Joel Grossman is a mediator and arbitrator with JAMS in Santa Monica. His practice focuses on employment, entertainment and other business disputes. He has been selected as a California Top Neutral four times by the Daily Journal. Joel can be reached at jgrossman@jamsadr.com.

# Is Staying at Work an Agreement to Arbitrate?

## *Bayer v. Neiman Marcus Holdings, Inc.*

**By Joel M. Grossman**

In the wake of the highly publicized United States Supreme Court decision in *AT&T Mobility v. Concepcion*,[1] many management-side lawyers have urged their clients to take advantage of the decision. Specifically, they have urged employers who have arbitration agreements with their employees to add a class waiver provision to the agreement; as for their clients who do not yet have an arbitration agreement, some counsel have advised them to adopt an arbitration agreement with a class waiver provision. By way of background, *Concepcion* held that class action waivers are fully enforceable, but it is not yet clear whether under California law, class action waivers in wage and hour cases ultimately will be deemed enforceable. This article will not address that issue, but will focus on more practical questions: If an employer imposes a new or revised policy requiring all disputes to be arbitrated, is that policy binding on employees who don't sign it? What if the employer's announcement states that the new arbitration policy is mandatory, not optional, and that employees who continue in employment are deemed to have accepted it whether or not they actually sign it? Is it in fact the case that continued employment is deemed acceptance of a class waiver through the creation of an implied-in-fact contract? Would it matter if an employee actually objected to the policy, and told the company that he had no intention of arbitrating any claims?

These intriguing questions are addressed in the Northern District of California's recent decision in *Bayer v. Neiman Marcus Holdings, Inc.*[2] Plaintiff Bayer was employed by Neiman Marcus in 2007, when it advised its employees by mail that it was implementing a mandatory arbitration program. Employees were each provided with an arbitration agreement that they were directed to sign. However, the plan also stated that acceptance of the program was a condition of ongoing employment, so that even employees who did not sign it were deemed to have accepted it merely by remaining on the job. Bayer not only did not sign the agreement, he told Neiman Marcus both orally and in writing that he refused to become a party to the agreement. He did, however, remain an employee. Four years later, Bayer's employment was terminated, and he filed a lawsuit in court, the details of which are not discussed here. Neiman Marcus filed a motion to dismiss the lawsuit and compel arbitration, pursuant to the arbitration agreement that it claimed Bayer had accepted by remaining in employment after the policy was distributed.

The court denied Neiman Marcus' motion to compel arbitration. The court began its discussion of the issue by noting that under California law, an employee's acceptance of the terms of an arbitration agreement can be either express or implied-in-fact. The court gave as an example of an express agreement a case in which the agreement to arbitrate was included in the job application.[3] As an example of an implied-in-fact agreement to arbitrate, the court cited a case with similar, but not identical, facts to *Bayer.* In *Craig v. Brown & Root*,[4] the court held that the act of an employee remaining on the job after the employer issued an arbitration agreement was deemed an implied acceptance of the agreement. In that case, the employer twice mailed the arbitration agreement to all employees, including the plaintiff. Although the plaintiff claimed that she never received the documents, the trial court relied on the presumption that a letter correctly addressed and mailed is deemed received. The court of appeal deferred to the trier of fact, who weighed the plaintiff's denial that she received the document against the presumption of receipt, and ruled against the plaintiff. For present purposes, the key teaching of the case is not the presumption that a properly mailed letter is deemed received. Rather, given the assumed fact that the plaintiff received the letter, which the trier of fact determined, Craig's continued employment constituted implied-in-fact acceptance of the agreement. In the court's words: "there is substantial evidence (1) that the memorandum and brochure [containing the arbitration agreement] were received by Craig in 1993 and again in 1994; (2) that she continued to work for Brown & Root until 1997; and (3) that she thereby agreed to be bound by the terms of the Dispute Resolution Program, including its provision for binding arbitration."[5]

In reaching its decision, the court in *Craig* explained: (1) that an arbitration agreement is like any other contract; and (2) that it had relied on general rules of contract interpretation: "General principles of contract law determine whether the parties have entered a binding agreement to arbitrate."[6] The court relied on a case that did not concern arbitration, but held that an employee who remains on the job after the employer announces changed working conditions is deemed

to have accepted the offer, creating an implied-in-fact contract.[7]

