New York Law Journal

NEW YORK LAW JOURNAL SPECIAL REPORT

An ALM Publication

Litigation

WWW.NYLJ.COM

VOLUME 256—NO. 93

MONDAY, NOVEMBER 14, 2016

Arbitration of Workplace **Sexual Harassment** And **Discrimination** Claims

Senior employees may not be covered by their company's agreements.

BY MARTIN S. HYMAN AND MATTHEW C. DALY

SHUTTERSTOCK

Arbitration clauses are prevalent in employment agreements. Typically, however, an officer or manager of a company will not be a party to other employees' employment agreements with the company, and oftentimes arbitration clauses in employment agreements do not expressly state that they apply to claims asserted against officers or managers, as opposed to claims between the parties to the agreement (i.e., claims between the company and the signatory employee). Workplace sexual harassment or discrimination claims, however, often are asserted against senior employees personally, whether in conjunction with claims against the company or not.[1] When an officer or manager is sued by an employee, he or she may seek the benefit of the company's arbitration agreement with the employee. The case law under the Federal Arbitration Act is murky, however, concerning the extent to which a non-signatory senior employee may enforce the company's arbitration clause for claims of sexual harassment or discrimination, particularly if the company is not a party to the suit.[2]

Arbitration is a creature of contract, and the general rule is that a party cannot be compelled to arbitrate a dispute he or she did not agree to arbitrate. Non-signatory senior employees who are sued for sexual harassment or discrimination, however, often seek to rely on an agency theory as an exception to this general rule. In the leading Second Circuit case in which the court held that non-signatory defendants could enforce an arbitration agreement, *Roby v. Corporation of Lloyd's*, the court stated that "[c]ourts in this and other circuits consistently have held that employees or disclosed

MARTIN S. HYMAN *is a partner, and* MATTHEW C. DALY *is an associate, at Golenbock Eiseman Assor Bell & Peskoe. The authors, together with Nancy Erika Smith and Neil Mullin of Smith Mullin PC, were co-counsel for former Fox News host Gretchen Carlson in her lawsuit against Fox News' former chairman and CEO Roger Ailes.*

agents of an entity that is a party to an arbitration agreement are protected by that agreement."[3] But the case law is more nuanced than how it is painted by this broad statement.

Roby was based on unique facts that did not involve sexual harassment or discrimination claims. In *Roby*, the non-signatory defendants were individual members of entities that managed Lloyd's insurance underwriting syndicates. Certain investors sued the syndicates and the managing entities for federal securities violations and civil RICO, and the investors sued individual members of the managing entities based on "controlling person" liability under §15 of the Securities Act and §20 of the Securities Exchange Act. The Second Circuit held that the individual members (referred to as "Chairs") could enforce the arbitration clauses in agreements between the managing entities (referred to as "Agents") and the investor-plaintiffs because "[t]he complaints against the individual Chairs are completely dependent on the complaints against the Agents."[4] The court described the claims against the Chairs as alleging "derivative misconduct."[5]

Roby does not fit squarely within the workplace sexual harassment or discrimination context because a sexual harassment or discrimination claim against the individual who perpetrated the alleged misconduct is not "completely dependent" on or "derivative" of a claim against the employer. Rather, it is typically the employer's liability, if any, that is derivative of the employee's misconduct in the sexual harassment or discrimination context. Additionally, 15 years after *Roby*, the Second Circuit indicated that *Roby* was not premised on an "agency" theory at all. In *Ross v. American Express*, the court stated that where "a non-signatory moves to compel arbitration with a signatory, it remains an open question in this Circuit whether the non-signatory may proceed upon any theory other than estoppel."[6] The Second Circuit has defined the "estoppel" theory as involving a situation where "'the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.'"[7] The "estoppel" theory also does not fit squarely within the typical workplace sexual harassment or discrimination context, because sexual harassment or discrimination claims usually do not rely on any terms of, and in fact exist independently of, the employment agreement containing the arbitration clause.[8]

The **general rule** is that a party cannot be compelled to arbitrate a dispute he or she did not agree to arbitrate. Non-signatory senior employees who are sued for sexual harassment or discrimination, however, often seek to rely on an **agency theory** as an exception to this general rule.

