U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 July 2008

Case No.: 2007-ERA-10

In the Matter of:

ELLEN KELLY,
Complainant

v.

UNITED STATES ENRICHMENT CORPORATION,
Respondent

DECISION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION AND DISMISSING CLAIM

This action involves a complaint filed by Ellen Kelly ("Kelly" or "Complainant"), against United States Enrichment Corporation ("USEC" or "Respondent"), alleging violations of Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 ("ERA"), and the regulations promulgated at 29 C.F.R. Part 24.

I. Factual Background

This is the third in a series of complaints filed by Kelly, pursuant to the whistleblower protection provisions of the ERA. Complainant began employment with USEC in 1981. Kelly was terminated in 2002, reinstated, and then terminated again in 2006. Following both terminations, she filed complaints against USEC under the ERA. In each case, the parties settled, and both settlements were approved by an administrative law judge. *See Kelly v. United States Enrichment Corp.*, 2003-ERA-6 (ALJ Jan. 8, 2004); *Kelly v. United States Enrichment Corp.* 2006-ERA-15, 2006-SDW-5 (ALJ Oct. 26, 2006). The 2006 settlement agreement is the subject of the instant claim, as Kelly alleges that USEC is retaliating against her by interpreting the settlement agreement in "an overly restrictive, and plainly erroneous" manner. (Kelly, Memo Opposing Sum. Dec. at 11). Kelly's complaint relates to the following clause of the settlement agreement:

> Ms. Kelly agrees not to seek or accept employment or re-employment with USEC or any of its affiliated or related companies, *or to perform work for any employer at any USEC site owned or operate by USEC* or any of its affiliated or related companies.

(USEC, Memo Sup. Sum. Dec., Ex. 1) (emphasis added).

In late 2006 or early 2007, Kelly sought employment with a company called Innovative Solutions, which performs work for the Department of Energy under a contract with a company called Theta Pro2Serve Management Company ("TPMC"). A series of emails were exchanged between attorneys for Kelly and attorneys for USEC. In a January 12, 2007 email, USEC's attorney wrote to Kelly's attorney, stating the following:

> Unfortunately, a problem exists for the specific work that you indicated that Ellen would be performing. Specifically, USEC understands that TPMC leases space at Portsmouth that is actually within space that USEC leases and operates. In other words, we do not see how she will be able to work for TPMC without entering USEC property. . . . Under these circumstances, we do not see how Ellen could work for TPMC as an escort . . . without violating the agreement."

(USEC, Memo Sup. Sum. Dec., Ex. 8). Kelly's attorney responded that the prospective job would not require her to work in areas operated by USEC, but conceded "that [Kelly] may have to *walk* across space *leased* by USEC." (USEC, Memo Sup. Sum. Dec., Ex. 9). (emphasis in original). On January 25, 2007, USEC's attorney sent another letter to Kelly's attorney, again expressing USEC's position regarding Kelly's attempt to seek employment at the Portsmouth site. The letter stated that Kelly's efforts to obtain employment with Innovative Solutions constituted a breach of the parties' 2006 settlement agreement, and that in accordance with the settlement agreement, USEC would submit the matter to arbitration within twenty days if Kelly continued to seek employment at the Portsmouth site. (USEC, Memo Sup. Sum. Dec., Ex. 10). On February 16, 2007, Kelly's attorney notified USEC that Kelly would not seek employment at the Portsmouth site. (USEC, Memo Sup. Sum. Dec., Ex. 12). No further action was taken by USEC.

II. Procedural History

Kelly filed this complaint on May 1, 2007, alleging that USEC was inaccurately calculating her pension in retaliation for prior protected activities. (USEC, Memo Sup. Sum. Dec., Ex. 4). Kelly subsequently amended her complaint to add additional allegations regarding the calculation of her pension, and an allegation that USEC is retaliating against her by preventing her from obtaining employment at the Portsmouth site. (USEC, Memo Sup. Sum. Dec., Ex. 4). Specifically, Kelly alleges that she has sought and received offers of employment from companies who operate at the site, but that USEC has "systematically foreclosed" her employment with these companies, "via an overly restrictive, and plainly erroneous, interpretation of the employment provision of the [2006] confidential settlement agreement." (Kelly, Memo Opposing Sum. Dec. at 11).

