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Missouri Courts Side with Employees against the Eighth Circuit: Continued Employment Does Not Constitute Acceptance and Consideration for Mandatory Arbitration Agreements: Frye v. Speedway Chevrolet Cadillac

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Missouri Courts Side with Employees Against the Eighth Circuit: Continued Employment Does Not Constitute Acceptance and Consideration for Mandatory Arbitration Agreements

Frye v. Speedway Chevrolet Cadillac[1]

I. INTRODUCTION

The question of whether continued employment constitutes acceptance and consideration for an employment contract, particularly applied to mandatory arbitration clauses, has split the authorities who decide on cases arising out of Missouri. The United States Court of Appeals for the Eighth Circuit, while purporting to apply Missouri law in cases arising out of Missouri, holds that an employee who continues to work for his or her employer after an arbitration program has been implemented is bound by it by the virtue of his or her continued employment.[2] Missouri courts, however, disagree with this interpretation of Missouri law and held in *Frye v. Speedway Chevrolet* that employment contracts calling for mandatory arbitration of at-will employees' claims are not valid and enforceable if the only consideration offered is the employee's continued employment.[3]

In the *Frye* holding, Missouri courts stand up for the state's employees in a minority position that will result in employees filing their claims in state court over federal court and employers either attempting to remove more cases to federal court or including in their arbitration agreements some kind of consideration other than continued employment.

II. FACTS AND HOLDING

Kimberly Frye (Frye) began employment with Speedway Chevrolet Cadillac, Inc. (Speedway) as a finance manager in May 2003.[4] On or around March 1, 2004, Speedway implemented a dispute resolution program (Program).[5] Speedway asserted that Frye signed an acknowledgment agreeing to be bound by the Program, but Frye denied signing it.[6] The Program outlined four choices for resolution of employee disputes, starting with in-house options and ending with mediation or

1. 321 S.W.3d 429 (Mo. App. 2010).
2. Berkley v. Dillard's Inc., 450 F.3d 775, 777 (8th Cir. 2006).
3. Frye v. Speedway Chevrolet Cadillac, 321 S.W.3d 429, 437 (Mo. Ct. App. 2010).
4. *Id.* at 432.
5. *Id.*
6. *Id.* The court does not address this factual issue.

binding arbitration.[7] The Program stated that any decision by an employee to remain employed by Speedway after the Program was in effect would amount to agreement to the Program's terms, both during the employee's service with the firm and after any termination.[8]

In early December 2004, Speedway terminated Frye.[9] After her termination, Frye claimed sexual discrimination, hostile working environment, retaliation, and defamation.[10] In her claim, Frye named three defendants: Speedway, Daniel F. Ladd (Ladd), the President of Speedway, and Brice Ackerman (Ackerman), the General Sales Manager of Speedway (collectively, the Defendants).[11]

In late 2006, after receiving a 'right to sue' letter, Frye filed suit in the Circuit Court of Johnson County, Missouri.[12] Instead of relying on the Program's terms to compel arbitration, Speedway responded almost three months later by removing the case to federal court.[13] In response, Frye amended her petition, deleting her federal claims, and the case was remanded back to the circuit court.[14] Each of the Defendants filed an answer about a month later, none of which asserted that Frye was bound to arbitrate her claims under the Program.[15] Frye began discovery for the suit on March 27, 2008.[16]

On April 29, 2008, about eighteen months after Frye initially filed her suit, the Defendants filed a motion to compel arbitration.[17] Frye opposed the motion on four grounds. First, she argued that the Defendants had waived their right to seek enforcement of the Program by delaying their motion to compel it. Second, Frye asserted that the acknowledgment form the Defendants claimed Frye signed did not comport with section 435.460.[18] Next, Frye claimed that the Program was an

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7. *Id.* The Program defined covered claims broadly as "any legal or equitable claim, demand or controversy, in tort, in contract, under statutory or common law doctrine to include future statutory or common law doctrine that do not exist as of the date of this policy, or alleged violation of any legal obligation, between persons bound by the Plan."

8. *Id.* at 432-33. The Program's exact text was: "after March 1, 2004, your decision to accept employment or continue your current employment will mean that you have agreed to and are bound by the terms of the Program . . . this will be true both during your employment and, should you terminate, after your employment."

9. *Frye*, 321 S.W.3d at 433.

10. *Id.* Frye filed her claims with the Equal Employment Opportunity Commission and the Missouri Human Rights Commission.

11. *Id.* at 432.

12. *Id.* at 433. Kimberly alleged that: (1) Speedway engaged in discrimination against her due to her sex in violation of the Missouri Human Rights Act and federal statutes, (2) Speedway created a sexually hostile work environment, (3) Her termination was retaliation for her complaints regarding Speedway's alleged discriminatory conduct, and (4) Speedway made defamatory statements about her to third parties.

13. *Id.* The case was removed to the District Court for the Western District of Missouri because Frye had asserted claims seeking relief under federal law. The Program provided that "if legal action is instituted, the court will be requested to refer the matter to the Dispute Resolution Program for final resolution."

14. *Id.*

15. *Frye*, 321 S.W.3d at 433-34. Speedway filed a counterclaim against Kimberly alleging fraud, breach of fiduciary duty, and civil conspiracy, which Kimberly replied to on April 20, 2007.

16. *Id.* at 434. The eleven month gap between Kimberly's reply to the counterclaim and the beginning of discovery is not explained by the record.

17. *Id.* at 434.

18. All statutory references are to MO. REV. STAT. 2000 as supplemented unless otherwise indicated. *Id.* at n. 6. Section 435.460 addresses what notice is required of arbitration provisions and states: "Each contract subject to the provisions of sections 435.350 to 435.470 shall include adjacent to, or above,

adhesive, illusory, and unconscionable contract. Finally, Frye argued that the Program did not cover her claims against co-employees Ladd and Ackerman or her claim of defamation.[19]

In June 2008, the trial court heard arguments regarding the Defendants' motion to compel arbitration.[20] The trial court entered a judgment denying the motion to compel in November of 2009.[21] The Defendants appealed from the judgment.[22] Speedway had one central assertion on appeal, with four specific arguments in support of its position.[23] Speedway's main point on appeal was that the parties entered into a valid and enforceable contract and that Frye's claims fell within the scope of that contract.[24] The Court of Appeals focused on the first two arguments in support of this statement because they were dispositive in the case.[25] The first of these arguments was Speedway's contention that the Program was not illusory or unconscionable.[26] Speedway's second argument in support of its general statement was that it had not waived the right to compel arbitration.[27]

The Court of Appeals for the Western District of Missouri held that the Program was not supported by legal consideration and was not an enforceable contract to arbitrate.[28] The court went on to hold that, even if the contract had been enforceable, Speedway had waived its right to enforce the Program against Frye.[29]

III. LEGAL BACKGROUND

A. Enforceability of Arbitration Clauses Against At-Will Employees

Historically, under the employment-at-will doctrine employers are free to terminate the employment relationship "for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act."[30] Although the doctrine spread across the country and many state courts adopted it, legislatures eventually began to adopt a variety of statutes limiting the ability of employers to fire employees, including when the termination was based on race, sex, or other

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the space provided for signatures a statement, in ten point capital letters, which read substantially as follows: 'THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.'" MO. REV. STAT. 435.460 (2000).

