American Bar Association, Section of Litigation
Alternative Dispute Resolution

PRACTICE POINTS

New York Law Prohibiting Arbitration of Sexual Harassment Claims Is Preempted

By Mitchell L. Marinello – September 12, 2019

Several states, propelled by recent political currents, have passed or proposed passing legislation that nullifies agreements that require the arbitration of certain kinds of claims, such as those involving sexual harassment or discrimination. In 2018, New York enacted legislation that prohibits the mandatory arbitration of sexual harassment claims. The validity of this legislation was recently tested in *Latif v. Morgan Stanley & Co. LLC,* Case No. 18 cv 11528 (U.S. Dist. S. D. NY June 26, 2019) 2019 U.S. Dist. LEXIS 107020.

In *Latif,* Morgan Stanley terminated the employment of Mahmoud Latif, a relatively new employee, after Latif had made several complaints about sexual harassment on the job. Latif brought a variety of claims against Morgan Stanley. Eventually, Latif stipulated that the arbitration agreement he had signed when he was first hired was enforceable with respect to all his claims except for his claim of sexual harassment. He argued that CPLR 7515 invalidated his agreement to arbitrate his sex harassment claim. By its terms, CPLR 7515 purported to render "null and void" any clause in an employment agreement that required an employee to arbitrate sexual harassment claims.

The district court rejected Latif's arguments and compelled arbitration reasoning as follows:

> Here, application of Section 7515 to invalidate the parties' agreement to arbitrate Latif's claims would be inconsistent with the FAA. The FAA sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by §7515.
>
> Moreover, the FAA's saving clause does not render the parties' Arbitration Agreement unenforceable here. Section 7515(b) applies only to contract provisions that require "mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment." N.Y. C.P.L.R. § 7515(a)(2). This provision is not a "ground[] as exist[s] at law or in equity for the revocation of any contract," 9 U.S.C. § 2, but rather a "state law prohibit[ing] outright the arbitration of a particular type of claim," which, as described by the Supreme Court, is "displaced by the FAA." Concepcion, 563 U.S. at 341. (2019 U.S. Dist. LEXIS 107020, p. 9-10)

Latif argued that the purpose of CPLR 7515 was to protect victims of sexual harassment and that the statute did not specifically intend to single out arbitration agreements. He argued that, as a result, CPLR 7515 was not inconsistent with the FAA's prohibition of arbitration-specific defenses. The court dismissed Latif's argument:

> The bundle of laws that make up [the relevant] bill were clearly intended to address sexual harassment; nothing in the bill suggests that the New York legislature intended to create a generally applicable contract defense [such as might be saved by 9 U.S.C. §2].

The court also noted that on June 19, 2019, the New York legislature amended CPLR 7515 to encompass claims of discrimination generally instead of being limited to sexual harassment claims. The court simply stated that, "[f]or the reasons described above, §7515 as so amended would not provide a defense to the enforcement of the Arbitration Agreement."

Practice Pointer: State legislatures and courts are constantly trying to create ways around arbitration agreements, and they either do not take into account or do not concern themselves with federal law in this area. Attorneys seeking to enforce arbitration agreements should consider filing their actions to compel arbitration in federal court (if possible), particularly when faced with local legislation or judicial decisions that recognize state law exceptions to the enforcement of arbitration agreements.

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