On August 23, 2007, the Occupational Safety and Health Administration, acting on behalf of the Secretary of Labor, dismissed the complaint. (USEC, Memo Sup. Sum. Dec., Ex. 4). Kelly filed objections, and the claim was transferred to the undersigned for a hearing. The parties subsequently resolved the issues regarding Kelly's pension, and the hearing request now relates solely to Kelly's allegation that USEC is violating the ERA by unfairly and/or inaccurately interpreting the employment provision of the 2006 settlement agreement. (USEC, Memo Sup. Sum. Dec., Ex. 5). On June 26, 2008, USEC filed a motion for summary decision. In support of its motion for summary decision, USEC argues that Kelly's claim is untimely, that the Department of Labor lacks jurisdiction over Kelly's claim, and that Kelly cannot establish a

prima facie case of retaliation under the ERA. For its jurisdictional argument, USEC contends that jurisdiction rests either with a federal district court or an arbitrator. Kelly filed a responsive memorandum on July 1, 2008.

III. Law and Analysis

The issue of arbitration must be resolved first. Absent the parties' clear intent to the contrary, a court, or in this case, the administrative law judge, resolves "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). "[I]ssues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Thus, if the claim is subject to arbitration, resolution of USEC's other arguments would be exclusively within the province of the arbitrator.

A. Whether the Federal Arbitration Act Applies to ERA Complaints

The Federal Arbitration Act ("FAA") "broadly provides that a written provision in 'a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (*quoting* 9 U.S.C. § 2). The FAA applies to state law proceedings and preempts state laws that restrict or limit parties to a contract from entering into arbitration agreements. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001) (*citing Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

Most recently, the Supreme Court has held that the FAA also supersedes state laws that confer jurisdiction over claims to state administrative tribunals. *Preston v. Ferrer*, __ U.S. __, 128 S.Ct. 978, 987 (2008). In *Preston*, the Supreme Court was faced with a California statute that confers jurisdiction over disputes involving artists and talent agents to a state labor commission. Observing that the state labor commission functions as "a tribunal authorized to find the facts and apply the law," the Court reasoned that this role "is just what the FAA-governed agreement . . . reserves for the arbitrator." *Id.* The Court, therefore, concluded that a party cannot escape an arbitration clause by relying on a state law "lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.*; *see also Davis v. O'Melveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) ("Arbitration is favored as a matter of policy regardless of whether it is in lieu of a judicial or administrative forum").

Although *Preston* involved a state law, its holding is equally applicable to federal whistleblower statutes, such as the ERA. The Supreme Court has consistently applied the FAA in a uniform manner to proceedings in state and federal courts. *See Preston*, 128 S.Ct. at 983; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). Furthermore, like the state labor commission in *Preston*, the Office of Administrative Law Judges, is "a tribunal authorized to find the facts and apply the law." *See* 29 C.F.R. § 24.109(a) (requiring the administrative law judge to adjudicate ERA claims by making factual findings and legal conclusions and issuing an appropriate order). Thus, the rationale of *Preston* and its holding that the FAA supersedes *state* laws lodging primary jurisdiction in an administrative forum, compels the conclusion that the

FAA also supersedes *federal* laws, such as the ERA, which lodge primary jurisdiction with the Office of Administrative Law Judges. Therefore, I find that the FAA is applicable to Kelly's claim.

B. Whether the FAA's Procedures are Applicable to Administrative Hearings

It is not immediately apparent how the FAA should be applied in this proceeding, as the statute refers to federal district courts, rather than administrative law judges. However, the Board's treatment of interlocutory appeals is instructive on this issue. No statute or rule provides for interlocutory appeals in administrative hearings, although 28 U.S.C. § 1292 outlines the procedure for interlocutory appeals in federal court. The statute refers to "district judge[s]," and "court[s] of appeals" in establishing the procedure by which a federal district court may certify an interlocutory appeal to the court of appeals. The Board has adopted the procedures outlined at 28 U.S.C. § 1292, effectively substituting the words "administrative law judge' for "district judge" and "Administrative Review Board" for "court of appeals." *See Johnson v. Siemens Building Technologies, Inc.*, ARB No. 07-010, ALJ No. 2005-SOX-15 (ARB Jan. 19, 2007) (*citing Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec'y April 29, 1987)). Having found the FAA applicable to administrative hearings, the only way to give effect to the statute is to treat its references to federal district courts and federal district judges as also applying to administrative law judges, just as the Board has done with 28 U.S.C. § 1292. Similarly, federal cases interpreting the role of trial courts in resolving arbitration issues under the FAA are equally applicable to the case at hand.