19. *Frye*, 321 S.W.3d at 434.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 435.

24. *Id.*

25. *Frye*, 321 S.W.3d at 435. The other two points on appeal were (1) the Program covers Kimberly's claims against co-employees Ladd and Ackerman, (2) the Program is subject to the Federal Arbitration Act so the requirements of section 435.460 are not applicable.

26. *Id.* at 435-36. This argument was supported by Speedway's assertions that it had the right to make only prospective changes and because the mutual promises exchanged between Speedway and its employees were sufficient to provide consideration for the contract.

27. *Id.* at 435.

28. *Id.* at 444. Because the contract was found to be invalid, the Court did not address the secondary argument that the Program was not unconscionable.

29. *Id.* at 445. The Court noted that if it had concluded that the Program was an enforceable contract, it would still find that Speedway had waived its right to enforce it.

30. Payne v. W. & Atl. R. Co., 81 Tenn. 507, 518 (1884).

protected characteristics.[31] The at-will doctrine has been commonly referred to as a default rule,[32] meaning that the employment relationship is not considered to be at will where the parties have provided otherwise by contract or where the law prohibits termination for a specific reason.

Missouri follows the traditional employment-at-will rule, allowing an exception only for when the termination violates public policy.[33] In determining whether a valid arbitration contract exists in Missouri, substantive law of the state governs.[34] According to Missouri law, if a party opposes arbitration, that party may only be compelled to arbitrate pursuant to an agreement whereby they have agreed to do so.[35] The agreement will not be valid unless it reflects essential contract elements required by Missouri law.[36] Missouri's approach in this area is consistent with courts across the country when examining contracts with at-will employees.[37] Authority splits, however, between the United States Court of Appeals for the Eighth Circuit and Missouri state courts on the issue of whether continued employment constitutes consideration for a contract to arbitrate employment claims.

The leading Missouri case addressing essential contract elements in the context of enforceability of an arbitration provision against at-will employees is *Morrow v. Hallmark Cards, Inc.*[38] In *Morrow*, the employer (Hallmark) adopted a dispute resolution program, which stated that employees who continued to work for Hallmark after the program went into effect would be deemed to have accepted the program's terms for dispute resolution, including binding arbitration.[39] The employee (Morrow) was thereafter terminated and filed suit.[40] The circuit court found a binding arbitration agreement and compelled arbitration.[41] Once in arbitration, the arbitrator dismissed Morrow's claim as untimely.[42] Morrow contested the ruling, but the circuit court affirmed.[43]

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31. Title VII, Civil Rights Act, 42 U.S.C. §§ 2000(e)-2000(e)(17) (1964).

32. *See*, e.g. Streckfus v. Gardenside Terrace Co-op Inc., 504 N.E. 2d 273, 275 (Ind. 1987); Duldulao v. Saint Mary of Nazareth Hosp. Center, 505 N.E.2d 314, 317-18 (1987); Mers v. Dispatch Printing Co., 483 N.E.2d 150, 153 (1985).

33. LEX K. LARSON, UNJUST DISMISSAL, § 10.26 (Howard Ross ed., 2011).

34. *Frye*, 321 S.W.3d at n. 21 (citing State *ex rel.* Vincent v. Schneider, 194 S.W.3d 853, 856 (Mo. Banc. 2006)). Because the Federal Arbitration Act, 9 U.S.C. 1 (FAA), and the Missouri Uniform Arbitration Act, Chap. 435, MO. REV. STAT. (MUAA), presume the presence of a legally enforceable contract to arbitrate, the court did not need to answer the question of whether either controlled the interpretation or enforcement of the contract. *See* Houlihan v. Offerman & Co., 31 F.3d 692, 694-95 (8th Cir. 1994) (stating that before a party maybe compelled to arbitrate under the FAA, the court must determine whether a valid agreement to arbitrate exists between the parties).

35. Morrow v. Hallmark, Inc., 273 S.W.3d at 21 (Mo. Ct. App. 2008).

36. *Id.* at 22; *see also* Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. Banc. 2003). The essential contract elements are "offer, acceptance, and bargained for consideration." *See* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. Banc 1988).

37. EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 6.01 (Janice Goodman ed., 2010) ("In determining implied-in-fact contract claims, courts will examine traditional elements of contract formation, (*i.e.*, offer, acceptance, and consideration) as well as reliance and mutuality. Additionally, courts will consider whether the contract is unilateral or bilateral.")

38. 273 S.W.3d 15 (Mo. Ct. App. 2008).

39. *Id.* at 19.

40. *Id.* at 21.

41. *Id.*

42. *Id.*

43. *Id.*

On review, the Court of Appeals for the Western District of Missouri held that the circuit court erred in finding an enforceable arbitration agreement and in compelling arbitration.[44] The court found that the program was not a contract because it did not involve mutual promises.[45] Hallmark was not bound to resolve any dispute through arbitration, and it retained the right to modify the provisions of the program at its sole discretion.[46] The court went on to hold that the program was not an enforceable contract because it lacked the third essential contract element—consideration.[47] In explaining this holding, the court stated that continuing employment was not consideration because Morrow was an at-will-employee, and the alleged contract did not preclude Hallmark from terminating an at-will-employee at any time.[48]

Morrow controlled when the court addressed Speedway's assertion that Frye's signature[49] of acknowledgment of the Program amounted to an agreement to be bound by the program.[50] In *Morrow*, the court noted that though employers and employees are free to enter into an agreement to arbitrate disputes, the agreement is not valid unless it reflects the essential contract elements required under Missouri law.[51] This conclusion by the court meant that, even if it was proven that Frye had signed a document agreeing to be bound by the Program's terms, that acceptance would not bind her in the absence of consideration.[52]

Missouri courts have stated that consideration "generally consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party."[53] In *Sumners v. Serv. Vending Co.*, decided in the Southern District of Missouri, the court noted that a contract "that contains mutual promises imposing some legal duty or liability on each promisor is supported by sufficient consideration to form a valid, enforceable contract."[54] The Missouri Supreme Court determines whether mutuality of promise exists in an agreement by looking at the agreement in its entirety.[55]

The Program in question suggests consideration could be achieved by both mutual promises and the continuation of at-will employment.[56] There are several

44. *Morrow*, 273 S.W.3d at 29.

