Exhaustion of Administrative Remedies Does Not Apply in Arbitration of Employment Claims

In *Virk v. Maple-Gate Anesthesiologists, P.C.*, No. 14-CV-381S, —F. Supp. 3d—, 2015 WL 268873 (W.D.N.Y. Jan. 21, 2015), the Western District of New York became the second court to consider the validity of an arbitration provision containing a statute of limitations that effectively prevented a plaintiff from exhausting administrative remedies prior to arbitrating federal employment discrimination claims. The court held that statutory exhaustion requirements apply only in federal court and do not implicate private arbitration agreements.*Id.* at *8.

Plaintiff Virk entered into an employment agreement with defendant Maple-Gate Anesthesiologists, P.C. The agreement contained a clause requiring arbitration of "[a]ny controversies or claims arising out of or relating to this Agreement or the breach thereof" except for disputes related to the non-competition clauses of the agreement. *Id.* at *1. The provision required that arbitration be commenced within six months of the date of any alleged controversy or claim. *Id.*

Maple-Gate thereafter terminated Virk. Virk filed an action in New York state court asserting, among others, federal employment discrimination claims under Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act. *Id.* at *2. Both of these claims require the plaintiffs to exhaust administrative remedies prior to filing a claim. *Id.* at *8 n.3. After removal to federal court, the defendants sought to compel arbitration. *Id.* at *2.

In deciding arbitrability under the Federal Arbitration Act, courts ask whether a valid arbitration agreement exists and, if so, whether the dispute to be arbitrated falls within the scope of that agreement. *Id.* at *3. Virk argued that the arbitration agreement was invalid because enforcing it would be unlawful as applied to his claims for employment discrimination. *Id.* at *8. Because the arbitration provision required arbitration to be commenced within six months—likely before the administrative process would be resolved—Virk argued he was effectively precluded from filing a claim at all. *Id.* at *8 & n.3.

The court recognized that arbitration agreements are subject to typical contract defenses. Thus, courts could invalidate arbitration agreements on public policy grounds where they "operate as a prospective waiver of a party's right to pursue statutory remedies," such as those provided by federal employment discrimination statutes. *Id.* at *8 (internal quotation marks omitted). The court held that there was no such waiver because the exhaustion requirements apply only in federal court and do not implicate private arbitration agreements.*Id.*

The court reasoned that because arbitration is a creature of contract, "an arbitration provision that requires an employment discrimination claim to be arbitrated before statutory exhaustion procedures could possibly be completed is easily construed as reflecting the parties' agreement to waive such requirement, as well as any defense based on that requirement." *Id.* The court noted that its decision was consistent with the only other court to confront the issue, *Morris v. Temco Service Industries, Inc.*, No. 09 Civ. 6194 (WHP), 2010 WL 3291810, at *5 (S.D.N.Y. Aug 12, 2010). *Virk*, 2015 WL 268873 at *8.

This decision is important for potential plaintiffs and defendants who are party to employment agreements with arbitration provisions and statutes of limitation because it moots a common issue in employment discrimination cases. In addition, drafters of employment agreement arbitration provisions should carefully consider the length of contractual statutes of limitation to either avoid, or embrace, the force of *Virk*. The Second Circuit may provide further guidance regarding the issue, as the case is currently on appeal.

Keywords: ADR, litigation, arbitrability, limitations, exhaust administrative remedies, employment discrimination, waiver

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