

Terminated Employee Agreements and the Right of Arbitration

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In a recent appellate decision, *Weiss v. Lonnquist*, 153 Wn. App. 502 (2009), a well-known local attorney, who represents employees against companies, experienced the pain of employment litigation arising from terminating her associate because the associate had allegedly failed to bill a sufficient number of hours in order to be profitable. As can be expected, the associate disagreed with the employer's perspective as to the reasons for her termination and filed suit, claiming that she had been terminated because she refused to file false evidence with the court, that she was owed unpaid wages, that she had been defamed when the attorney posted the false reasons for her termination on two attorney websites, and that she had suffered severe emotional distress. In response, the employer sought to compel arbitration which would keep this dispute out of the public record, and in all likelihood, prevent public disclosure of the alleged request to submit false evidence to the court. The basis for her arbitration demand was that the parties had signed an employment contract requiring cause termination and containing an arbitration provision. Such a provision calls for resolution of any employment dispute outside of the courts and the jury system and in a confidential manner with a paid, private arbitrator.

Generally, arbitration agreements are enforced in Washington. However, here, the employer had terminated the at-issue employment contract when she became frustrated with the associate's lack of billable hours, though she continued to employ the associate in the same position for another year and pay the associate the same wages and benefits. In terminating the employment contract, the employer told the associate she was "at-will" and not entitled to any particular notice as had been available under the terminated contract. After the associate sued for wrongful termination, the employer sought to compel arbitration under the terms of the previously terminated contract. The *Weiss* court refused to compel arbitration because the employer had terminated the employment contract which provided for arbitration. The case would proceed in the public record, as there was no "right" to arbitration absent a written agreement to do so. Although recognizing that an implied contract existed between the employer and the associate by continuing to employ the associate in the same position with the same wages and benefits, there would be no arbitration because the employer had (1) terminated the written contract; (2) asserted the associate was "at-will" which was inconsistent with the terms of the employment contract; and (3) had not specifically negotiated an arbitration agreement with the associate.

The take away from *Weiss* is that a trial court will compel arbitration of wrongful termination claims if there is a valid employment contract in place. Companies can negotiate enforceable arbitration provisions to keep employment disputes out of the public record and, arguably, shield the company from adverse publicity associated with allegations of harassment or discrimination. Courts will not enforce an oral agreement to arbitrate when the former employee claims she did not agree to arbitrate any dispute with her employer. Arbitration agreement should be in writing to avoid disputes as the *Weiss* employer learned. Once an employment contract with an arbitration provision is terminated, a trial court will not compel arbitration of any claim that arose after its termination. The *Weiss* court highlighted that parties can, through their post-contract termination conduct, create implied employment contracts where the

employee continues to work under the same terms and conditions of the terminated contract. Therefore, if a company terminates an employment contract, but wants to retain the employee under new terms and conditions, it would be advisable to inform the employee in writing that he or she is no longer employed according to the terms and conditions of the terminated contract. If the employee continues to work under the same terms and conditions and provide the same services, a trial court will find an implied contract and enforce what the company had thought was a terminated agreement. On the other hand, if the company wishes to retain the employee and enjoy the protections of certain terms of the terminated contract (such as arbitration provision), it must reach an agreement with the employee on the terms it wishes to enforce. In *Weiss*, the employer had failed to reach such an agreement with the associate that any dispute would be arbitrated as had existed in the terminated contract. Thus, there was not right to arbitration. *Weiss* also shows that plaintiff attorneys are not immune to the same problems that all others are subject to: terminated employees suing claiming wrongful termination.