In light of this precedent, what led the court in *Bayer* to reject the employer's motion to compel arbitration? After all, Bayer did not deny that he *received* the employer's arbitration program documents and he clearly remained in employment after receiving the package. Under *Craig*, those facts would seem sufficient to bind the plaintiff. However, rather than stop with *Craig*, the *Bayer* court looked to other California cases for additional guidance. In *Romo v. Y-3 Holdings*,[8] the plaintiff employee was presented with a multi-section employee handbook, one section of which was an arbitration agreement that had its own signature line. The employee did not execute this section; however, she did execute the final section of the handbook, titled "EMPLOYEE ACKNOWLEDGMENT," which bound her to "all matters included within the employee handbook."[9] The employer argued that the term "all matters included within the handbook" clearly encompassed the arbitration clause. The court rejected this argument based on the specific language of the arbitration section, which began with the phrase "this Mutual Agreement to Arbitrate" and referred to "this Agreement to Arbitrate," as well as the fact that the arbitration section had its own signature line. The court therefore concluded that the parties' intention was to treat the arbitration section separately: "[t]he fact that Section VII contemplates a signature from the employee separate from that required after the heading EMPLOYEE ACKNOWLEDGMENT, as well as signature by the employer, suggests a separate, severable agreement."[10] Thus, the *Romo* court concluded that the employee did not agree to the arbitration clause.

More significant to the *Bayer* court was the fact that Bayer actually advised the company, both orally and in writing, that he did *not* accept the arbitration clause: "Under *Craig*, it would appear that Plaintiff's acceptance of the Arbitration Agreement can be implied by his continued employment at Neiman Marcus. However, as Plaintiff correctly points out, the plaintiff in *Craig* did not express refusal of the new terms, explicitly reject the new terms, or state any disagreement with them."[11] By contrast, the plaintiff in *Bayer* expressly told his supervisors that he rejected the arbitration agreement, wrote two letters to the company advising it of this rejection, and even filed charges with the Equal Employment Opportunity Commission, in which he claimed it was unlawful for the employer to coerce an employee to arbitrate a claim under the Americans with Disabilities Act (ADA).

To put it another way, the imposition of an implied-in-fact agreement is logical and lawful when a party's behavior indicates acceptance of a contract term. Thus, courts have acknowledged that when an *employer* changes a condition of employment, such as changing the terms of compensation or imposing an arbitration clause, and the employee nevertheless remains in employment, then it is logical to assume that by staying on the job, the employee has impliedly agreed to the changed terms. However, when an employee expressly rejects the new term, the employee's rejection calls into question the implied acceptance. For this reason, the *Bayer* court rejected the precedent set in *Craig*, and refused to compel arbitration.

The *Bayer* court also relied on a Ninth Circuit case, *Nelson v. Cypress Bagdad Copper Corp.*,[12] in which the court of appeals held that in order for an arbitration clause to bind an employee, and thereby require the employee to waive the statutory right to a judicial forum under the ADA, the waiver must be express. In *Nelson*, the employee signed an acknowledgment that he had read the employee handbook which included an arbitration clause. As in *Romo*, the acknowledgment did not expressly state that by signing it, the employee was agreeing to arbitrate claims. The employee in *Nelson* continued his employment after he received the handbook, but the Ninth Circuit held that was insufficient to bind Nelson to arbitrate statutory claims. In the court's words: "[a]ny bargain to waive the right to a judicial forum for civil rights claims, including those covered by the ADA, in exchange for employment or continued employment must at the least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question."[13]

It is not yet clear whether *Bayer*, which involved a statutory claim as did *Nelson*, would also apply to common law claims such as wrongful termination in violation of public policy. *Bayer* is on appeal to the Ninth Circuit, and it will be interesting to see how that court applies its own *Nelson* decision. Taken together, *Bayer* and *Nelson* raise important questions as to whether an employer's unilateral implementation or revision of an arbitration program, either to prohibit class actions or for any other reason, will be deemed binding even when an employee does not expressly agree to accept the new term. An implied acceptance, such as remaining in employment, may not suffice. Stay tuned.

## ENDNOTES

1. 131 S. Ct. 1740 (2011).
2. No. CV 11-3705 MEJ, 2011 U.S. Dist. LEXIS 129277, 2011 WL 5416173 (N.D. Cal. Nov. 8, 2011).
3. *Id., citing Mago v. Shearson Lehman Hutton, Inc.,* 956 F.2d 932 (9th Cir. 1992).
4. 84 Cal. App. 4th 416 (2000).
5. *Id*. at 422.
6. *Id*. at 420.
7. *Id*. at 420, *citing Asmus v. Pacific Bell*, 23 Cal. 4th 1, 11 (2000).
8. 87 Cal. App. 4th 1153 (2007).
9. *Id*. at 1157.
10. *Id*. at 1159.
11. *Bayer, supra*, slip op. at 4.
12. 119 F.3d 756 (9th Cir. 1997).
13. *Id*. at 762.