

# One Minute Memo<sup>®</sup>



## Conscientious Objectors to Arbitration Policy Can Bring Their Cases in Court

By Christopher Lowe and Meredith-Anne Berger

**Seyfarth Synopsis:** Last week, the Third Circuit held that two employees could sue their employer in court despite a dispute resolution policy requiring binding arbitration, because those same employees had objected to the policy at the time of its adoption. (Scott v. Education Management Corporation, No. 15-2177 and Jones v. Education Management Corporation, No. 15-2225 rev., Western District of Pennsylvania, dismissing the plaintiffs' ADEA and Title VII claims.)

Scott and Jones were employed as Assistant Directors of Admissions at the Art Institute of Pittsburgh, a subsidiary of Education Management Corporation ("EDMC"). Both employees, in nearly identical Charges with the EEOC, claimed that they were subject to unfair performance evaluations on the basis of their ages. Jones also alleged discrimination on the basis of his race. Following the filing of those Charges, EDMC instituted a company-wide alternative dispute resolution ("ADR") policy, which included final binding arbitration. The policy was intended to create the exclusive means by which all work-related disputes would be resolved, including those sounding in "discrimination, harassment, retaliation, wrongful termination or other alleged unlawful treatment under state, local, or federal law."

The plaintiffs' attorney sent an email to EDMC on behalf of Jones, indicating that Jones believed the policy was "illegal" and violated Title VII. The plaintiffs then amended their EEOC complaints to include a retaliation claim for the institution of the ADR policy. After requesting Right to Sue letters from the EEOC, the plaintiffs filed complaints in federal court, alleging violations of the ADEA, Title VII, and Pennsylvania common law. Both cases were dismissed with prejudice because the claims fell within the scope of the ADR policy, and since the plaintiffs continued to work after the policy was instituted, they manifested their assent to the policy.

On appeal, the Third Circuit focused on the issue of mutual assent. EDMC argued that an employee's assent is manifested when the employee continues to work for the employer. The court noted that the plaintiffs promptly voiced their specific objection to and rejection of the ADR policy, which precluded their assent to the policy. The court held that on these facts, the plaintiffs' continuing to work did not manifest an assent to the policy. The court also noted that Pennsylvania law would dictate the same holding.

This decision is "not precedential," undermining the potential force of this holding in future cases. However, the Third Circuit may not be as deferential as other circuits toward agreements to resolve disputes through mediation or arbitration, and employees may be entitled to their day in court despite an agreement to the contrary.

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