C. Whether the Federal Arbitration Act Mandates Arbitration of Kelly's Claim

Having established that the FAA, as interpreted by the federal courts, is applicable to the instant claim, the next issue is whether the FAA requires that Kelly's claim be resolved by arbitration. Initially, it bears noting that the Supreme Court has repeatedly emphasized that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The Court has also held that the FAA "declares a national policy favoring arbitration of claims that parties contract to settle in that manner." *Preston*, 128 S.Ct. at 983 (*citing Southland Corp.*, 465 U.S. at 10), and seeks "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

The Sixth Circuit has outlined a four-part analysis to guide courts in determining whether a claim is subject to mandatory arbitration. First, the court must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be arbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration. *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 392-94 (6th Cir. 2003).

1. Whether the Parties Agreed to Arbitrate

The first issue is whether the parties agreed to arbitrate. The FAA provides that an arbitration agreement may be challenged only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, the court may only consider a challenge to the arbitration clause itself; the validity of the contract as a whole is for the arbitrator to determine. *Buckeye Check Cashing*, 546 U.S. at 445-46. The 2006 Settlement Agreement provides:

> If a Party believes that the other Party has breached any of the terms of this Agreement . . . the aggrieved Party *must* notify the other Party in writing within twenty (20) days of the alleged breach, or within twenty (20) days of the date that the aggrieved party learned or should have learned of the breach and give that party the opportunity to cure the alleged breach. If the parties are unable to resolve their differences, the aggrieved party *must* submit the dispute to binding arbitration in accordance with Section IX, not later than twenty (20) days after providing notice of the breach to the opposing party.

(USEC, Memo Sup. Sum. Dec., Ex. 1). (emphasis added). The settlement agreement, by its plain language, clearly requires arbitration of certain disputes arising out of the agreement. Kelly was represented by counsel when she signed the settlement agreement containing the arbitration clause. The agreement was supported by consideration, and there is no evidence of fraud, duress, or unconscionability. Accordingly, I find that the parties agreed to arbitrate.

2. Scope of the Arbitration Agreement

Having found that the parties agreed to arbitrate, I now address whether the arbitration agreement encompasses this dispute. The language of a contract containing an arbitration clause defines the scope of disputes subject to arbitration. *Waffle House*, 534 U.S. at 289. As a general principle, the Supreme Court has "interpreted the Federal Arbitration Act as establishing that, 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989) (*quoting Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25). Similarly, the Sixth Circuit has instructed that arbitration is required "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc.*, 350 F.3d 568, 576-77 (6th Cir. 2003).

However, the mere existence of an arbitration clause does mean that all disputes between the parties are subject to mandatory arbitration. To this end, the Supreme Court has cautioned that, "[w]hile ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Waffle House*, 534 U.S. at 294; *see also Simon v. Pfizer Inc.*, 398 F.3d 765, 775 (6th Cir. 2005) ("arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration."). In addressing these countervailing concerns, the Sixth Circuit has directed lower courts to "ask if an action could be

maintained without reference to the contract or relationship at issue." *Fazio*, 340 F.3d at 395. "If it could, it is likely outside the scope of the arbitration agreement." *Id.*

Here, the arbitration agreement extends to "disputes"[1] in which "a Party believes that the other Party has breached any of the terms of th[e] agreement." (USEC, Memo Sup. Sum. Dec., Ex. 1). This language is less sweeping than language commonly found in arbitration agreements, which often extend to disputes "arising out of" the contract. *See e.g., Nestle Waters N. Am., Inc. v. Bollman*, 505 F.3d 498, 505 (6th Cir. 2007). Applying the test enunciated in *Fazio*, Kelly's claim that USEC retaliated against her by interpreting a provision of the settlement agreement in a certain manner necessarily cannot be "maintained without reference to the contract" at issue.[2] This creates a presumption that the dispute is arbitrable, which most be overcome by strong evidence that the parties intended to exclude the claim at issue.

Kelly has not addressed this issue in her reply memorandum. However, her strongest argument that her claim is not within the scope of the arbitration clause would likely be that she is not alleging a "breach" of the contract, but rather that USEC retaliated against her by inaccurately accusing *her* of breaching the agreement. However, an equally compelling argument could be made that Kelly is in fact alleging a breach of the settlement agreement, in that the settlement agreement confers certain rights to Kelly, including the right to work for companies which do not operate on USEC owned or operated property. When viewed in this light, Kelly *is* alleging a breach of the settlement agreement, in that she alleges that USEC interfered with rights conferred to her under the contract. *See Black's Law Dictionary* 188 (6th ed. 1990) (defining breach as the "[p]revention or hinderance . . . of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party").

