

EMPLOYMENT AND LABOR PRACTICE GROUP

**COURT STRIKES DOWN HALLMARK'S MANDATORY
ARBITRATION PROGRAM**

On June 30, 2008, the Missouri Court of Appeals for the Western District in Kansas City issued an important decision striking down a mandatory arbitration program utilized by Hallmark which was part of its Dispute Resolution Program (“DRP” or “Program”). Hallmark’s DRP was designed to address discrimination, retaliation and other employment claims. Read further to discover why the court in *Morrow v. Hallmark Cards, Inc.*, (Mo. App. WD 06/30/2008) (WD67440) concluded that Hallmark’s carefully drafted DRP was unenforceable.

THE DISPUTE RESOLUTION PROGRAM

Hallmark’s DRP had four levels consisting of an open door process, final internal review, non-binding mediation by an outside mediator, and if all those steps failed, level four provided for a decision by an independent neutral arbitrator to determine the merits of the claim. Under the DRP, the arbitrator’s decision was final, and the employee had no right to a jury trial.

The parties to the case agreed that a party cannot be required to arbitrate a dispute which it has not agreed to arbitrate. However, the parties disagreed regarding whether there was a binding contract to arbitrate Morrow’s age discrimination and retaliation claims.

The Missouri Court of Appeals expressed concern that the requirement to arbitrate was not mutual because if Hallmark wished to sue an employee for any reason it could do so without having to arbitrate, but the employee had to arbitrate if he or she had a claim against Hallmark. The appeals court was also troubled that under the DRP, Hallmark had the sole discretion to modify or discontinue the DRP at any time. Thus, the court pointed out that under the DRP Hallmark had the power to change the terms of the Program or even to decide who to select as an arbitrator. Even though Hallmark stated it was willing to have the court interpret the DRP in such a manner that

any change to the Program would be effective for future cases only, the court stated that it would review the DRP as written at the time it was adopted.

**CONTINUED AT WILL EMPLOYMENT DOES NOT
CONSTITUTE CONSIDERATION**

It is a fundamental principal of contract law that there must be some consideration in order for a contract to be enforceable. Typically, consideration is provided by each party giving the other party some benefit or promising to give the other party some benefit or by one party suffering some detriment in exchange for a promise by the other party to perform under the contract. Furthermore, a court does not typically concern itself with the amount of consideration (i.e., \$10 can be adequate consideration to enforce a promise to perform a substantial undertaking). Hallmark argued that its agreement to continue to employ Morrow was sufficient consideration (i.e., benefit to Morrow and detriment to Hallmark) to justify forcing Morrow to arbitrate her employment disputes, even after the end of her employment. However, the Court concluded that since Morrow was an employee at will and could be terminated at any time for any reason, the promise of continued employment was illusory and did not amount to adequate consideration. The court reasoned that Hallmark could have terminated Morrow 15 minutes after the DRP took effect.

CONCLUSION OF THE APPEALS COURT

The Appeals Court concluded that there was no valid contract or agreement to arbitrate; therefore Morrow could proceed in Missouri state court against Hallmark on her retaliation and age discrimination claims. The Court did not decide other issues that had been raised by Morrow’s attorney including whether the Hallmark Program required an illegal waiver of the right to a jury trial or whether the Program was structured in such a way that it would not be

considered unconscionable – unreasonably unfair. Seven judges agreed with the majority opinion. Two judges filed a separate concurring opinion agreeing with the result but on a narrower ground by concluding that Hallmark’s program failed because Hallmark retained in its written Program sole discretion to modify or discontinue the DRP at any time. The two concurring judges pointed out that they were not presented with an arbitration program imposed only on newly hired employees or an arbitration program accompanied by an increase in pay or substantive changes to the employee’s terms or conditions of employment or a program in which the employer’s right to modify or terminate the program is explicitly and meaningfully limited.

CONCLUSION

It is reported that Hallmark is seeking a transfer (i.e., appeal) to the Missouri Supreme Court. This case certainly represents a departure from prior Missouri cases that have considered continued employment to be adequate consideration for a contract. In light of this new decision, every Missouri employer which has a mandatory arbitration program for employment discrimination and related employment claims should have their dispute resolution program reviewed by counsel experienced in such matters to assess the implications of this new decision and how to deal with it.

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