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Employee vs. employer: The battle over arbitration

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Charles Walton served burgers and beers at Applebee's in Jenkintown. Emergency-room physician Deborah Pierce rescued the city's wounded.

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Fox network anchor Gretchen Carlson reported on the news, and former exotic dancer Melody Schofield took on lap dances at Delilah's Den in Philadelphia.

And then there are 380,000 Uber drivers.

Blue collar or white collar, what all these people have in common was a disagreement with their employers, a dispute they wanted to take to court, but instead had to arbitrate.

Now it's likely that the U.S. Supreme Court is going to look at this growing employment trend.

Proponents of arbitration, particularly management-side lawyers, say it's a streamlined and less expensive dispute-resolution method. Others have a different view, describing it as a hidden system of justice that skews in favor of employers, in part by precluding class-action lawsuits.

"I'm a fan of a streamlined process," said management-side lawyer Rick Grimaldi, a partner at Fisher & Phillips in Radnor. "To the extent there is an opportunity to engage in an alternate means of litigation, it benefits employers and employees alike."

That's not Pierce's take:

"After my experience, it is simply unbelievable that one could claim arbitration is a low-cost alternative to the court system," she said, testifying at a congressional hearing several years ago.

"I didn't know companies had this kind of power to take away your rights to a trial by jury," said Tara Zoumer, of California, who tried to sue WeWork on behalf of herself and others when she found herself "making less than minimum wage," working 10 to 30 extra hours a week for $42,000 a year.

Zoumer thought she was getting in on the ground floor as an "associate community manager" at the hip coworking space, but ended up switching beer kegs and cleaning up after parties.

Because Zoumer signed an arbitration agreement when she was first hired, a judge ruled that she must arbitrate her dispute - in Washington, an expensive airplane ticket away.

"What we're talking about is a private court system where employers avoid being held accountable for large-scale labor issues," she said.

Zoumer has filed a complaint about WeWork's arbitration policy with the National Labor Relations Board.

WeWork global spokeswoman Jennifer Skyler sent a statement: "Arbitration is only one part of our dispute resolution program that aims to resolve all disputes fairly and at no cost to our employees."

Attorneys on both sides say a Supreme Court review is inevitable, particularly the part about precluding class actions.

"Our clients are ready to get this before the Supreme Court,"said John DiNome, a partner at Reed Smith LLP. "Everyone's on pins and needles, not knowing how to approach employment agreements because of the uncertainty in the law."

On the employee side, "as an employment-right class-action lawyer, the possible elimination of arbitration is the most important issue in employment law," said Peter Winebrake, at Winebrake & Santillo LLC, in Dresher.

The issue's legal history stems from a class-action consumer lawsuit filed by cellphone customers disputing their bill with AT&T Mobility. AT&T said their contract required them to arbitrate and precluded any class action.

In 2011, the Supreme Court agreed, citing the Federal Arbitration Act.

An increase in employment arbitration agreements followed, and between 2010 and 2014, the courts turned away 470 worker lawsuits, sending them to arbitration. That compares with 149 moved between 2005 and 2009 - a 215 percent increase, according to a New York Times analysis of federal court dockets.

As the trend was building, the National Labor Relations Board stepped in, saying arbitration agreements banning class actions violate federal law guaranteeing the rights of workers - union or not - to band together for "protected concerted activity" to improve their pay or working conditions.

Several circuit courts agreed, setting up a potential Supreme Court faceoff, pitting the Federal Arbitration Act against the National Labor Relations Act.

In September, the NLRB, along with Ernst & Young and Epic Systems Corp., two employers involved in key appellate cases, asked the court to review the issues.

It will be too late for Charles Walton, the ex-waiter at the Jenkintown Applebee's run by the Rose Group, a restaurant company in Newtown.

Walton and others had sued, saying the Rose Group's payment procedures often meant they earned less than the minimum wage. Rose Group countered, saying that Walton shouldn't be in court. It pointed to an arbitration agreement Walton signed when hired.

U.S. District Judge Berle Schiller reluctantly agreed, writing, "Applebee's workers must chew on a distasteful dilemma - give up certain rights or give up the job."

Rose Group declined to comment. Walton lost the job and the arbitration.

Former Fox News anchor Gretchen Carlson fared better, by about $20 million. She filed a lawsuit accusing Roger Ailes, then Fox News chairman, of sexual harassment, which he denied.

Because she had signed an arbitration agreement, the court sent the case to arbitration. The dispute was settled Sept. 6 for a reported $20 million.

Exotic dancer Melody Schofield's case is now before an arbitrator, 20 months after she filed her lawsuit.

In her suit, she complained that on slow nights, by the time she paid an $85 house fee for every night on the job, tipping the disc jockey, the bouncer, and the "house mom" who runs the dressing room, she wasn't even making minimum wage, let alone overtime.

"I think it's really unfair that they weren't compensating us for our time," Schofield said.

The potential class of exotic dancers in Schofield's case is relatively small, but in another case, on Sept. 7, a federal appeals court in California handed Uber a victory in a ruling that affects 380,000 Uber drivers.

The court ruled that Uber drivers who sued as a class in a background-check case must arbitrate their disputes individually.

In Philadelphia, however, a small group of Uber Black limousine drivers found a way to pursue their class-action lawsuit.

Their attorney, Jeremy Abay, explained: Uber often updates its ride-sharing app and when it does, it frequently also amends its driver agreements.

This time, a driver noticed that Uber Black drivers could opt out of the arbitration agreements if they contacted the company within 30 days.

In Philadelphia, the drivers quickly spread the word and "we ended up getting 244 drivers to opt out," Abay said. "Now we're the only one to have survived that issue."

On July 21, U.S. District Judge Michael Baylson in Philadelphia denied Uber's motion to force the case into arbitration.

"Most of us don't even know what arbitration is," said Uber Black driver Ali Razak, president of the Philadelphia Limousine Association, one of those who opted out of arbitration.

Beyond the issues in each case, both sides see darker forces at work.

In class-action suits, the employee plaintiffs get relatively little, while the attorneys rake in big fees, the management-side attorneys said. No wonder plaintiffs' lawyers don't want that type of litigation to go away.

Class actions provide economies of scale, allowing the little guy to stand against big corporations, plaintiffs' lawyers say.

Even the case involving Deborah Pierce, who, as a doctor, earns a higher wage, cost her lawyers $500,000. (She lost the arbitration with a physicians' practice group in Abington.)

Damages in individual cases involving waiters and janitors are too small to make it worth the fight, plaintiffs' lawyers say, and the employers know it.

"The great equalizer is the right to go to court," said Anthony Marchetti, a Cherry Hill plaintiff's lawyer representing a class of former Robert Half International staffing managers in an arbitration/class-action case.

"Anyone," he said, "can file a lawsuit and take on the biggest companies and the most powerful of the most powerful."

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