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## Northern District of Illinois Holds Party Waived Right to Compel Arbitration

In *Smith v. Adams & Associates*, No. 1-14-C-5522, 2015 WL 5921098, at \*5, (N.D. Ill. Oct. 9, 2015) the court denied a defendant's motion to compel arbitration because the defendant had participated in litigation and thereby waived her right to arbitrate.

Mo'nique Smith, the plaintiff, was hired by Adams & Associates, the defendant. Her employment agreement contained a broad arbitration clause requiring employment-related disputes to be arbitrated. One year later, the defendant terminated the plaintiff's employment.

In July 2014, the plaintiff filed a *pro se* employment discrimination lawsuit against the defendant. The court appointed counsel to represent the plaintiff, and the appointed counsel filed an amended complaint. At a status hearing the following February, the court set a discovery cut-off date as well as a future status date. In April 2015, the defendant served the plaintiff with interrogatories and a request to produce. On June 4, 2015, the defendant moved to compel arbitration.

Around the same time it moved to compel arbitration, the defendant made an oral motion for the dismissal of the plaintiff's appointed counsel. The defendant argued that the plaintiff's counsel from a state-court action had filed an appearance in the instant federal case and that the plaintiff should be barred from proceeding with both retained and appointed counsel. The court denied the defendant's oral motion and allowed the plaintiff to proceed with both attorneys.

In support of its motion to compel arbitration, the defendant argued that the arbitration clause in The plaintiff's employment agreement mandated that the parties arbitrate the employment discrimination claims. In opposition, the plaintiff argued that the defendant waived its right to arbitrate the employment dispute by choosing to proceed in the federal forum and defend against the plaintiff's claims. The court agreed with the plaintiff.

The court acknowledged that the party asserting waiver has a heavy burden in order to overcome the "strong federal policy favoring enforcement of arbitration agreements." *Id.* at \*3. When considering if a party waived its right to arbitrate, the court considered several factors: diligence in litigation; participation in litigation; any substantial delay in its request for arbitration; the party's participation in discovery; whether its conduct was intentional or merely responsive; and "whether the party opposing arbitration 'was prejudiced by its reliance on the litigious behavior of the waiving party.'" *Id.* at \*3-4. The court noted that waiver is a case-specific inquiry based on the totality of the circumstances.

The court held that the defendant waived its right to arbitration due to its participation in litigation. The court found waiver from the defendant's acquiescence to the discovery deadline, its initiation of discovery, and its delay of almost one year before filing its motion to compel arbitration. *Id.* at \*4.

Also supporting a finding of waiver, according to the court, was the fact that the defendant's litigation conduct was not merely responsive. *Id.* Specifically, the court stated that the defendant's intentional requests for the removal of the plaintiff's appointed counsel "represent[ed] an affirmative effort to gain a substantive advantage in the federal court case by attempting to force" the plaintiff to proceed pro-se or with her attorney from the state-court action. *Id.* The court's interactions with counsel "strongly suggest[ed] that [the defendant] made a conscious decision to wait to assert its right to arbitrate to secure whatever tactical advantage it could against an indigent Plaintiff." *Id.* at \*5.

The lesson learned from *Smith* is simple: If you want to enforce an arbitration agreement, then "don't delay!" A party seeking to enforce an arbitration clause must request the "earliest feasible determination" of whether claims must be arbitrated. *Id.* at \*5. Any litigation conduct that is more than merely responsive—initiating discovery, for example—could very well be construed as a waiver of the party's right to arbitrate.

**Keywords:** alternative dispute resolution, adr, litigation, motion to compel arbitration, waiver, waiver by participation

— *Eileen Boyle, Novack and Macey LLP, Chicago IL*