45. *Id.*

46. *Id.* at 25.

47. *Id.* at 29; *See also Frye*, 321 S.W.3d 429 at n. 13 ("*Morrow* did not expressly conclude that "acceptance" of an employer imposed arbitration program can be found by the fact that an at-will employee continues employment on notice that the decision to continue employment will be viewed by the employer as acquiescence to the arbitration program. We do note our Eastern District has expressly concluded that an at-will employee's continued employment is not sufficient to constitute acceptance of an employer imposed arbitration program.") (citing Kunzie v. Jack-In-The-Box, Inc., 330 S.W.3d 476 (Mo. Ct. App. 2010)).

48. *Morrow*, 273 S.W.3d at 27.

49. *Frye*, 321 S.W.3d at 437. Frye denies signing the document. This factual issue was not settled by the trial court since it found the Program to be unenforceable as a matter of law or enforceable but waived as a matter of law.

50. *Id.* at 437 (citing *Morrow*, 273 S.W.3d at 22).

51. *See Morrow*, 273 S.W.3d at 22.

52. *Frye*, 321 S.W.3d at 437.

53. *Morrow* 273 S.W.3d at 22.

54. Sumners v. Serv. Vending Co., Inc., 102 S.W.3d 37, 41 (Mo. Ct. App. 2003).

55. *Frye*, 321 S.W.3d at n. 16 (citing State *ex rel.* Vincent Schneider, 194 S.W.3d 853, 858 (Mo. 2006)).

56. *Id.* at 438.

Missouri court decisions that reflect the conclusion that "employment at-will is not a legally enforceable employment relationship because it is terminable at the will of either party on a moment-by-moment basis."[57] Courts across the country are divided on the question of whether additional consideration is necessary to rebut the presumption of employment-at-will and to apply a limitation only for just cause.[58] The Eighth Circuit is one court that disagrees with Missouri state courts on this issue, and does so despite purporting to apply state law.

Where the deciding court reasons that this limitation on employment-at-will "depend[s] wholly upon the intention of the parties as reasonably comprehended by them when the agreement was made," the only consideration needed to sustain an implied-in-fact contract to terminate for just cause is the employee's acceptance of employment on such terms.[59] In contrast, where the deciding court reasons that job security is an additional benefit or promise that the employee can only secure by furnishing some additional benefit or detriment, the court will require additional consideration.[60] The courts that reject the need for additional consideration generally reason that this is a rule of construction that, at most, creates a rebuttable presumption, and not a rule of substantive law.[61] Some courts will look at the intent of the parties in view of the totality of the circumstances.[62]

The Eighth Circuit, purporting to apply Missouri law, continues to hold that mandatory arbitration clauses meet contract requirements since continued employment constitutes consideration.[63] In *Patterson v. Tenet Healthcare*, [64] Patterson was a former employee of Tenet Healthcare who sued the company for civil rights violations.[65] The suit was dismissed after the district court found that Patterson's claims were arbitrable under the parties' employment agreement.[66] The employment agreement referenced included an employee handbook with the last page dedicated to a mandatory arbitration agreement.[67] Patterson argued on appeal that the agreement was not a binding contract.[68] The agreement stated:

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57. *Morrow,* 273 S.W.3d at 26. *See also* Luethans v. Wash. Univ., 894 S.W.2d 169, 172 (Mo. Banc. 1995).

58. LISA R. LIPMAN, LYNN D. FEIGER, & VICKI LAFER ABRAHAMSON, 2-6 EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE § 6.01 (Matthew Bender 2010).

59. Coelho v. Posi-Seal Int'l, Inc., 208 Conn. 106, 118 (1988); *See* Barry v. Posi-Seal Int'l, 36 Conn. App. 1 (1994); Hartbarger v. Frank Paxton Co., 115 N.M. 665 (1993); Sowards v. Norbar, Inc., 605 N.E.2d 468 (Ohio Ct. App. 1992); Stites v. Napoleon Spring Works, 12 INDIV. EMPL. RTS. CAS. 406 (Ohio Ct. App. 1996); Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).

60. *See* Black v. Baker Oil Tools, 107 F.3d 1457 (10th Cir. 1997) (Oklahoma law); Robertson v. Atlantic Richfield Co., 371 Pa. Super. 49 (1987); Shebar v. Sanyo Bus. Sys. Corp., 111 N.J. 276 (1988); Salt v. Applied Analytical, Inc., 104 N.C. App. 652 (1991); Peters v. Mansfield Screw Mach. Prods. Co., 73 Ohio App. 3d 197 (1991).

61. *See* Littell v. Evening Star Newspaper Co., 120 F.2d 36 (D.C. Cir. 1941); Drzewiecki v. H&R Block, Inc., 24 Cal. App. 3d 695 (1972).

62. *See* Ohanian v. Avis Rent-A-Car System, Inc., 779 F.2d 101, 109 (2d Cir. 1985); Eklund v. Vincent Brass & Aluminum Co., 351 N.W.2d 371, 376 (Minn. Ct. App. 1984).

63. *See* Berkley v. Dillard's, 450 F.3d 775, 777 (8th Cir. 2006).

64. 113 F.3d 832 (8th Cir. 1997).

65. *Id.* at 834.

66. *Id.*

67. *Id.*

68. *Id.* at 834-35.

