SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2265-21

LAURA ZULUAGA,

Plaintiff-Appellant,

v.

ALTICE USA, MITCH NYAMWANGE and CLIFFORD PIERCE,

Defendants-Respondents.

Argued November 9, 2022 – Decided November 29, 2022

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6240-21.

Richard M. Schall argued the cause for appellant (Schall & Barasch, LLC, attorneys; Richard M. Schall, on the briefs).

August W. Heckman III argued the cause for respondents (Morgan, Lewis & Bockius LLP, attorneys; August W. Heckman III and Tova F. Katims, on the briefs).

The Dwyer Law Firm, LLC, attorneys for amicus curiae National Employment Lawyers Association of New Jersey (Andrew Dwyer, of counsel and on the brief).

PER CURIAM

Plaintiff Laura Zuluaga appeals from a Law Division order compelling arbitration and dismissing plaintiff's complaint with prejudice. We affirm in part and reverse and remand in part.

Plaintiff sued defendants, Altice U.S. (Altice), Mitch Nyamwange, and Clifford Pierce, alleging violations of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50. Plaintiff claims that Altice fostered and condoned a sexually hostile work environment and constructively discharged her. She claims that Nyamwange and Pierce aided and abetted the creation of a sexually hostile work environment.

We recite the pertinent facts. On November 5, 2020, in connection with her employment by Altice, plaintiff entered into a Mutual Arbitration Agreement (the agreement). The agreement states that it is "governed by the [Federal Arbitration Act, 9 U.S.C. §§ 1-402 (FAA)] and, to the extent not inconsistent with or preempted by the FAA, by the laws of the state in which Employee last worked for the Company without regard to principles of conflict of laws."

The agreement states that

> **all disputes, claims, complaints, or controversies** . . . that I now have or in the future may have against Altice USA and/or any of its . . . current and former officers, directors, employees, and/or agents . . . **are subject to arbitration at the election of any party** pursuant to the terms of this Agreement and will be resolved by arbitration and **not by a court or jury.** . . . The parties hereby forever waive and give up the right to have a judge or a jury decide any Claims as to which any party elects arbitration.

The agreement defines the term "Claims" to include "disputes, claims, complaints, or controversies arising out of and/or directly or indirectly relating to the relationship between [plaintiff] and the Company." Claims arising during the application for employment, employment, or termination from employment are subject to the agreement. The agreement states that if any party elects arbitration, the parties "forever waive and give up the right to have a judge or jury decide" any of the following types of claims: "contract claims, tort claims, discrimination and/or harassment claims, retaliation claims, claims for overtime, wages, compensation, penalties or restitution, and any other claim under any federal, state or local statute, constitution, regulation, rule, ordinance, or common law."

The agreement further states by checking the signature box, the employee acknowledges that the "**[e]mployee is giving up the right to have any disputes**

that are subject to arbitration be decided by a court or jury . . . ." Plaintiff checked the signature box.

In December 2020, plaintiff began working for Altice as a sales representative at its call center in Piscataway. On March 15, 2021, plaintiff was assigned to work under the supervision of Nyamwange. Plaintiff alleges that Nyamwange changed the location of her workstation to move her within "very close physical proximity to him," and engaged in numerous acts of improper conduct. Plaintiff alleges Pierce expressed "an interest in her" and claims that he "watch[ed] her in a way that made her uncomfortable." Plaintiff claims she suffered anxiety and panic attacks as a result of the alleged sexual harassment.

In April 2021, plaintiff reported the misconduct to a Human Resources (HR) representative. The following month, Altice's Regional HR Director informed plaintiff that Altice had concluded its investigation into her allegations, which resulted in Nyamwange being "addressed" and that the reported conduct of Pierce was merely a "misunderstanding."