Following *Roby*, the agency theory has been applied by two New York courts to permit non-signatory senior employees to compel arbitration under the Federal Arbitration Act of claims that included workplace discrimination: the Southern District of New York in *Gateson v. ASLK-Bank, N.V.*[9] and the Appellate Division, First Department, in *DiBello v. Salkowitz*.[10] In both of those cases, however, the plaintiff-former employee sued both the signatory employer and the non-signatory senior employees and, in addition to the discrimination claims, asserted contract-related claims against the non-signatory senior employees.[11] If the plaintiff invokes provisions of the contract in his or her claims, it is fair that the plaintiff should be held to the terms of that contract, including the arbitration clause. But it is more difficult to justify compelling the plaintiff into arbitration in an action against a non-signatory that includes only claims for sexual harassment or discrimination that do not rely on the contract.

Persuasive decisions under the Federal Arbitration Act from courts outside New York hold that senior employees cannot compel arbitration of non-contract-based claims simply because the claims arose in the context of their agency for a company that signed an arbitration agreement with the plaintiff. For example, the Fifth Circuit in *Westmoreland v. Sadoux*—a fraud action by former minority shareholders against individual owners of entities that were parties to a

shareholders agreement containing an arbitration clause—held that "a nonsignatory cannot compel arbitration merely because he is an agent of one of the signatories."[12] The court held, in contrast, that a non-signatory may enforce an arbitration agreement under an estoppel theory when the plaintiff "is suing in reliance upon that contract," because the estoppel doctrine is "effective in preserving the distinctions between broad readings of the reach of an arbitration clause and our formal insistence upon confining the obligations to the parties of the contract."[13]

In *McCarthy v. Azure*, the First Circuit held that a non-signatory corporate officer could not compel arbitration of claims arising from the alleged failure of his company to follow through on its obligations under a stock purchase agreement.[14] The court relied on the distinction between personal capacity claims and official capacity claims, and held that the former include claims alleging ultra vires conduct or "tort suits in which a corporate officer or agent, though operating within the scope of corporate authorization, through his or her own fault injures another to whom he or she owes a personal duty."[15] Claims for sexual harassment or discrimination would seem to fall within these "personal capacity" categories.

In both *Westmoreland* and *McCarthy*, the courts emphasized that arbitration is a creature of contract and that, rather than ex post facto relying on an agency theory to permit a non-signatory to enforce the company's arbitration agreement with the plaintiff, the more appropriate course is to seek to negotiate an arbitration clause at the outset that covers claims against individuals. In *Westmoreland*, the Fifth Circuit stated:

> Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules—the cardinal prerequisite to all dispute resolution.[16]

Similarly, in *McCarthy*, the First Circuit stated:

> [T]he best preventative is to act *before*, rather than *after*, the fact; to be blunt, judicial juggling is far less effective anodyne than skillful drafting of contract documents in the first instance. A corporation that wishes to bring its agents and employees into the arbitral tent can do so by writing contracts in general, and arbitration clauses in particular, in ways that will specify the desired result.[17]

The reasoning of *Westmoreland* and *McCarthy* is particularly compelling in the context of claims for sexual harassment or discrimination. Arbitration restricts substantial rights to which a plaintiff-employee otherwise would be afforded in a court proceeding, including the right to have his or her claims decided by a jury. Additionally, as the Equal Employment Opportunity Commission has recently found, mandatory arbitration in the employment context undercuts public policy interests because it can prevent employees from learning about similar claims of other employees, impede the development of the law, and weaken an employer's incentive to comply with the law.[18] When signing an employment agreement containing a standard arbitration clause, a prospective employee understandably may not realize that he or she could be waiving the right to sue non-signatory individuals in court for sexual harassment or discrimination, even when such claims would not constitute a breach of any terms and conditions contained in the employment contract. Requiring that the arbitration clause specify that sexual harassment and discrimination claims, including those asserted against a company officer or other manager, will be subject to arbitration gives the prospective employee (at least in theory) the opportunity to make an informed decision before entering into the employment relationship.[19]

A clear and specific arbitration clause would also benefit employers. Any ambiguity concerning the scope of, or the persons covered by, the arbitration clause could spawn a good faith legal challenge that may preserve an employee's right to file

his or her claim in court or, even if the claims ultimately are found to be arbitrable, enable the plaintiff to place his or her allegations before the court of public opinion. On the other hand, if the arbitration clause clearly and specifically covers the claims at issue, the plaintiff and his or her counsel should think twice before publicly filing those claims in court because of the risk of sanctions or a counterclaim for breach of the employment agreement.