> I understand AMI[69] makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.[70]

The Eighth Circuit affirmed the district court's judgment and held that the mandatory arbitration clause met the requirements for a binding contract, including offer, acceptance and consideration.[71] The Eighth Circuit restated its position in 2009 with *McNamara v. Yellow Transportation, Inc.*,[72] when asked to determine whether continued employment constituted consideration for a mandatory arbitration clause in an employment contract under South Dakota law.[73] Consideration is required for a valid and enforceable contract in South Dakota, as it is in Missouri.[74] Similarly to the agreement in *Frye*, the *McNamara* agreement expressly stated that continued employment with Yellow would operate as acceptance of the agreement and McNamara continued to work for Yellow for approximately five years after receiving the Agreement.[75] As a result, the court found that his continued employment served as acceptance and consideration.[76]

The court noted that, in applying laws of other states, it had held that the necessary elements of acceptance and consideration were achieved by an employee's continued employment after an employer imposed a term or condition upon employment.[77] While the Supreme Court of South Dakota had not yet confronted the issue, the court found it to be well-settled Eighth Circuit law and held that the contract was valid and enforceable against McNamara.[78]

One of the cases the Eighth Circuit cited in *McNamara* as evidence of its application of state law to come to the conclusion that continued employment consti-

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69. *Id.* AMI was the precursor to Tenet Healthcare. *Id* at n. 3.

70. *Patterson*, 113 F.3d at 834-35.

71. *Id.* at 835.

72. 570 F.3d 950 (8th Cir. 2009).

73. *Id.* at 956.

74. *Id.* The requirements for a valid and enforceable contract in South Dakota are (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration). *Id.* (citing *Patterson*, 113 F.3d 832 at 834).

75. *McNamara*, 570 F.3d at 956. The Frye agreement stated that the employee's decision to continue his or her employment would mean that he or she had agreed to and was bound by the Program. Frye remained working at Speedway for about nine months after signing the agreement. *See* Frye v. Speedway, 321 S.W.3d 429, 432-33 (Mo. Ct. App. 2010).

76. *Id.*

77. *Id.* (citing Berkley v. Dillard's, 450 F.3d 775, 777 (8th Cir. Mo. 2006) ("By continuing her employment, [the employee] accepted the terms of the arbitration program."); Winfrey v. Bridgestone/Firestone, Inc., 1999 WL 1295310, at *1 (8th Cir. 1999) ("[W]here an at-will employee . . . retains employment with knowledge of new or changed conditions . . . retention of employment constitute[s] acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, [the employee] supplie[s] the necessary consideration for the offer, and agree[s] to be bound by the Plan's mandatory arbitration provision").

78. *Id.* (citing *e.g.*, Johnston v. Panhandle Coop. Ass'n, 408 N.W.2d 261, 266 (Neb. 1987) (stating that continuation of employment by at-will employee following change in conditions of employment serves as acceptance and consideration); *see also* Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983).

tutes consideration was *Berkley v. Dillard's*,[79] in which the court purported to apply Missouri law.[80] In *Berkley*, the employee, Berkley, filed complaints against her employer, Dillard's, on the basis of discrimination.[81] About a month later, Dillard's implemented an arbitration program that stated by "accepting or continuing employment with Dillard's, you have agreed to accept the Program known as the Agreement to Arbitrate Certain Claims."[82] Berkley refused to sign the agreement.[83] Berkley sued, Dillard's fired her, and the district court granted Dillard's motion to compel arbitration.[84] The Eighth Circuit ruled that by virtue of accepting employment with Dillard's or continuing employment, Berkley accepted the terms of the arbitration program.[85]

Missouri state courts have directly responded to the Eighth Circuit's conflicting rulings on the topic of continued employment constituting consideration. In *Kunzie v. Jack-in-the-Box*,[86] an employee Kunzie objected to mandatory arbitration on the basis that his continued employment did not constitute acceptance nor consideration for such a contractual agreement.[87] Citing the Eighth Circuit case *Berkley v. Dillard's, Inc.*, the trial court found that Kunzie's knowledge of the alternative dispute resolution provision and conduct of continuing his employment after being presented with the arbitration agreement constituted his acceptance of the contract.[88]

The court of appeals rejected this approach. First, the court acknowledged that the decisions of the federal court should be respected but do not bind the state courts on issues of state law, such as contract formation.[89] The court next disagreed with the trial court's reliance on *Berkley's* interpretation of Missouri law in its conclusion that Kunzie's decision to continue his employment after obtaining knowledge of its arbitration agreement rose to the level of an unequivocal acceptance.[90] Without more, the court could not find that the mere continuation of employment manifests the necessary assent to Jack-in-the-Box's terms of arbitration.[91] The court was not swayed by *Berkley's* interpretation of Missouri law regarding an existing employee's acceptance of a proposed arbitration agreement,[92] and held that "the manifestation of an existing employee's unequivocal intention

79. 450 F.3d 775, 777 (8th Cir. 2006).

80. *Id.* The 8th Circuit cites to Missouri cases Cook v. Coldwell Banker, 967 S.W.2d 654, 657 (Mo. Ct. App. 1998) and Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 454 (Mo. Ct. App. 1998).

81. *Id.* at 776.

82. *Id.*

83. *Id.* Dillard's informed her that her refusal to sign had no effect, since the agreement applied to all employees who continued their employment after its implementation. *Id.*

84. *Berkley*, 450 F.3d at 777.

85. *Id.* at 777 (citing Cook v. Coldwell Banker, 967 S.W.2d 654, 657 (Mo. Ct. App. 1998); Easy Returns Midwest, Inc. v. Schultz, 964 S.W.2d 450, 454 (Mo. Ct. App. 1998)).

86. 330 S.W.3d 476 (Mo. Ct. App. 2010).

87. *Id.* at 482.

88. *Id.* (citing Berkley v. Dillard's, Inc., 450 F.3d 775 (8th Cir. 2006).

89. *Id.* at 482. This issue does not fall under the FAA.

90. *Id.* at 484. The court asserted that Kunzie's conduct, by itself, only evinced his intent to maintain the status quo.

91. *Id.* The *Kunzie* court noted that, in *Berkley*, the Eighth Circuit supported its decision with citations to two Missouri contract cases: *Cook v. Coldwell Banker*, 967 S.W.2d 654 (Mo. Ct. App. 1998)), and *Easy Returns Midwest Inc. v. Schultz*, 964 S.W.2d 450 (Mo. Ct. App. 1998)), and went on to distinguish those two cases from *Kunzie*.