Plaintiff sought psychiatric treatment, which included in-patient treatment, and remained out of work due to worsening symptoms. On June 29, 2021, an HR representative informed plaintiff that Altice considered her to be "on an unauthorized leave of absence" in violation of Altice's "Attendance

Policy" and was expected to return to work. On July 20, 2021, plaintiff's attorney advised Altice that plaintiff would not be returning to work as the company's "actions and inactions led to the constructive discharge of [her] employment."

In October 2021, plaintiff filed this lawsuit against Altice, Nyamwange, and Pierce asserting causes of action under the NJLAD. Plaintiff claimed that defendant Altice fostered and condoned a sexually hostile work environment and that she was constructively discharged due to Altice's failure to adequately address her allegations. Plaintiff alleged Nyamwange and Pierce aided and abetted the creation of a sexually hostile work environment.

Defendants moved to dismiss the complaint and to compel arbitration, relying on the agreement. Plaintiff opposed the motion, arguing that the arbitration agreement failed to clearly and unambiguously provide notice that she was waiving her constitutional and statutory rights and was therefore invalid.

On March 4, 2022, the judge rendered an oral decision granting defendants' motion, dismissing plaintiff's complaint with prejudice and ordering the parties to arbitration. As an initial matter, the judge noted that plaintiff did not dispute that her claims against defendants fell within the scope of the

arbitration agreement, and that her signature was affixed to the arbitration agreement. The judge determined that the agreement contains a "clear and unambiguous waiver of the right to seek judicial remedies," that the challenged language was "clear and unambiguous," and the agreement was enforceable as a matter of law.

The judge did not address the issue of whether Section 12.7 of the NJLAD continued to be preempted by the FAA as amended by the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA), Pub. L. 117-90, 136 Stat. 26, signed into law by President Biden on March 3, 2022, the day before the motion was decided. This appeal followed.

We requested supplemental briefing addressing two issues: (1) in view of the enactment of the EFAA, does federal preemption of N.J.S.A. 10:5-12.7 continue to apply generally to claims that accrued prior to March 3, 2022; and (2) if so, does the federal preemption of N.J.S.A. 10:5-12.7 continue to apply to claims that accrued prior to March 3, 2022, if the arbitration had not yet commenced or taken place.

We granted the application of the National Employment Lawyers Association of New Jersey to appear as amicus curiae.

Plaintiff raises the following points for our consideration:

POINT I

GIVEN THAT THE FORCED ARBITRATION OF SEXUAL HARASSMENT CLAIMS "SHIELD[S] PERPETRATOR[S], SILENCE[S] SURVIVORS, AND ENABLE[S] EMPLOYERS TO SWEEP EPISODES OF SEXUAL ASSAULT AND HARASSMENT UNDER THE RUG," THE TRIAL COURT IN THE PRESENT CASE ERRED IN "RESOLV[ING] AMBIGUITY AND CONTRACT LANGUAGE IN FAVOR OF ARBITRATION."

POINT II

BECAUSE DEFENDANT ALTICE'S "MUTUAL ARBITRATION AGREEMENT" FAILED TO "CLEARLY AND UNAMBIGUOUSLY" CONVEY TO PLAINTIFF THAT SHE WAS WAIVING HER CONSTITUTIONAL AND STATUTORY RIGHTS TO A JURY TRIAL, THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND COMPEL ARBITRATION.

A. Because Defendant Altice's Arbitration Agreement Portrays Arbitration as an "Elective" Option and Thereby Leaves Plaintiff In The Dark as to Whether or Not She is Waiving Her Right to Bring Her NJLAD Statutory Claims to Court, the Trial Court Erred in Dismissing Plaintiff's Complaint and Compelling Arbitration.

B. Given That Defendant Altice Drafted an Acknowledgement of the Arbitration Agreement that Used Language So Confusing, Circular, and Back-Handed that Employees Would Likely Not Understand What Rights They Were Waiving, the Trial Court Erred in Dismissing Plaintiff's

Complaint and Compelling Arbitration of Plaintiff's NJLAD Claims.

