CLAIMS OF SEXUAL ASSAULT AND SEXUAL HARASSMENT IN EMPLOYMENT NOT SUBJECT TO ARBITRATION – AT LEAST IN ONE CASE

THE #METOO MOVEMENT FOCUSES ATTENTION ON MANDATORY ARBITRATION AGREEMENTS

The #MeToo movement brought attention to the use of private arbitration for claims of sexual harassment and sexual assault in the workplace because employers benefit from the sometimes reduced costs of arbitration by not having to air those disputes in public and before juries of their peers. In fact, lawmakers around the country have begun to address these concerns with legislation designed to prohibit such claims being the subject of mandatory arbitration.

THE MICHIGAN COURT OF APPEALS DECISION

In a case decided recently by the Michigan Court of Appeals, claims of sexual assault by two former employees of a renowned personal injury law firm have, at least for now, avoided their employer's mandatory arbitration clause governing employment-related disputes. Both employees signed agreements that require arbitration of any disputes over application or interpretation of the law firm's policies relative to their employment, including claims relating to discipline and discriminatory conduct.

When the plaintiffs filed lawsuits in two different state circuit courts, the law firm asked the court to compel arbitration of the disputes under the terms of the employees' signed arbitration agreements. The trial courts in both cases ordered the claims to arbitration, including those related to sexual assault.

The Michigan Court of Appeals, actually a majority of two, reversed both decisions in a decision issued for publication on March 14, 2019. The court noted that arbitration is a matter of contract between the parties and that if claims are even arguably subject to arbitration, doubt should be resolved in favor of arbitration, rather than litigation in court.

Nevertheless, the Court of Appeals majority explained that "claims of sexual assault cannot be related to employment" and that "under no circumstances could sexual assault be a foreseeable consequence of employment in a law firm." As a result, the court concluded, the plaintiffs' claims "fall outside the purview" of the arbitration agreements. The court further noted that "the idea that two parties would knowingly and voluntarily agree to arbitrate a dispute over such an egregious and possibly criminal act is unimaginable... The effect of allowing the defendants to enforce the [arbitration agreement] under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. Such a result has no place in Michigan law."

Notwithstanding the court majority's conclusions about sexual assault not being related to one's employment in a law firm, the panel went on to explain that the different circumstances might compel a different result. The basis for potential liability against the law firm rested in part on the law firm's alleged failure to discipline, or adequately discipline, the alleged perpetrator for past acts of impropriety, and, as noted, the agreement required arbitration of acts related to employment, including disagreements related to discipline. But, because the claims were premised upon the alleged acts of the firm's sole shareholder, president, secretary and treasurer, the failure to discipline necessarily rests on his failure to discipline himself. The Court of Appeals was unwilling to separate the owner from the firm under the circumstances. The defense attorney has publicly vowed an appeal to the Michigan Supreme Court.

PRACTICAL TAKEAWAYS

The decision of the Court of Appeals, issued for publication, makes clear that sexual assault does not relate to employment and that arbitration of such claims should not be made mandatory. However, the court's emphasis on the fact that the result *might* be different if the claims were not brought against the sole owner of the law firm calls into question whether claims of sexual assault against an employer might be ordered to arbitration in most other cases. It remains to be determined whether the Michigan Supreme Court – and courts across the country – will look at the matter in the same way. In the meantime, there can be no question that the impact of the #MeToo movement continues its impact on the law.

For employers who have questions about mandatory arbitration of employment disputes, or this decision, please contact Jon Rabin by email

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