New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 265—NO. 30

WEDNESDAY, FEBRUARY 17, 2021

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

The FAA Precludes New York From Exempting Claims From Arbitration

By **Edward M. Spiro**

And **Christopher B. Harwood**

When parties to a contract agree to settle any claims that may arise between them through arbitration, the Federal Arbitration Act (the FAA) sets forth a national policy favoring arbitration. As a matter of public policy, however, New York has sought—through the 2018 enactment of §7515 of the New York Civil Practice Law and Rules—to exempt certain types of claims from arbitration, including claims alleging discrimination under the New York State Human Rights Law. Through §7515, New York seeks to provide those who claim to have been victimized by sexual assault a public forum in which to air their grievances.

In *Gilbert v. Indeed*, No. 20-3826, 2021 WL 169111 (S.D.N.Y. Jan. 19, 2021), U.S. District Court Judge Lewis J. Liman for the Southern District of New York recently addressed whether §7515 could be applied to invalidate the parties' prior agreement to arbitrate. Judge Liman found that §7515 is preempted by the FAA, and thus cannot be used to exempt from arbitration claims that otherwise would be arbitrable under the FAA. Because the parties' agreement to arbitrate was otherwise enforceable, Judge Liman granted the defendants' motion to compel arbitration.

> Judge Liman found that §7515 is preempted by the FAA, and thus cannot be used to exempt from arbitration claims that otherwise would be arbitrable under the FAA.

'Gilbert'

Plaintiff Taylor Gilbert's complaint tells a brutal story of sexual assault, rape, and related misconduct while she was employed by defendant Indeed. Shortly after plaintiff began her employment at Indeed in 2015, she alleges that she was sexually assaulted and raped by a senior Indeed employee. Plaintiff alleges that the abuse did not end with the 2015 rape, and that for years, she was subjected to further sexual misconduct. Plaintiff alleges that she reported the rape and other misconduct to two Indeed supervisors, who took no action.

Plaintiff further alleges that (1) in the aftermath of the rape and other misconduct, she developed severe medical conditions, (2) she was denied reasonable accommodations for her medical conditions, (3) Indeed subjected her to a hostile work environment through a pattern and practice of favoring women who engage in sexual and/or romantic relationships with male colleagues, (4) Indeed discriminated against her for her refusal to engage in such relationships, her objection to them, and her medical conditions, and (5) Indeed retaliated against her because of her complaints, her refusal to acquiesce to the culture at Indeed, and her medical conditions.

Plaintiff is pursuing federal and state law claims against Indeed and various current and former Indeed employees (collectively, defendants), including federal law claims for gender discrimination, sexual harassment, and hostile work environment under Title VII of the Civil Rights Act of 1964, and state law claims for gender harassment and disability discrimination under the New York State Human Rights Law.

Plaintiff Executed Agreements Containing a Broad Arbitration Provision. Upon commencing her employment at Indeed in 2015, plaintiff signed a document titled, Nondisclosure, Inventions

EDWARD M. SPIRO *and* CHRISTOPHER B. HARWOOD *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. Mr. Spiro is the co-author of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2020), and Mr. Harwood is the former Co-Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York.*

Assignment and Arbitration Agreement (the nondisclosure agreement), which contained a broad arbitration provision stating:

> The parties hereby agree to submit all disputes I might have against the Company, and all disputes the Company might have against me, to final, binding arbitration to the fullest extent permitted by law. This provision shall be referred to herein as the "ADR Agreement." The Federal Arbitration Act, 9 U.S.C. §1 et seq., shall govern the interpretation and enforcement of this ADR Agreement … .

The nondisclosure agreement also included a provision requiring a party who resists arbitration to pay the other side's costs, expenses and attorney fees in connection with a motion to compel arbitration if the court compels arbitration (the fee shifting provision").