Plaintiff raises the following additional points in her supplemental brief:

POINT I

GIVEN THAT IN ENACTING THE EFAA, CONGRESS HAS AMENDED THE FAA TO COMPLETELY REVERSE THE FEDERAL POLICY ON THE MANDATORY ARBITRATION OF SEXUAL HARASSMENT CLAIMS, ANY CONFLICT BETWEEN THE FAA AND SECTION 12.7 OF THE [NJLAD] NO LONGER EXISTS, AND, ACCORDINGLY, THERE IS NO REASON TO DENY PLAINTIFFS IN SEXUAL HARASSMENT CASES THE RIGHTS GRANTED THEM BY OUR LEGISLATURE WHEN, AS OF MAY 18, 2019, IT ADDED THE PROVISIONS OF SECTION 12.7 TO THE [NJLAD].

POINT II

GIVEN THAT THE UNITED STATES SUPREME COURT HAS MADE CLEAR THAT THERE IS "NO VESTED RIGHT IN ANY GIVEN MODE OF PROCEDURE," DEFENDANT CANNOT BE HEARD TO ARGUE THAT THE APPLICATION OF SECTION 12.7 OF THE [NJLAD] TO THE PRESENT CASE WILL DEPRIVE IT OF ITS RIGHT TO DUE PROCESS OF LAW.

Amicus curiae argues:

POINT I

AS A STATUTE SOLELY IMPACTING PROCEDURAL AND JURISDICTIONAL RULES,

AND WHICH DOES NOT CREATE ANY NEW CAUSE OF ACTION OR REMEDY, THE EFAA APPLIES TO INVALIDATE ANY PREDISPUTE ARBITRATION AGREEMENT FOR SEXUAL HARASSMENT CLAIMS, AS LONG AS THE ARBITRATION PROCEEDING DID NOT COMMENCE PRIOR TO ITS ENACTMENT.

POINT II

THE LEGISLATIVE HISTORY OF THE EFAA CONFIRMS THAT IT SHOULD APPLY TO INVALIDATE ANY PREDISPUTE ARBITRATION AGREEMENT FOR SEXUAL HARASSMENT CLAIMS AS LONG AS THE ARBITRATION PROCEEDING DID NOT COMMENCE PRIOR TO ITS ENACTMENT.

"We review de novo the trial court's judgment dismissing the complaint and compelling arbitration." Flanzman v. Jenny Craig, Inc., 244 N.J. 119, 131 (2020). "Whether a contractual arbitration provision is enforceable is a question of law, and we need not defer to the interpretative analysis of the trial . . . courts unless we find it persuasive." Skuse v. Pfizer, Inc., 244 N.J. 30, 46 (2020) (quoting Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)).

"Under both the FAA and New Jersey law, arbitration is fundamentally a matter of contract." Antonucci v. Curvature Newco, Inc., 470 N.J. Super. 553, 561 (App. Div. 2022) (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63,

67 (2010); 9 U.S.C. § 2; NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div. 2011)). The FAA "places arbitration agreements on an equal footing with other contracts." Ibid. (quoting Rent-A-Center, 561 U.S. at 67). As such, "the FAA 'permits states to regulate . . . arbitration agreements under general contract principles,' and a court may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" Ibid. (quoting Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 441 (2014)). Nevertheless, a state may not "subject an arbitration agreement to more burdensome requirements than those governing the formation of other contracts." Leodori v. CIGNA Corp., 175 N.J. 293, 302 (2003).

Arbitration cannot be compelled when there was no agreement to arbitrate. Accordingly, as a threshold matter, a court must determine: (1) whether a valid arbitration agreement exists; and (2) whether the dispute falls within the scope of the agreement. See, e.g., Martindale v. Sandvik, Inc., 173 N.J. 76, 83, 92 (2002). Here, we need only determine the validity of the agreement, as plaintiff does not dispute that her claims fall within the scope of the agreement.[1]

[1] Plaintiff's NJLAD claims clearly fall within the scope of the agreement, which states that it applies to "discrimination and/or harassment claims" and "any other claim under any federal, state or local statute."

