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## 2nd Circuit weighs impact of arbitration clauses on wage-and-hour cases

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By Carlyn Kolker

COMMENTS (0)

NEW YORK (Reuters) - The 2nd U.S. Circuit Court of Appeals is considering a pair of cases that could determine the degree to which employers can tamp down wage-and-hour class actions.

The central issue in the two cases, which were heard back-to-back on Wednesday, is whether company arbitration clauses can foreclose class actions over wage conditions brought under the Fair Labor Standards Act.

The issue has garnered attention from both sides. The Department of Labor, the Equal Employment Opportunity Commission and workers' rights groups such as the National Employment Law Project have weighed in with friend-of-the-court briefs on behalf of the plaintiffs. The Chamber of Commerce has filed on behalf of businesses.

The cases highlight the extent to which the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*, which ruled that the Federal Arbitration Act limited the ability of plaintiffs to file class actions in consumer cases, has threatened to chill group actions in other areas.

The first case that the three-judge panel of the 2nd Circuit heard on Wednesday concerns Stephanie Sutherland, a former entry-level accountant at Ernst & Young who sued after her termination, saying she was unfairly denied \$1,867 in overtime pay and that she and a group of accountants were misclassified as employees exempt from overtime pay.

U.S. District Judge Kimba Wood ruled that Ernst & Young's agreement requiring arbitration with employees was unenforceable in this case because it would require Sutherland to spend so much money to pursue an arbitration on her own that she could not vindicate her rights. Ernst & Young appealed.

The other case before the 2nd Circuit on Wednesday had a broader sweep. After two former employees of CitiMortgage sued for unpaid overtime, U.S. District Judge Robert Sweet denied Citi's motion to compel arbitration, saying that employees can not waive any rights to proceed with collective actions under the Fair Labor Standards Act.

The appellate panel consisted of Judges Jose Cabranes and Chester Straub, who were in court in New York, and Judge Ralph Winter, who heard the case by telephone from New Haven, Connecticut.

The judges had the most questions for the plaintiffs in the Citigroup case.

Straub asked plaintiffs' lawyer Douglas Wigdor of Thompson Wigdor to "tell me precisely" where congressional legislative history of the FLSA suggested that collective actions couldn't be waived by arbitration agreements. After Wigdor replied, Straub said, "These are all policy arguments. They don't go to the legislative history."

Wigdor defended the import of collective actions, saying they promoted "uniform application of the FLSA" and "efficiency" in the courts.

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In the Ernst & Young matter, one focus of questioning centered on what effect a case pending at the Supreme Court this term, *American Express Co. v. Italian Colors Restaurant*, would have.

"The basic issue of your case is pending before the Supreme Court," Straub told Ernst & Young lawyer Rex Heinke of Akin Gump Strauss Hauer & Feld soon after he began his argument.

In the American Express case, merchants claim that they can't vindicate their rights through individual arbitrations because of the high costs, a parallel argument made by Sutherland in an employment context in the Ernst & Young case. In the American Express case, the 2nd Circuit sided with the merchants.

The appellate panel may await a final determination from the Supreme Court in the American Express case before deciding on the Ernst & Young matter, said Robert Whitman, an attorney at Seyfarth Shaw who attended Wednesday's arguments but is not involved in either case.

"I would guess the 2nd Circuit would hold off until there's a Supreme Court decision," he said. "If the 2nd Circuit waits, it will be guided by the Supreme Court."

Whitman noted that whichever way the Supreme Court rules, and however the 2nd Circuit decides that ruling may apply to the Ernst & Young case, "this is an important issue in the world of employment law."

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The cases are Stephanie Sutherland v. Ernst & Young LLP and Tara Raniere v. Citigroup Inc, Court of Appeals for the 2nd Circuit, Nos. 12-304 and 11-5213.

For Stephanie Sutherland: Max Folkenflik of Folkenflik & McGerity and Leon Greenberg of Leon Greenberg, Esq.

For Ernst & Young: Rex Heinke, Gregory Knopp and Katharine Galston of Akin Gump Strauss Hauer & Feld.

For Tara Raniere: Kenneth Thompson, Douglas Wigdor and David Gottlieb of Thompson Wigdor.

For Citigroup: Samuel Shaulson and William Chang of Morgan, Lewis & Bockius.

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