Plaintiff signed an updated version of the nondisclosure agreement in 2019 (the "2019 nondisclosure agreement), which included both the arbitration provision and the fee shifting provision. Moreover, each year from 2015 through 2019, plaintiff also signed a performance unit agreement that granted her the right to receive certain incentive-based compensation. The performance unit agreements expressly stated that by signing them, plaintiff was agreeing to abide by the terms of the applicable non-disclosure agreement.

In early 2020, plaintiff refused to sign her performance unit agreement for 2020. On April 22, 2020, plaintiff sent an email to Indeed's human resources manager in which she explained that she would not sign the 2020 agreement, "because I do not consent to any mandatory arbitration provision in the [nondisclosure agreement] … . I fully intend to pursue my rape/sexual harassment, discrimination, hostile work environment, failure to accommodate, unequal pay, retaliation and other claims and allegations … in court." Indeed continued to employ plaintiff following her refusal to sign the 2020 performance unit agreement.

Plaintiff filed her complaint on May 18, 2020. Shortly thereafter, Indeed and the other defendants moved to compel arbitration. Plaintiff raised three arguments in opposition to the motion to compel: (1) any agreements that she made to arbitrate are not enforceable against her by virtue of her refusal to sign the 2020 performance unit agreement, (2) New York state law—specifically, §7515—makes it unlawful for an employer to require an employee such as plaintiff to agree to arbitrate a statutory claim of discrimination, and (3) the nondisclosure agreement's arbitration provision otherwise is unconscionable, including because it contains the fee shifting provision, which requires fee shifting when a court grants a motion to compel arbitration but not when a court denies such a motion.

Judge Liman held a hearing on the motion to compel on Oct. 19, 2020, after which defendants filed a letter in which they withdrew the request they had made in their motion under the fee shifting provision to recover the costs and fees incurred by them in connection with the motion.

Plaintiff's Prior Agreements To Arbitrate Are Enforceable. Judge Liman rejected plaintiff's initial argument against arbitration—that her prior agreements to arbitrate were unenforceable due to her refusal to sign the 2020 Performance Unit Agreement—because (1) by its terms, the 2019 nondisclosure agreement's arbitration provision covers both "claims known or accrued as of the date of execution of [the agreement]," as well as those claims that accrue or arise during the term of the 2019 nondisclosure agreement, (2) the 2019 nondisclosure agreement further provided that it "shall not be modified, amended, superseded or terminated in whole or in part except in a writing signed by the parties," and (3) the parties had not executed any such writing. *Gilbert*, 2021 WL 169111, at *9. As a result, Judge Liman concluded that "plaintiff's obligation to arbitrate remain[s] binding on her as to all of the claims asserted in this action." Id.

With respect to plaintiff's refusal to sign the 2020 performance unit agreement, Judge Liman observed that that act "could be considered a repudiation *by plaintiff* of the [2019 nondisclosure agreement]," i.e., a statement to Indeed of plaintiff's intent no longer to abide by the terms of the [2019 nondisclosure agreement]." Id. at *10 (emphasis added). Judge Liman concluded, however, that such a repudiation "would not relieve plaintiff of her obligation to arbitrate this dispute," because "[o]ne party to an agreement cannot unilaterally relieve herself of her contractual obligations." Id.

New York State Cannot Exempt Claims From Arbitration Under the FAA. Judge Liman also rejected plaintiff's second argument—that to the extent the arbitration provision in the 2019 Nondisclosure Agreement is read to cover her statutory discrimination claims, §7515 renders it null and unenforceable—on the ground that, under settled Supreme Court law, a state cannot take action to exempt from arbitration claims that (like plaintiff's claims here) otherwise would be subject to mandatory arbitration under the FAA. Id. at *11-16.

Section 7515 provides: "Except where inconsistent with federal law, no written contract … shall contain a prohibited clause as defined in paragraph two of subdivision (a) of this section." N.Y. C.P.L.R. §7515(b)(i). Paragraph two of subdivision (a), in turn, defines a prohibited clause as "any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination,

in violation of laws prohibiting discrimination, including but not limited to, article fifteen of the executive law [i.e., the New York State Human Rights Law]." Id. §7515(a)(2). Section 7515(b)(iii) provides that mandatory arbitration provisions that are prohibited clauses are "null and void." Id. §7515(b)(iii).