92. *Kunzie*, 330 S.W.3d at 485.

to be bound by an employer's proposed arbitration agreement as a new condition of employment necessitates more than the employee's mere continued work to satisfy Missouri's meeting of the minds requirement."[93]

As to the other component of consideration advanced by Speedway—the mutual exchange of promises—the court considered *Morrow* and reviewed the Program to determine whether the Program could be distinguished from *Morrow* on this issue.[94] Mutuality is not essential to a valid and enforceable contract according to the basic principles of contract law.[95] A contract will be held to be invalid only if a "lack of mutuality amounts to lack of consideration."[96] Although this part of the court's opinion relies mostly on the plain-language doctrine and the court's interpretation of the Program, several principles of contract construction prevented the court from interpreting the Program to find that Speedway made a mutual promise to submit its claims to arbitration.[97]

On the issue of the unilateral right to modify a contract, *Morrow* states that "[a] promise is not good consideration unless there is mutuality of obligation, so that each party has the right to hold the other to a positive agreement. Mutuality of obligation means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of another; that is, *neither party is bound unless both are bound.*"[98] Another case from the Western District of Missouri has stated that if the agreement allows one party to unilaterally modify the agreement, giving that party the power to relieve itself of its promises, the contract is illusory and unenforceable since there would be no "meaningful mutuality."[99] *Cooper v. Jenson*[100] defines an illusory contract as one where a party "had it always in his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee."[101]

The issue of unilateral employee contracts was addressed in the seminal case of *Toussaint v. Blue Cross & Blue Shield of Michigan.*[102] In *Toussaint*, the Supreme Court of Michigan reasoned that

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93. *Id.* at 486. The court noted that, despite the *Berkley* court's pronouncement of Missouri law, it appeared that it "may have relied upon evidence of 'something more' than the employee's mere continuation of employment following Dillard's presentation of the arbitration agreement to its employees". *Id.* at n. 14.

94. *Frye*, 321 S.W.3d 429, n. 17. The court notes that *Morrow* was not decided until after the parties argued Speedway's motion to compel to the trial court so there was no discussion of "mutual promises" during oral argument on the motion to compel. However, *Morrow* was provided to the trial court after oral argument so the court presumes the trial court considered it in its determination.

95. Lisa R. Lipman, Lynn D. Feiger & Vicki Lafer Abrahamson, *supra* n. 57 (citing 1A CORBIN ON CONTRACTS § 152; 1 WILLISTON ON CONTRACTS § 104(A) (3d ed. 1971)).

96. *Id.* (citing Stauter v. Walnut Grove Products, 188 N.W.2d 305, 311 (Iowa 1971)).

97. *Frye*, 321 S.W.3d 429 at n. 20 (citing Transit Cas. Co. in Receivorship v. Certain Underwriters at Lloyd's of London, 963 S.W.2d 392, 398 (Mo. Ct. App. 1998).

98. *Morrow*, 273 S.W.3d at 30 (emphasis added) (quoting Sumners v. Serv. Vending Co., 102 S.W.3d 37, 41 (Mo. App. S.D. 2003)).

99. *Frye*, 321 S.W.3d at 442 (quoting Am. Laminates, Inc. v. J.S. Latta Co., 980 S.W.2d, 23 (Mo. Ct. App. 1998) ("Retaining the right to cancel a contract or to avoid one's promise is an unenforceable, illusory promise."))

100. 448 S.W.2d 308, 314 (Mo. Ct. App. 1969) (cited in *Frye*, 321 S.W.3d at 442).

101. *Id.* at 314.

102. 408 Mich. 579 (1980).

> [i]f there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory.[103]

Since *Toussaint*, courts have held that such provisions "may become part of the contract either by express agreement . . . or as a result of an employee's legitimate expectations grounded in an employer's policy statements."[104]

B. Waiver of Right to Enforce Arbitration Provision

It is well settled that a party's contractual right to arbitration may be lost through his conduct, and delay in asserting a contractual right to arbitration is only one of several types of conduct which have been recognized as resulting in such a loss.[105] The standard for determining whether a delay is long enough to result in the loss of the right to arbitrate is typically "reasonableness,"[106] and factors in determining the reasonableness of the delay include the situation of the parties, the nature of the transaction, and the facts of the particular case.[107]

The leading Missouri case regarding the question of when a party may waive a valid arbitration agreement is *Major Cadillac, Inc. v. Gen. Motors Corp.*[108] On October 22, 2007, Major Cadillac, Inc. (Cadillac) filed suit against General Motors Corporation (GM) for damages for fraudulent inducement, negligent misrepresentation, tortious interference, and other torts.[109] After various motions,[110] GM filed a motion to compel arbitration under the FAA on May 13, 2008.[111] Cadillac

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103. *Id.* at 895.

104. Lisa R. Lipman, Lynn D. Feiger, & Vicki Lafer Abrahamson, *supra* n. 57, at [3][b]. In *Taylor v. National Life Ins. Co.*, (161 Vt. 457 (1993)), the Vermont Supreme Court clarified and liberalized Vermont law concerning the contractual effect of personnel manuals, holding that a manual may have contractual effect even though it was not bargained for, and even though it was distributed only to supervisors. *See also* Lee v. Fresenius Medical Care, Inc., 741 N.W.2d 117 (Minn. 2007) (handbook constituted contract that could be enforced against employer where employee had acknowledged receipt and thereafter continued on job for two years).

105. AM. JUR. 2D, ARBITRATION AND AWARD §§ 51-53.

106. *See* Sawday v. Vista Irrig. Dist., 64 Cal 2d 833 (1966) (holding that where an arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed, and that what constitutes a reasonable time is a question of fact. The factors in determining the reasonableness of a delay in demanding arbitration were said to be the situation of the parties, the nature of the transaction, and the facts of the particular case.); Ted Stoppick & Co. v. Ernest Glick Co., 110 N.Y. S.2d 850 (1952) (holding that there should not be unreasonable delay in asserting a contractual right to arbitration, and added that "obviously," whether the delay is or is not reasonable must depend on the facts of each case); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316 (1950) (motion for arbitration must be within reasonable time after filing of action at law by opposing party).

107. *Sandway*, 64 Cal. 2d at 836.

108. 280 S.W.3d 717 (Mo. Ct. App. 2009).

109. *Id.* at 717.

110. After removing the case to federal court, GM filed an answer with a counterclaim and a motion to dismiss in that court. When the federal court granted Cadillac's request for remand due to lack of diversity, GM applied for a change of judge and filed a motion for extension of time to answer. GM then filed another motion to dismiss with prejudice in the circuit court. *Id.* at 719.

