

SJC rejects Uber's arbitration agreement

By: Kris Olson January 4, 2021

Due to an inadequate registration process, Uber could not compel two of its users to arbitrate their discrimination claims against the company, the Supreme Judicial Court ruled on Jan. 4.

"The app's registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms, both of which could have been easily achieved," Justice Scott L. Kafker wrote on behalf of the court.

He added that a review of the case law revealed that Uber has had no trouble providing such reasonable notice and requiring express affirmation from its own drivers.

"Here, in remarkable contrast, both the notice and the assent are obscured in the registration process," Kafker wrote.

Plaintiffs Christopher and Hannah Kauders sued Uber Technologies Inc. and its wholly owned subsidiary Rasier LLC in Superior Court, claiming, among other things, that three Uber drivers refused to provide Christopher Kauders with rides because he was blind and accompanied by a guide dog, violating G.L.c. 272, §98A.

Each of the plaintiffs had registered with Uber through its cellphone app, and the court took a close look at what that registration process entailed.

The SJC noted that the user is presented with "extensive and far reaching" terms and conditions, which Uber can amend at any time and without notice to the users who have already agreed to them.

Citing a provision in those terms and conditions, Uber sought to compel arbitration of the Kauders' claims. Superior Court Judge Douglas H. Wilkins initially rejected the Kauders' argument that there was no enforceable arbitration agreement and granted Uber's motion.

The arbitrator then ruled in favor of Uber on all of the plaintiffs' claims on June 4, 2018.

Three weeks later, the 1st U.S. Circuit Court of Appeals issued a decision in *Cullinane v. Uber Techs., Inc.*, concluding that Uber's registration process did not create a contract because it did not provide reasonable notice to users of the terms and conditions.

Several months later, after Uber moved to confirm the arbitration award, Wilkins allowed a motion for reconsideration and reversed his earlier decision, concluding that there was no enforceable contract requiring arbitration.



In addition to arguing that the plaintiffs were bound by the terms and conditions, Uber also contended that the judge had no choice but to confirm the arbitration award once the plaintiffs failed to challenge the award within 30 days.

But the SJC rejected that argument as well, finding that the issue of arbitrability had been preserved for appeal.

As for whether the plaintiffs' acceptance of the terms and conditions formed an enforceable agreement, the SJC looked to the Appeals Court's 2013 decision in *Ajemian v. Yahoo*. In that decision, the court used a reasonableness standard, focusing on whether the contract provisions at issue "were reasonably communicated and accepted," the SJC noted.

The SJC agreed that the two-prong test, focusing on whether there is reasonable notice of the terms and a reasonable manifestation of assent to those terms, "is the proper framework for analyzing issues of online contract formation," though it noted that setting out such general fundamental contract principles is not, however, "the difficult part of analysis."

Rather, "the trick" was assessing how those principles should be applied to "newer forms of contracting," like registering for a smartphone app.

The court then made a detailed exploration of each prong — notice and assent — and found Uber's terms and conditions wanting in both respects.

The SJC's 43-page decision is *Kauders, et al. v. Uber Technologies, Inc., et al.*, *Lawyers Weekly No. 10-001-21*.

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