•••••••••••••●●••••••••••••

1. Claims against the individual alone are contemplated by the New York City Human Rights Law, N.Y.C. Admin. Code §8-107 et seq., which provides certain protections for a company that adopts, and meaningfully enforces, anti-discrimination policies. Thus, suing the company may impose additional hurdles that would not exist in a suit against the individual alleged perpetrator.

2. The Federal Arbitration Act broadly applies to any contract containing an arbitration clause that "affects" interstate commerce. *Diamond Waterproofing Sys. v. 55 Liberty Owners*, 4 N.Y.3d 247, 252 (N.Y. 2005).

3. 996 F.2d 1353, 1360 (2d Cir. 1993).

4. Id.

5. Id.

6. 547 F.3d 137, 143 n.3 (2d Cir. 2008); see also *Astra Oil v. Rover Navigation*, 344 F.3d 276, 279 n.2 (2d Cir. 2003) (noting that there are five general principles under which a *signatory* might compel a *non-signatory* to arbitrate, but stating that "we express no view on whether these other theories [other than estoppel] would ever apply when a non-signatory seeks to compel a signatory to participate in arbitration").

7. *Ross*, 547 F.3d at 143 (quoting *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 177 (2d Cir. 2004)).

8. In *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2d Cir. 2010), the Second Circuit applied the estoppel theory to permit a non-signatory to compel arbitration of employment discrimination claims, but that case involved unique facts. The plaintiff was a make-up artist who was hired by a production company to provide services to non-signatory ESPN, the television sports network. The plaintiff had alleged that she considered ESPN to be her "co-employer." Id. at 127. The Southern District of New York applied the estoppel theory to permit a non-signatory senior employee to compel arbitration of a plaintiff's retaliatory discharge claims in *Cicchetti v. Davis Selected Advisors*, No. 02 Civ.10150 RMB, 2003 WL 22723015, at *3 (S.D.N.Y. 2003), but that decision provided no analysis of whether the claims were intertwined with the employment agreement. Additionally, the arbitration clause at issue in *Cicchetti* expressly included "claims of discrimination and/or harassment." Id. at *2 n.1.

9. No. 94 Civ. 5849 (RPP) (S.D.N.Y. 1995).

10. 4 A.D.3d 230 (1st Dep't 2004).

11. In *Gateson*, the plaintiff's claims included breach of contract and promissory estoppel. 1995 WL 387720, at *1. In *DiBello*, the plaintiff's claims included tortious interference with actual and prospective contractual relations. 4 A.D.3d at 231. Additionally, in *DiBello*, the arbitration clause expressly included claims based on "tort, discrimination, retaliation, or otherwise." Id.

12. 299 F.3d 462, 466-67 (5th Cir. 2002).

13. Id. at 465; see also *Britton v. Co-op Banking*, 4 F.3d 742, 748 (9th Cir. 1993) (holding that a non-signatory agent, officer, or employee of a company could not compel arbitration where the fraud claims against him were "unrelated to any provision or interpretation of the contract").

14. 22 F.3d 351 (1st Cir. 1994).

15. Id. at 359 (internal quotation marks omitted).

16. 299 F.3d at 467.

17. 22 F.3d at 360 (emphasis in original); see also *Constantino v. Frechette*, 897 N.E.2d 1262, 1266 (Mass. App. Ct. 2008) ("If the nursing home harbored the intention to bring its employees within the purview of the arbitration provision, it had the duty to clearly inform its patients that the arbitration provision was intended to inure to the benefit of individual nurses as well … . This was not done in the contract before us, and important rights should not be waived by implication.").

18. Equal Employment Opportunity Commission, Advancing Opportunity: A Review of the Systematic Program of the U.S. Equal Employment Opportunity Commission, July 7, 2016, available at https://www.eeoc.gov/eeoc/systematic/review/.

19. The issue of what constitutes a "forced" arbitration agreement is not the subject of this article.