Therefore, there is at least a credible argument that Kelly's claim falls within the scope of the arbitration clause of the settlement agreement, and thus, doubt exists as to whether Kelly's claim is arbitrable. This doubt must be resolved in favor of arbitration. *See Wilson Elec. Contractors, Inc., supra*. Additionally, it cannot be said "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *See Highlands Wellmont Health Network, Inc., supra.* The fact that Kelly's claim cannot be "maintained without reference to the contract" at issue, further supports a finding that her claim is arbitrable. *See Fazio, supra*. Accordingly, Kelly's claim is within the scope of the arbitration agreement.

[1] USEC suggests that use of the term "dispute" in the arbitration clause evinces an intention to arbitrate all disputes arising out of the settlement agreement. (USEC, Memo Sup. Sum. Dec. at 19). This interpretation would certainly bolster USEC's argument, but it is unsupported by the plain language of the clause. The scope of the arbitration clause is clearly defined by the phrase "If a Party believes that the other Party has breached any of the terms of this Agreement . . ." The use of the term "dispute" later in the paragraph refers to disputes in which "a Party believes that the other Party has breached any of the terms of this Agreement," not, as USEC suggests, to any dispute arising out of the settlement agreement.

[2] Notably, Kelly's reply memorandum is devoted almost exclusively to a discussion of why her interpretation of the future employment clause of the 2006 settlement agreement is correct and USEC's interpretation is incorrect.

3. Whether Congress Intended ERA claims to be Arbitrable

The next issue is whether Congress intended for ERA claims to be arbitrable. Federal statutory claims can be the subject of arbitration, absent a contrary congressional intent. *See Gilmer*, 500 U.S. at 26; *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Congress, however, may override the presumption in favor of arbitration by manifesting its intention to do so. *Id*. "If such an intention exists, it will be discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 755 (7th Cir. 2003) (*citing Gilmer*, 500 U.S. at 26). The burden of demonstrating that Congress intended to preclude arbitration rests with the party opposing arbitration. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 81 (2000).

The parties have not identified any case in which a court has addressed the arbitrability of ERA claims. However, federal courts have upheld mandatory arbitration for a variety of statutory claims that protect workers from discrimination and/or retaliation. *See Gilmer*, 500 U.S. 20 (ADEA); *Adams*, 532 U.S. 105 (California Fair Employment and Housing Act); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 309 (6th Cir. 1991) (Title VII); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir.1997) (FMLA); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2d Cir.1991) (ERISA); *Boss v. Salomon Smith Barney Inc.*, 263 F.Supp.2d 684, 685 (S.D.N.Y.2003) (Sarbanes-Oxley whistleblower provisions). Several administrative law judges have also held that Sarbanes-Oxley claims are arbitrable. *Sullivan v. Science Applications Int'l Corp.*, 2007-SOX-60 (ALJ Sep. 21, 2007); *Bergman v. Chesapeake Energy Co.*, 2008-SOX-9 (ALJ Dec. 19, 2007); *Ulibarri v. Affiliated Computer Services*, 2005-SOX-46 (ALJ Jan. 13, 2006). Thus, the growing trend of authority clearly permits arbitration of statutory employment claims, such as Kelly's ERA claim, and nothing in the text of the ERA precludes mandatory arbitration.

As the Supreme Court observed in *Adams*, "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." 532 U.S. at 123. Therefore, I conclude that ERA claims may be subject to mandatory arbitration. By agreeing to arbitrate her claim, Kelly "does not forgo the substantive rights afforded by the statute; [she] only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Thus, Kelly may pursue, and if successful, obtain the full panoply of remedies available under the ERA before the arbitrator.[3]

[3] I express no opinion on the merits of Kelly's ERA claim, as this issue lies exclusively within the province of the arbitrator.

4. Whether the Claim Should be Dismissed or Stayed

The fourth and final issue is whether to dismiss the claim or issue a stay. A majority of circuits, including the Sixth Circuit, have held that courts have discretion to dismiss a complaint where it finds all claims before it to be arbitrable. *Choice Hotels Intern., Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001); *Green v. Ameritech Corp.*, 200 F.3d 967, 973 (6th Cir. 2000); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). The Supreme Court has also suggested that a case may be dismissed with prejudice when all claims are subject to arbitration. *See Randolph*, 531 U.S. at 86. In light of this authority, and Respondent's request for a dismissal, rather than a stay and order compelling arbitration, dismissal with prejudice is the appropriate disposition in this case.

Order

IT IS HEREBY ORDERED that Respondent's motion is GRANTED, and the complaint is DISMISSED WITH PREJUDICE. IT IS FURTHER ORDERED that the hearing scheduled for August 19-20, 2008 is CANCELLED.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).