August 4, 2021

ADR Case Update 2021 - 14

Federal Circuit Courts

- **NO JURISDICTION TO REVIEW FLRA DECISION TO SET ASIDE ARBITRATION AWARD**

  AFGE Local 3690 v. FLRA
  2021 WL 2760045
  United States Court of Appeals, District of Columbia Circuit
  July 2, 2021

  The U.S. DOJ Federal Bureau of Prisons Federal Correctional Institution in Miami implemented a staffing practice without negotiating with AFGE Local 3690, which represented the employees. The AFGE Local 3690 filed a grievance, alleging that FCI Miami was using non-custody employees to fill in at short-staffed custody posts to avoid paying overtime to custody employees, and invoked arbitration. The arbitrator ruled in favor of AFGE. FCI Miami filed exceptions to the award with the FLRA, which set aside the award in its entirety, concluding that the award failed to draw its essence from the CBA. AFGE petitioned for review of the Authority decision.

  The United States Court of Appeals for the District of Columbia Circuit dismissed the petition. Section 7123(a)(1) of the Federal Service Labor-Management Statute allows for judicial review of an Authority decision arising from review of arbitral awards only if "the order invokes an unfair labor practice." Because the Authority decision did not involve an unfair labor practice, the Court concluded that it lacked jurisdiction to review the decision.

- **AGREEMENT DID NOT PROVIDE AFFIRMATIVE BASIS TO CONCLUDE PARTIES AGREED TO CLASS ARBITRATION**

  American Institute for Foreign Study, Inc. v. Laura Fernandez-Jimenez
  2021 WL 2882454
  United States Court of Appeals, First Circuit
  July 9, 2021

  The American Institute for Foreign Study, which places au pairs with U.S. host families, entered

into a contract with Fernandez-Jimenez that required parties to arbitrate their disputes. After Fernandez-Jimenez filed a class action against the Institute and its CEO, the defendants sued in federal district court to enjoin class arbitration. The court granted a preliminary injunction to the Institute and denied relief to the CEO. Fernandez-Jimenez appealed, and the Institute and CEO cross-appealed.

The United States Court of Appeals for the First Circuit affirmed. The presumption is that parties have not agreed to class arbitration without "an affirmative 'contractual basis for concluding'" otherwise. Neither silence nor ambiguity satisfies this standard. This Agreement did not provide the affirmative basis to conclude that the parties agreed to class arbitration. After the litigation began, the CEO agreed to arbitrate all disputes with Fernandez-Jimenez; thus, his claim was moot.

- **ORDER OF ARBITRATION AND DENIAL OF MOTION TO VACATE AFFIRMED**

Selden v. Airbnb
2021 WL 2932203
United States Court of Appeals, District of Columbia Circuit
July 13, 2021

When Greg Selden signed up for Airbnb, he was presented with a sign-in wrap – a webpage that informed the user he was agreeing to certain terms by signing up. When Selden, an African American man, suspected that a host had denied his rental request because of his race, which the host could see from the profile picture, he created fake accounts with profile pictures of white people. He successfully requested the same property for the same dates. Selden sued Airbnb, alleging race discrimination in violation of Title II, §1981, and the Fair Housing Act (FHA), and seeking damages and injunctive relief. Based on the arbitration clause in Airbnb's Terms of Service, the court granted Airbnb's motion to compel arbitration. The arbitrator ruled in favor of Airbnb, dismissing Selden's claims as a matter of law. The court denied Selden's motion to vacate, and Selden appealed, challenging both the court's order of arbitration and its denial of his motion to vacate.

The United States Court of Appeals for the District of Columbia Circuit affirmed. The Court held that Selden agreed to arbitrate his claims against Airbnb because he had reasonable notice of the Terms of Service and the arbitration clause therein. The Court disagreed with Selden's contention that Title II of the Civil Rights Act prohibited the arbitration of claims brought under it, holding as a matter of first impression that nothing in the text or structure of Title II foreclosed arbitration. Selden provided no explanation of how the Terms of Service were procedurally unconscionable, thus forfeiting his unconscionability argument. Alleged arbitrator misconduct did not warrant vacatur because Selden was not prejudiced by the purported errors of the arbitrator.

- **ALLEGATIONS DID NOT IMPLICATE AGREEMENT THAT CONTAINED ARBITRATION CLAUSE**

Setty v. Shrinivas Sugandhalaya
2021 WL 2817005
United States Court of Appeals, Ninth Circuit
July 7, 2021

Setty, individually and as a general partner in a partnership (collectively, SS Bangalore), sued Sugandhalaya LLP (SS Mumbai), a non-signatory to the partnership agreement containing an arbitration agreement, alleging fraud. SS Mumbai's motion to compel arbitration was denied. This Court affirmed, holding that SS Mumbai could not equitably estop SS Bangalore from avoiding arbitration. The U.S. Supreme Court granted certiorari, vacated the judgment, and remanded.

On remand, the United States Court of Appeals for the Ninth Circuit affirmed. Following the Supreme Court's decision in *GE Energy*, the Court accepted that a non-signatory could compel arbitration in a NY Convention case. However, the Court found that the allegations here did not implicate the partnership deed containing the arbitration clause – a prerequisite for compelling arbitration under the equitable estoppel framework. Thus, the court did not abuse its discretion in

rejecting SS Mumbai's argument that SS Bangalore should be equitably estopped from avoiding arbitration or denying SS Mumbai's motion to stay the proceedings pending arbitration.

Michigan

- **WHETHER SEXUAL ASSAULT CLAIMS ARE SUBJECT TO ARBITRATION CLAUSE IN EMPLOYMENT AGREEMENT DEPENDENT ON WHETHER THEY COULD BE MAINTAINED WITHOUT REFERENCE TO CONTRACT OR RELATIONSHIP AT ISSUE**

  Lichon v. Michael Morse and Michael Morse, PC
  Smits v. Michael Morse and Michael Morse, PC
  2021 WL 3044458
  Supreme Court of Michigan
  July 20, 2021

  Lichon and Smits were both employees of the Michael Morse law firm who separately sued Morse and the Morse firm, alleging that Morse sexually assaulted them. Defendants moved to dismiss the claims and compel arbitration based on the firm's Mandatory Dispute Resolution Procedure Agreement (MDRPA), which both plaintiffs signed and which provided for arbitration of any dispute or concern relating to employment. Separate courts granted the motions as regards to Lichon and Smits, and both employees appealed. Smits also appealed her motion against a shareholder, which was dismissed. The Court of Appeals consolidated the actions and affirmed in part, reversed in part, and remanded. Defendants sought leave to appeal, which was granted.

  The Supreme Court of Michigan vacated and remanded. In determining whether a claim is relative to employment for purposes of an arbitration provision in an employment agreement, the question is whether the action could be maintained without reference to the contract or relationship at issue. The Court remanded the cases to their respective circuit courts to analyze which of the plaintiffs' claims could be maintained without reference to the contract or relationship at issue.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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