111. *Id.* at 721.

opposed the motion and argued both that the arbitration clauses were invalid and, if they were valid, GM waived its right to have the arbitration enforced.[112] The trial court denied the motion and the court of appeals affirmed.[113]

The court of appeals in *Major Cadillac* held that "[a] party may waive an arbitration agreement" and that "[a] party waives its right to arbitrate if it (1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that right; and (3) prejudiced the party opposing arbitration."[114] The court found the first two prongs easily satisfied by the facts—GM knew that the arbitration clause existed because it drafted the contract.[115] GM also acted inconsistently with a right to arbitrate by removing the case to federal court, requesting a change of judge, and filing motions to dismiss in both the federal and the circuit court.[116]

When addressing the third element, GM argued that Cadillac did not demonstrate prejudice because it only showed that GM "delayed filing a motion to compel arbitration." Delay has been held insufficient to constitute prejudice.[117] The court rebutted this argument, stating that delay was only one of several reasons Cadillac claimed that GM's behavior prejudiced them. In addition to delay, Cadillac claimed that it was prejudiced because the parties had engaged in discovery, Cadillac spent a significant amount of money in order to respond to GM's improper removal of the case to federal court and to brief two motions to dismiss, and GM requested that both the federal and circuit courts decide the merits of the case.[118]

The *Major Cadillac* court went on to note that prejudice is determined on a case-by-case basis[119] and that the prejudice requirement is met "when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party."[120] The court agreed with GM's assertion that delay in the litigation itself is not substantial enough prejudice to support a finding of waiver.[121] However, the court went on to point out that prejudice may be found when one party's time and money have been expended because that party took advantage of the main benefit of arbitration: efficient and economical resolution of the dispute.[122] It noted that delay and trial-oriented activity are material factors in assessing prejudice.[123] The court of appeals concluded that GM's conduct prejudiced Cadillac because GM spent eight months litigating substantial issues

112. *Id.*
113. *Major Cadillac*, 280 S.W.3d 717, 719 (Mo. App. W.D. 2009).
114. *Id.* at 721-22.
115. *Id.* at 722 (citing Getz Recycling v. Watts, 71 S.W.3d 224 (Mo. App. W.D. 2002) (finding knowledge of the right to arbitrate because the alleged waiving party drafted the agreement)).
116. *Id.* at 722.
117. *Id.* at 722-23.
118. *Major Cadillac*, 280 S.W.3d at 722-23.
119. *See* McCarney v. Nearing, Staats, Preloger & Jones, 866 S.W.2d 881, 890 (Mo. App. W.D. 1993).
120. *Id.* at 723 (citing Boogher v. Stifel, Nicolaus & Co., 825 S.W.2d 27, 30 (Mo. App. E.D. 1992). "Prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or litigation of substantial issues going to the merits." Nettleton v. Edward D. Jones & Co., 904 S.W.2d 409, 411 (Mo. App. E.D. 1995) (quoting *McCarney*, 866 S.W.2d at 890).
121. *Id.* at 723.
122. *Major Cadillac*, 280 S.W.3d at 723 (citing Reis v. Peabody Coal Co., 935 S.W.2d 625, 631 (Mo. App. E.D. 1996)).
123. *Id.* at 723.

with various motions, which denied Cadillac an efficient and low-cost resolution of disputes.[124] GM's prejudicial conduct was found to have effectively waived its right to arbitrate.[125]

IV. INSTANT DECISION

In *Frye*, the court began its analysis by noting that the first two issues on appeal by Speedway were dispositive and it focused its opinion on these two points alone.[126] The court devoted the bulk of its legal analysis to Speedway's contention that the contract between it and Frye was valid and enforceable.[127] Later, the court briefly spoke to Speedway's assertion that it did not waive the right to compel arbitration.[128]

In answering the question of whether the Program was a valid and enforceable contract, the court relied heavily on the *Morrow* case,[129] which had a similar fact pattern and came out after oral arguments in this case. The court separated its analysis into three sections which spoke to the signature issue, mutuality of promises, and the unilateral right to modify, respectively.[130] First, the court quickly disposed of Speedway's contention that, because Frye allegedly signed the document,[131] she agreed to be bound by it. In denying this argument, the court stated that the signature would amount merely to acceptance of the Program, and that this acceptance did not bind Frye in the absence of consideration.[132] The court cited *Morrow* for the proposition that an arbitration agreement will not be valid and enforceable if it does not include the contract elements required by Missouri law, despite employers' and employees' freedom to enter into agreements to arbitrate disputes.[133]

Next, the court considered the issue of whether the Program contained mutual promises between Speedway and Frye that amounted to consideration. The court noted that Speedway did not assert that the continued at-will employment constituted consideration for Frye's waiver of her right of access to the courts.[134] On the argument that Speedway did put forth, that the Program was supported by Speedway's mutual promise to be "bound by the terms of the Program," the court did not agree.[135] Despite Speedway's insistence that it promised to submit any disputes it had against employees to the procedures outlined in the Program, the court found that the Program merely obligated Speedway to cooperate with employees who used the Program and were bound by the resolutions reached through the

124. *Id.* at 723-24.
125. *Id.* at 724.
126. *Frye*, 321 S.W.3d at 435.
127. *Id.*
128. *Id.* at 445.
129. *Morrow*, 273 S.W.3d at 15.
130. *Frye*, 321 S.W.3d at 437-47.
131. Frye denied signing the document; the court did not decide this factual issue. *See supra* n. 3.
132. *Frye*, 321 S.W.3d at 437.
133. *Id.* (citing *Morrow*, 273 S.W.3d at 22).
134. *Frye*, 321 S.W.3d at 438. *Morrow* has already held that "[e]mployment at-will is not a legally enforceable employment relationship because it is terminable at the will of either party on a moment-by-moment basis." *Morrow*, 273 S.W.3d at 26.
135. *Frye*, 312 S.W.3d at 439.

Program.[136] The court noted that the Program's terms only obligate an *employee* to submit claims to the dispute resolution process, not the employer.[137] There were no corollary provisions in the Program addressing disputes Speedway had with its employees or how Speedway was to present those claims.[138]

The court of appeals concluded its discussion on the lack of mutuality of promises by noting that if Speedway had intended to implement a dispute resolution program that bound Speedway to submit its claims against employees to arbitration, it easily could have done so.[139] However, it did not. Finally, the court construed Speedway's promise to be "bound to use the Program" as merely Speedway's promise to participate with employees who submit their disputes to the Program.[140] This promise was found to have been illusory because of Speedway's unilateral right to amend the Program.[141]

Speedway's unilateral right to modify the contract was the final reason that led the court to find the contract invalid and unenforceable. The court cited *Morrow* for the principle that "[a] promise is not good consideration unless there is mutuality of obligation, so that each party has the right to hold the other to a positive agreement."[142] The contract will be found to be illusory and unenforceable if it includes language allowing one party to unilaterally modify the agreement so that one party could relieve itself of its promises.[143]

The court addressed Speedway's contentions that its right to amend the Program was subject to two limitations: (1) any amendment to the Program could be applied only prospectively; and (2) any such amendment must be in writing and disclosed to Speedway's employees.[144] On the notice requirement, the court noted that the Program's provisions were inconsistent.[145] Additionally, Speedway cited no authority for its proposition that these limits are sufficient to prevent its promise to be bound by the Program from being found to be illusory.[146] The court concluded that "Speedway's argued limitations on its right to amend the Program

136. *Id.*

137. *Id.* at 440. For example, the Program provides, "Effective 1 March 2004, all employee disputes will be referred for resolution through the Company Dispute Resolution Program."

