc. v. Allen Snyder Inc.*, 49 NY2d 1 (1979).
9. SIS is a four-step process for resolving work-place disputes. Steps 1 through 3 cover all employees and involve internal, in-store, processes for informally resolving disputes. Step 4 provides for voluntary arbitration.
10. *Manigault*, 506 F.Supp.2d at 161 (citation omitted).
11. Restatement (Second) of Contracts §69(1).
12. *Manigault*, 506 F.Supp.2d at 162.
13. *Dubois*, 2007 U.S. Dist. LEXIS 66500, at *13.
14. *Manigault*, 506 F.Supp.2d at 163.
15. *Dubois v. Macy's East Inc.*, No. 06 Civ. 6522 (NGG)(LB), 2007 U.S. Dist. LEXIS 87039 (EDNY Nov. 27, 2007).
16. 294 F.3d 1104, 1109 (9th Cir. 2002).
17. Id. at 1109.
18. Id.
19. 2005 U.S. Dist. LEXIS 39642 (N.D. Ga. July 12, 2005).
20. Id., at *11. See also *Johnson v. Macy's South, LLC*, 2007 U.S. Dist. LEXIS 72519 (N.D. Ga. Sept. 27, 2007) (following the *Nguyen* court in compelling arbitration); *Hicks v. Macy's Dep't Stores Inc.*, 2006 U.S. Dist. LEXIS 68268 (N.D. Cal. Sept. 11, 2006) (holding that employees impliedly agreed to arbitrate their employment disputes by failing to return their opt-out forms); *Garrett v. Circuit City Stores Inc.*, 338 F.Supp.2d 717 (N.D. Tex. 2004), rev'd on other grounds, 449 F.3d 672 (5th Cir. 2006) (compelling arbitration); *Wright v. Circuit City Stores Inc.*, 82 F.Supp.2d 1279 (N.D. Ala. 2000) (holding that employee was bound to arbitration because he did not return opt-out form).
21. *Manigault*, 506 F.Supp.2d at 163.
22. Id., citing 1 Arthur Linton Corbin & Joseph M. Perillo, Corbin on Contracts (revised ed. 1993) §3.18.