"[S]tate contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." Atalese, 219 N.J. at 441 (alteration in original) (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)). "An agreement to arbitrate, like any other contract, 'must be the product of mutual assent, as determined under customary principles of contract law.'" Antonucci, 470 N.J. Super. at 561 (quoting Atalese, 219 N.J. at 442). "A legally enforceable agreement requires 'a meeting of the minds.'" Ibid. (quoting Atalese, 219 N.J. at 442). "Consequently, to be enforceable, the terms of an arbitration agreement must be clear, and any legal rights being waived must be identified." Ibid.

"No magical language is required." Morgan v. Sanford Brown Inst., 225 N.J. 289, 309 (2016). "Instead, '[o]ur courts have upheld arbitration clauses "that have explained in various simple ways" that arbitration is a waiver of the right to bring suit in a judicial forum.'"" Antonucci, 470 N.J. Super. at 561-62 (quoting Morgan, 224 N.J. at 309). "Accordingly, in employment settings, 'a waiver-of-rights provision must reflect that an employee has agreed clearly and unambiguously to arbitrate the disputed claim.'" Id. at 562 (quoting Leodori v. Cigna Corp., 175 N.J. 293, 302 (2003)).

To be enforceable, our Supreme Court has emphasized that a waiver clause in an arbitration agreement, "at least in some general and sufficiently broad way, must explain that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Atalese, 219 N.J. at 447. Consequently, "the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Id. at 445.

Plaintiff argues the agreement was invalid because it failed to clearly and unambiguously provide notice that she was waiving her constitutional and statutory rights. Plaintiff's argument is two-fold: (1) the elective language in the agreement created doubt whether she was waiving her right to seek judicial remedies; and (2) the agreement's language was confusing and circular, thus preventing employees from understanding exactly which rights they were waiving.

As noted by the judge, plaintiff's arguments are "betrayed by the language of the [agreement] itself." First, the agreement states that "**all disputes, claims, complaints, or controversies** . . . **are subject to arbitration at the election of any party** pursuant to the terms of this Agreement and will be resolved by arbitration and **not by a court or jury**." Next, the agreement states that "[t]he parties hereby forever waive and give up the right to have a judge or a jury

decide any Claims as to which any party elects arbitration." Lastly, the agreement reiterates that the **"[e]mployee is giving up the right to have any disputes that are subject to arbitration be decided by a court or jury** . . . ."

The agreement clearly and unambiguously explained that plaintiff is giving up her right to bring her claims in court or have a jury resolve those claims and it draws a clear distinction between arbitration and the right being relinquished—the right to pursue claims in a judicial forum. The agreement includes "clear and unmistakable" waivers, Atalese, 219 N.J. at 443 (quoting Christ Hosp. v. Dep't of Health and Senior Servs., 330 N.J. Super. 55, 63-64 (App. Div. 2000)), that all claims "**are subject to arbitration at the election of any party**," and that arbitration is a remedy distinct from resolution by "**a court or jury.**"

The judge found that the language of the agreement is plain, and the effect is clear. "If either party chooses to exercise the arbitration clause, then the other party is bound by the decision, as they have clearly waived their rights." We concur. With its unambiguous language and unmistakable waivers of the right to resolve disputes in a judicial forum, the agreement signed by plaintiff is valid.

Defendants elected to arbitrate plaintiff's claims. Plaintiff asserts the agreement is against public policy and unenforceable under Section 12.7 of the

NJLAD, which provides: "A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable." Plaintiff argues public policy considerations favor application of Section 12.7 of the NJLAD and should preclude enforcement of arbitration of her sexually hostile work environment and constructive discharge claims.

We addressed this very issue in Antonucci. "'When state law prohibits outright the arbitration of a particular type of claim,' the conflicting state law is pre-empted by the FAA." Antonucci, 470 N.J. Super. at 564-65 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011); Preston v. Ferrer, 552 U.S. 346, 353 (2008)). Accordingly, we held "the FAA pre-empts Section 12.7 when applied to prevent arbitration called for in an agreement governed by the FAA." Id. at 566.