138. *Id.* at 441.

139. *Id.* at 442. This was shown by the fact that instead of Speedway addressing or attempting to resolve its disputes with Frye through the Program's procedures, it fired her without any process.

140. *Id.* The court analogized Speedway's "promise" to the promise Hallmark claimed to have made to its employees in *Morrow*.

141. *Frye*, 312 S.W.3d at 442.

142. *Id. (citing Morrow*, 273 S.W.3d at 30).

143. *Id.* (citing Am. Laminates, Inc. v. J.S. Latta Co., 980 S.W.2d 12, 23 (Mo. App. W.D. 1998)).

144. *Id.* at 443.

145. *Id.* On the second page of the Program, it states that "the terms can only be modified by providing notice of the change to employees in writing"—here, there is no mention that modifications will be given only prospective application. Later, the Program provides that "this Plan may be amended by Sponsor at any time. However, no amendment shall apply to a Dispute of which Sponsor had actual notice on the date of the amendment"—here, there is no mention that notice of the amendment must be provided to the employees.

146. *Id.* Speedway incorrectly claimed that *Morrow* stood for this proposition. The court itself found multiple cases suggesting that the right to amend prospectively, if coupled with advance notice of the amendment, may prevent the right to amend from rendering a mutual promise illusory. *Id.* at 443-44 (citing Pierce v. Kellogg, Brown, Root, Inc., 245 F.Supp.2d 1212, 1215-16 (E.D. Okla. 2003)); Batory v. Sears, Roebuck & Co, 124 Fed.App'x 530, 534 (9th Cir. 2005)). However, the court concluded that the Program in *Frye* did not require Speedway to provide its employees any advance notice of an amendment. Therefore, these cases were not relevant to the current case. *Id.* at 434.

were not sufficient to avoid rendering its claimed mutual promise to be bound by the Program illusory."[147]

Because the court found that Frye's signature did not constitute consideration for giving up her right to access the court system, the contract did not include the mutual promise of Speedway to be bound by the Program, and Speedway maintained the power to unilaterally modify the Program.[148] It was held that the Program was not supported by legal consideration and, therefore, not an enforceable contract to arbitrate.[149]

In considering the question of whether Speedway waived its right to arbitrate, the court reiterated that it is possible for a party to waive its rights to arbitration.[150] It then briefly went over the requirements for a waiver of arbitration.[151] A party waives its right to arbitrate if it (1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that right, and (3) prejudiced the party opposing arbitration.[152] The court noted that Speedway had conceded that it had knowledge of its purported right to compel arbitration on Frye's claim pursuant to the Program.[153] The court then concluded that Speedway acted inconsistently with a right to enforce arbitration of Frye's claims.[154] The court considered Speedway's actions, along with its delay in asserting its claimed right to compel arbitration, in finding that Speedway was preparing for adjudication and acted inconsistently with its right to arbitrate.[155] After concluding that Speedway had knowledge of its right to arbitrate and acted inconsistently with that right, the court stated that it could not find waiver without finding prejudice.[156]

The court cited to *Major Cadillac* for the principle that prejudice is determined on a case-by-case basis.[157] Next, the court detailed how Speedway engaged in significant trial-oriented activities before asserting a right to compel arbitration.[158] The court stated that, from these facts, it had no difficulty concluding that prejudice was sufficiently established.[159]

V. COMMENT

If the Court of Appeals for the Western District of Missouri had found that Frye's continued employment at Speedway constituted acceptance and consideration for her promise to arbitrate, this case could have turned out differently.[160]And in many courts across the US, including the Eighth Circuit, it would have. This

147. *Frye*, 321 S.W.3d at 444.
148. *Id.* at n. 24.
149. *Id.* at 444.
150. *Id.* at 445.
151. *Id.* (citing Major Cadillac, 280 S.W.3d at 721).
152. *Id.*
153. *Frye*, 321 S.W.3d at 445.
154. *Id.* Defendants removed the case to federal court; each filed answers, none of which asserted as a defense the obligation to arbitrate; Speedway filed a counterclaim which necessitated Frye filing a reply; Frye was required to propound discovery after an eleven-month delay.
155. *Id.*
156. *Id.* at 446.
157. *Id.* (citing *Major Cadillac*, 280 S.W.3d at 723).
158. *Id.* at 446.
159. *Frye*, 321 S.W.3d at 446.
160. This statement removes the consideration of Speedway's waiver of its right to arbitrate.

comment will examine the tension between the Eighth Circuit's holding on this topic and the minority position Missouri state courts have taken in favor of the employee over the employer, with the result being that at-will employees who wish to challenge a mandatory arbitration clause against their employers in Missouri could end up with vastly different results, merely depending on whether or not they have federal claims. When the Eighth Circuit holds this way, it ignores substantive Missouri contract law for its own bias in favor of employers over employees.

Decisions of the federal court system do not bind the state courts in their holdings, especially when the determination rests upon state contract law.[161] While federal courts are supposed to apply the substantive law of the state the case arises out of if the claim is state-based, federal courts may not always analyze or apply state principles.[162] These courts may instead have the goal of upholding mandatory arbitration agreements despite a clear showing that the agreement violates the state's common-law contract doctrine.[163] When faced with the question of whether an employee's continued employment after signing an agreement to arbitrate constitutes the acceptance and consideration necessary for a valid and enforceable contract, the Eighth Circuit has continuously held that it is.[164]

In *Berkley*, the Eighth Circuit did not analyze substantive Missouri law and instead just analyzed the language of the arbitration agreement. From the language that stated that employees "are deemed to have agreed to the provisions of the Rules by virtue of...continuing employment...", the court deemed the contract to have been valid and enforceable. The court cites no authority in this conclusion, but cites to two Missouri cases that it claims supports its proposition that continued employment equals acceptance and consideration of an arbitration program.[165] Both cases were distinguished by the Missouri court in *Kunzie*. The Eighth Circuit seemed to abandon the traditional elements of "acceptance and consideration" in favor of what appears to be a notice requirement. The court's construct would find an arbitration clause valid as long as the language used was sufficient to put an employee on notice that he or she is bound to arbitrate employment disputes if employment is continued.

