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New York State Ban on Arbitration of Sexual Harassment Claims Preempted, Court Rules

New York Federal Court Holds That New York State's Recently Adopted Ban on Pre-Dispute Agreements To Arbitrate Claims of Sexual Harassment Is Unenforceable as to Those Agreements Covered by the Federal Arbitration Act.

SUMMARY

The 2018-2019 State Budget, which was signed into law in April 2018 by New York Governor Andrew Cuomo, contained several significant provisions addressing workplace sexual harassment, including a ban on pre-dispute agreements requiring arbitration to resolve sexual harassment claims "except where inconsistent with federal law." On June 26, 2019, Judge Denise Cote, of the United States District Court for the Southern District of New York, in *Latif* v. *Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019), held that this provision of the Budget is preempted by the Federal Arbitration Act (the "FAA"). Judge Cote's ruling is consistent with prior authority holding that the FAA "preempt[s] any state rule discriminating on its face against arbitration—for example, a 'law prohibiting outright the arbitration of a particular type of claim.'"[1] Judge Cote's ruling is also consistent with a broader body of case law interpreting the FAA and may provide greater certainty for New York employers covered by the FAA concerning the arbitrability of sexual harassment claims that have arisen in the wake of the #MeToo movement. The FAA applies to all arbitration agreements in interstate commerce (other than to agreements involving certain transportation workers), and thus there may be agreements entered into by employers operating solely within New York State which would remain enforceable.

BACKGROUND

The 2018-2019 State Budget added Section 7515 to the New York Civil Practice Law and Rules to provide that no written contract shall contain "any clause or provision . . . [requiring] that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment," and that any "mandatory arbitration clause" with respect to such claims is null and void. A "mandatory arbitration clause" is defined to include contractual language to the "effect that the facts found or determination made by the arbitrator or panel of arbitrators in its application to a party alleging an unlawful discriminatory practice based on sexual harassment shall be final and not subject to independent court review." Section 7515 explicitly provides that the ban on mandatory arbitration does not apply as to non-sexual harassment claims and that it does not affect the enforceability of agreements to arbitrate other claims. Section 7515 applies only to pre-dispute arbitration agreements; parties remain free to agree to arbitration claims after a dispute arises. Collective bargaining agreements may continue to require arbitration of sexual harassment claims. These provisions took effect on July 11, 2018.[2]

On June 5, 2017, Mahmoud Latif signed an offer letter of employment with Morgan Stanley & Co., which included an agreement that "covered claims . . . will be resolved by final and binding arbitration." "Covered claims" was defined to include "statutory discrimination, harassment and retaliation claims." Latif alleges that in the fall of 2017, he became the target of inappropriate comments regarding his sexual orientation, inappropriate touching, sexual advances, and offensive comments about his religion. He also claims that a female supervisor sexually assaulted him around February 2018. Latif alleges that he reported the incidents to Morgan Stanley's human resources department, and that after numerous e-mails and meetings with the human resources department, his employment was terminated around August 1, 2018.[3]

On December 10, 2018, Latif filed a complaint in federal court against Morgan Stanley alleging discrimination, hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law, as well as additional claims under New York State law. Morgan Stanley moved to compel arbitration based on the arbitration agreement in Latif's offer letter. Latif conceded that he was bound to arbitrate all of his claims except for his claims of sexual harassment, but argued that Section 7515 prevented the court from compelling arbitration of those claims.[4]

THE DISTRICT COURT'S DECISION

The court began its analysis by noting that "[t]he Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms."[5] "[A] party to an arbitration agreement seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable or invalid."[6] The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity *for the revocation of any contract*."[7]

The court explained that the FAA "recognizes only defenses that apply to 'any' contract . . . establishing a sort of 'equal treatment' rule for arbitration contracts," whereby arbitration agreements may be "invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," and that the FAA "does not save defenses that target arbitration either by name or by more subtle methods."[8] Critically, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[9]

Against this backdrop, and after analyzing the purposes of Section 7515 to "deal[] with the scourge of sexual harassment" and to "handle[] all different kinds of sexual harassment situations," the court had no trouble finding that because Section 7515 reflected a "state law prohibit[ing] outright the arbitration of a particular type of claim"—sexual harassment claims—it was preempted by the FAA. The court rejected Latif's arguments that because Section 7515 was enacted as just one of a bundle of provisions "reflect[ing] a general intent to protect victims of sexual harassment and not a specific intent to single out arbitration clauses for singular treatment," it did not "run afoul of the FAA's prohibition on arbitration-specific defenses," and that Section 7515 "does not disfavor all arbitration, but only arbitration of sexual harassment claims." The court found that "nothing in the bill suggests that the New York legislature intended to create a generally applicable contract defense."[10]

The court further rejected Latif's argument that because requiring arbitration of sexual harassment claims "interfere[s] with New York's substantial state interest in transparently addressing workplace sexual harassment," Section 7515 "is a ground 'in equity for the revocation of a contract,'" finding that "Section 7515 presents no generally applicable contract defense, whether grounded in equity or otherwise, and as such cannot overcome the FAA's command that the parties' Arbitration Agreement be enforced." Accordingly, the court granted Morgan Stanley's motion to compel arbitration, including of Latif's sexual harassment claims.[11]

IMPLICATIONS

Section 7515 was one of many efforts by employee advocates to limit the use of pre-dispute arbitration provisions in the employment context. The *Latif* decision reinforces the strong presumption in favor of arbitration and the limitations of a state's ability to curtail the use of arbitration agreements for employers covered by the FAA. It is worth noting, however, that the proposed Ending Forced Arbitration of Sexual Harassment Act, which would amend the FAA to prohibit arbitration of sexual harassment claims, is pending in Congress. The Act, which is sponsored by Senators Kirsten Gillibrand (D-N.Y.) and Lindsey Graham (R-S.C.) and has been pending in Congress for approximately one year without substantive progress, would not face the same obstacles as laws enacted at the state level because it would amend the FAA itself. Absent Congressional action, however, states will face significant hurdles in limiting the use of arbitration to resolve claims regarding particular subjects.

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ENDNOTES

1 *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (citing *AT&T Mobility Corp.* v. *Concepcion*, 563 U.S. 333, 341 (2011)).

2 S 7507 C, 2017–2018 Leg. Sess. pt. KK, subpt. B §§ 1–2.

3 *Latif* v. *Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *1 (S.D.N.Y. June 26, 2019).

4 *Id.* at *1–2.

5 *Id.* at *2 (citing *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1412 (2019)).

6 *Id.* (citing *Harrington* v. *Atl. Sounding Co.*, 602 F.3d 113, 124 (2d Cir. 2010)).

7 *Id.* (emphasis in original) (citing 9 U.S.C. § 2).

8 *Id.* (citing *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018); *Concepcion*, 563 U.S. at 339).

9 *Id.* (citing *Concepcion*, 563 U.S. at 341).

10 *Id.* at *3–4.

11 *Id.*

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