While the underlying claims in this case, her sexually hostile work environment and constructive discharge, differ from the claim asserted in Antonucci, wrongful termination, the nature of the discrimination claim does not alter the analysis. The NJLAD does not accord enhanced protection to a specific form of discrimination. See Meade v. Twp. of Livingston, 249 N.J. 310,

327 (2021) (noting the purpose of the NJLAD is "the eradication of the cancer of discrimination" without distinguishing a particular form of discrimination (quoting Raspa v. Off. of Sheriff, 191 N.J. 323, 335 (2007))). For the reasons expressed in Antonucci, and because plaintiff and Altice agreed that the FAA governed claims under the agreement, the FAA in effect when plaintiff filed her complaint preempts Section12.7 Zuand the motion judge properly compelled arbitration.

On March 3, 2022, President Biden signed the EFAA into law, which invalidated pre-dispute arbitration agreements precluding a party from filing a lawsuit in court involving sexual assault or sexual harassment. 9 U.S.C. § 402. We reject plaintiff's argument that the EFAA, which amended the FAA, should be applied retroactively to allow her to proceed with her sexually hostile work environment and constructive discharge claims pursuant to Section 12.7 of the NJLAD. The notes accompanying the EFAA and the language of the EFAA state the provisions in the enactment shall not apply retroactively. EFAA § 3, 136 Stat. at 28 ("This Act, and the amendments made by this Act, shall apply with respect to any dispute or claim that arises or accrues on or after the date of enactment of this Act."). Because plaintiff's sexual harassment claim arose no later than October 27, 2021, the date she filed her complaint, the EFAA does not

apply, and her sexually hostile work environment and constructive discharge claims must be arbitrated.

Adopting plaintiff's position would ignore the clear language of the EFAA. It would also violate the established principle that "[a]n arbitration clause cannot be invalidated by state-law 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" Atalese, 219 N.J. at 441 (quoting Concepcion, 563 U.S. at 339).

Plaintiff argues the EFAA eliminated the conflict with Section 12.7. We disagree. While it eliminated the conflict as to sexual assault and sexual harassment claims that accrued on or after March 3, 2022, it did not eliminate the conflict for claims, such as plaintiff's claims, that accrued before that date.

Under the Supremacy Clause, "the Laws of the United States" are "the supreme Law of the Land, and the Judges in every State shall be bound thereby[.]" U.S. Const. art. VI, cl. 2. "Consistent with that command, [the United States Supreme Court has] long recognized that state laws that conflict with federal law are 'without effect.'" Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)). Thus, a state law is preempted to the extent of any conflict with a federal statute such as when a conflict occurs when compliance with both federal and state regulations is

impossible. Hillman v. Maretta, 569 U.S. 483, 490 (2013); Hager v. M&K Construction, 246 N.J. 1, 29 (2021). Because Section 12.7 conflicts with the FAA as amended by the EFAA as to claims that accrued before March 3, 2022, it is preempted as to those claims.

Plaintiff argues that the preemption of Section 12.7 should not apply to instances, as here, where the arbitration has not yet taken place. We are unpersuaded. Our role as a state court is not to set policies within the province of Congress. Congress could have but did not create an exception for claims accruing before the effective date of the amendment that had not yet been arbitrated. Plaintiff is bound by the FAA's continuing preemptive effect as to claims that accrued prior to March 3, 2022.

Lastly, we address the dismissal of plaintiff's complaint with prejudice. The complaint should not have been dismissed. Instead, under the FAA, the case should have been stayed "pending arbitration of those claims 'in accordance with the terms of the agreement.'" Concepcion, 563 U.S. at 344 (quoting 9 U.S.C. § 3). We reverse the dismissal and remand to the trial court to enter an order staying the case until the arbitration is completed.

To the extent we have not addressed any argument raised by plaintiff, it is because the argument was without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.