In rejecting plaintiff's §7515 preemption argument, Judge Liman observed that, under settled Supreme Court authority, (1) "agreements to arbitrate [can] be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"; and (2) the FAA "declares a national policy favoring arbitration of claims that parties contract to settle in that manner which forecloses state legislative attempts to undercut the enforceability of arbitration agreements." *Gilbert*, 2021 WL 169111, at *12 (quotation marks and brackets omitted). Indeed, Judge Liman noted that "the FAA's displacement of conflicting state law is now well-established." Id. "It follows from these principles," Judge Liman concluded, "that New York State cannot exempt plaintiff['s] federal employment discrimination and state law claims from mandatory arbitration under the FAA." Id. at *13. Judge Liman observed that two other courts in this district, *White v. WeWork Cos.*, No. 20-1800, 2020 WL 3099969 (S.D.N.Y. June 11, 2020) (McMahon, C.J.), and *Latif v. Morgan Stanley & Co.*, No. 18-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019) (Cote, J.), recently reached the same conclusion. *Gilbert*, 2021 WL 169111, at *13.

The Arbitration Provision Is Not Unconscionable. Judge Liman then turned to plaintiff's final argument against enforcement of the arbitration provision—that the arbitration provision is unconscionable because it (1) violates public policy by requiring arbitration of her sex discrimination and harassment claims, and (2) includes the Fee Shifting Provision—and also rejected it. Id. at *16-22. Judge Liman found "[t]he policy concerns raised by plaintiff … [to be] legitimate and weighty," including the "public cost to forcing those who have been victimized by sexual assault

'Gilbert' demonstrates that, due to the FAA's national policy favoring arbitration, absent exceptional circumstances—such as where an agreement to arbitrate has been procured through fraud or duress, or its enforcement otherwise would be unconscionable—a party will not be able to avoid its prior agreement to arbitrate a claim subject to the FAA.

to raise [their] claims only in a private arbitral forum and denying them a public forum in which to air their grievances." Id. at *17. Judge Liman concluded, however, that because plaintiff "entered into a valid arbitration agreement which explicitly cover[s the] claims brought here … the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Id. at *18 (quotation marks omitted).

With respect to the fee shifting provision, Judge Liman indicated that if defendants had not waived enforcement of the fee shifting provision, the provision may have rendered the arbitration agreement unenforceable, including because "[t]here is no reason to believe that Congress intended for a plaintiff who takes an ultimately losing but not unreasonable position with respect to the forum in which to bring suit to be subject to an attorneys' fees award, just as Congress does not impose such fees on a plaintiff who takes any other reasonable but ultimately unsuccessful legal or factual position." Id. at *19. Judge Liman found, however, that "plaintiff's argument to resist arbitration here on these grounds … fails" because "defendants have waived the [fee shifting p]rovision," and plaintiff was not chilled in asserting her rights in court. Id. at *21.

Having rejected each of plaintiff's challenges to enforcement of the arbitration provision, and having concluded that the arbitration provision unambiguously delegated to the arbitrator all questions of arbitrability, Judge Liman granted defendants' motion to compel, to allow the arbitrator to determine whether plaintiff's federal and state law claims are arbitrable. Id. at *23-24.

Conclusion

Gilbert demonstrates that, due to the FAA's national policy favoring arbitration, absent exceptional circumstances—such as where an agreement to arbitrate has been procured through fraud or duress, or its enforcement otherwise would be unconscionable—a party will not be able to avoid its prior agreement to arbitrate a claim subject to the FAA.

Reprinted with permission from the February 17, 2021 edition of the NEW YORK LAW JOURNAL © 2021 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-256-2472 or reprints@alm.com. # NYLJ-02162021-480634