Such a construct is not on par with Missouri contract law. To enter into a valid contract in Missouri, "there must be a definite offer, unequivocal acceptance, and consideration."[166] In a bilateral contract, such as an arbitration agreement, the offer and acceptance must be mutual, with the acceptance evidencing assent and agreement to those terms. Generally, courts hold that there is sufficient consideration when one party agrees to arbitrate its disputes with another party in exchange

161. Kunzie v. Jack-in-the-Box, 330 S.W.3d 476, 482 (Mo. App. E.D. 2010).

162. *Id.* at 482.

163. *See* Kenneth Jeremy Geniuk, *Untipping the Scales: Using State Contract Law to Protect At-Will Employees from Unfair Mandatory Arbitration Agreements*, 74 UMKC L. REV. 197, 199 (2005).

164. *See e.g.* Berkley v. Dillards, 450 F.3d 775, 777 (8th Cir. Mo. 2006); KCMS Contr., Inc. v. Triage Mgmt. Servs., 2010 U.S. Dist. LEXIS 49807 (W.D. Mo. 2010); Fay v. New Cingular Wireless PCS, LLC, 2010 U.S. Dist. LEXIS 34274 (E.D. Mo. 2010); Shelnutt v. AT&T Mobility, LLC, 2011 U.S. Dist. LEXIS 34274, *52 (W.D. Mo. 2011).

165. *Berkley*, 450 F.3d at 777 (citing Cook v. Coldwell Banker, 967 S.W.2d 654, 657 (Mo. App. E.D. 1998)); Easy Return Midwest, Inc. v. Schultz, 964 S.W.2d 450, 454 (Mo. App. E.D. 1998).

166. Reppy v. Winters, 2011 Mo. App. LEXIS 1025, *8 (Mo. Ct. App. 2011).

for the other party's promise to do the same.[167] Missouri case law states that "the consideration sufficient to support a simple contract may consist of a detriment to the promisee or a benefit to the promisor. Either alone is sufficient."[168] The court in *Frye* considered this precedential sentiment in considering whether the arbitration agreement fulfilled the contract requirements and found that, according to its state's case law, continued employment does not constitute consideration on its own.

The conflicting holding of *Frye* with that of the Eighth Circuit in determining the same issue presents a problem to Missouri employers and an opportunity to Missouri employees. If an employee's argument against mandatory arbitration rests on the assertion that no contract existed in the first place due to lack of acceptance and/or consideration, and the employer's main defense against that claim is that the employee continued his or her employment after the arbitration program was implemented, the employee can ensure the success of her argument by choosing to file only in state court rather than federal. This would cause the case to be heard by Missouri courts, who would rule that continued employment is not acceptance or consideration for an agreement to mandatory arbitration, as opposed to the district courts and eventually the Eighth Circuit, who rule in the opposite way.

As the *Frye* holding benefits Missouri employees, it places an extra burden on employers. While the majority of state courts around the country and the federal courts of Missouri hold that continued employment is the only consideration needed to impose mandatory arbitration clauses on employees, state courts in Missouri just will not allow it anymore. This means employers have to include some other form of consideration in order to avoid the entire agreement being ruled invalid and unenforceable by these courts. In *Frye* the court notes that consideration could have been found for the Program if the employers had exchanged mutual promises or if the contract had been bilateral rather than unilateral with the employer having the right to nullify at any time. These are examples of consideration that will have to be conceded to employees in Missouri if the employers want to avoid litigation in the future.

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167. *See, e.g.*, Adkins v. Labor Ready, Inc., 303 F.3d 496, 501 (4th Cir. 2002) (holding that an employer's promise to arbitrate its own claim against an employee was sufficient consideration); Ortiz v. Winona Mem. Hosp., 2003 U.S. Dist. LEXIS 12446, at *15-16 (D. Ind. 2003) (holding that an employer's promise to 1) arbitrate disputes with employee, 2) be bound by arbitration decisions, and 3) pay arbitration fees was sufficient consideration for an employee's promise to arbitrate disputes with the plaintiff); Raasch v. NCR Corp., 254 F. Supp. 2d 847, 857 (S.D. Ohio 2003) (holding employer's promise to arbitrate disputes was sufficient consideration for an employee's promise to arbitrate disputes); Wilks v. Pep Boys, 241 F. Supp. 2d 860, 863 (M.D. Tenn. 2003) (holding that when both employer and employee agreed to arbitrate claims against each other and neither party could change the agreement without a writing signed by both parties, there is sufficient consideration); DeLuca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 108-09 (D. Mass. 2001) (holding that employer and employee both exchanging promises to arbitrate statutory claims was sufficient consideration); Jenks v. Workman, 2000 U.S. Dist. LEXIS 9562, at *19 (S.D. Ind. 2000) (holding that employer's promise to arbitrate disputes with its employee was sufficient consideration to enforce the employee's agreement to arbitrate disputes with his employer).

168. *See* Coffman Indu., Inc. v. Gorman-Tabor Co., 521 S.W.2d 763, 770 (Mo. App. W.D. 1975).

VI. CONCLUSION

The court of appeals' holding in *Frye v. Speedway* has far-reaching implications for at-will employers and employees in the state of Missouri who must choose whether to bring claims in state court or in the Eighth Circuit. The holding reflects Missouri's minority position that an allowing an at-will employee to continue working in exchange for an agreement to arbitrate does not qualify as sufficient consideration for the contract. Missouri takes the position that, if an at-will employee freely signs a contract agreeing to arbitrate any claims against his employer, the employee's continued employment will not be enough to fulfill the consideration requirement for the contract to be enforceable. This contrasts with the Eighth Circuit's position that the continued employment of an employee after the company has implemented an arbitration program causes that employee to be bound by the program in question.

The *Frye* holding means that employers who want to be safe in both state and federal courts under employee claims must take the extra step of promising to submit their own claims to arbitration and must not maintain a unilateral right to modify the contract. This also may lead to more employers trying to remove cases to federal court in order to get favorable treatment by the Eighth Circuit. For employees, the *Frye* holding is a small victory in the protection of employee rights against employers under mandatory arbitration clauses. However, this victory will only be felt if the employee has no federal claims, or deletes his or her federal claims in order to remand the case to state court.

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