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SEXUAL ASSAULT AND NIGHT WATCHMEN: RECENT DEVELOPMENTS IN ARBITRATION

I. THE FRANKEN AMENDMENT.

A. Jamie Leigh Jones.

1. The Arbitration Agreement.

Jamie Leigh Jones began working in 2004, at age 19, for Halliburton/Kellogg, Brown & Root (“KBR”) as an administrative assistant in Houston. On July 21, 2005, she signed an employment contract with an overseas subsidiary of KBR. That contract included the following provision:

You also agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the Dispute Resolution Program requires, as its last step, that any and all claims that you might have against Employer related to your employment, including your termination, and any and all personal injury claim arising in the workplace, you have against parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.

2. The Claims.

Ms. Jones has claimed that, while working for Halliburton/KBR in Houston, her immediate supervisor sexually harassed her.

On July 25, 2005, Ms. Jones began working at Camp Hope, located in the Green Zone of Baghdad. She has claimed that men in the predominantly male barracks in which she lived sexually harassed her, that she reported that harassment and that no action was taken in response to her request to be housed in a safer area. Three days later, things became far worse for her. As the district court summarized:

“On the evening of July 28, 2005, just four days after she arrived in Iraq, Ms. Jones alleges that she was drugged and brutally raped by several Halliburton/KBR firefighters, including Defendant Charles Boartz, in her room in the barracks, resulting in serious injuries including torn pectoral muscles and ruptured breast implants. On the morning of July 29, 2008, Ms. Jones discovered

Defendant Boartz lying in the bottom bunk of her bed, and he allegedly confessed to having unprotected sex with her. Ms. Jones reported the rape to another employee, who took her to see KBR medical personnel. A rape kit was administered at a hospital run by the U.S. Army. Plaintiff alleges that Defendants subsequently mishandled the rape kit. Ms. Jones also alleges that after reporting the rape, Defendants locked her in a trailer and denied her access to an outside phone line until Ms. Jones was able to convince a guard to allow her to call home. According to Plaintiff, she was also interrogated by management and human resource personnel for hours and was told that if she chose to return to the United States, she would not have the guarantee of a job upon return.

Jones v. Halliburton Co., 625 F.Supp.2d 339, 343 (S.D. Tex. 2008).

3. The Results So Far in Court.

Ms. Jones filed a charge of sexual harassment with the EEOC. That agency issued a reasonable-cause finding. Ms. Jones then filed a lawsuit in federal district court, in which she asserted claims of negligence, negligent undertaking, sexual harassment and hostile work environment under Title VII, retaliation, false imprisonment, fraud in the inducement to enter the employment contract, fraud in the inducement to enter the arbitration agreement, assault and battery, and intentional infliction of emotional distress.

The defendants in that case moved that the court enforce the arbitration agreement Ms. Jones had signed for all of the claims she asserted in that lawsuit. The district court held that the agreement was enforceable, rejecting Ms. Jones' arguments of failure of a meeting of the minds, fraud in the inducement, unconscionability, public policy and unclean hands. *Id.* at 344-49. That court also held that all of Ms. Jones' claims were within the scope of the arbitration agreement, with the exception of her claims for assault and battery; intentional infliction of emotional distress arising out of the assault; negligent hiring, supervision, and retention; and false imprisonment. *Id.* at 350-55.

The Fifth Circuit affirmed that decision. *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009). That interlocutory appeal was filed by the defendants in that case from the district court's decision that certain claims were outside the scope of the arbitration agreement.

B. The Franken Amendment.

1. The Text of the Amendment.

The *Jones* case led Sen. Al Franken to propose an amendment to the 2010 Department of Defense Appropriations Act. That amendment appears in the bill that was enacted into law, P.L. 111-118. That amendment provides as follows:

Sec. 8116. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of \$1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

(b) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract awarded more than 180 days after the effective date of this Act unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a 'covered subcontractor' is an entity that has a subcontract in excess of \$1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.

2. The Scope and Impact of the Amendment.

The Franken Amendment applies to contractors and subcontractors for (a) Department of Defense contracts exceeding \$1 million (b) that are funded as result of the 2010 Department of

Defense Appropriations Act (c) more than 60 days after the effective date of that statute. It applies to claims made under Title VII and to torts “related to or arising out of sexual assault or harassment.”

The amendment prohibits a contractor or subcontractor for any such contract from requiring, as a condition of employment, that any employee or independent contractor arbitrate any Title VII or any of those tort claims. In addition, it also prohibits a covered contractor or subcontractor from enforcing an existing mandatory arbitration agreement for any of those claims. Beginning 180 days after the effective date of that statute, covered contractors must certify that their subcontractors are not requiring arbitration as a condition of employment for any such claim.

The amendment contains two exceptions. The first applies whenever the agreements of the contractor or subcontractor “may not be enforced in a court of the United States.” The second provides for waivers by the Secretary of Defense. The specific requirements for any such waiver are contained in § 8116(d).

II. NIGHT WATCHMEN AND PRECLUSION.

A. *Alexander* and Its Progeny.

Harrell Alexander, Sr., an African-American employee of Gardner-Denver Co. in Denver, filed a grievance in October 1969 from the company’s decision to terminate his employment. The grievance did not expressly allege race discrimination. His union, Local No. 3069 of the United Steelworkers of America, processed the grievance. During the last stage before arbitration, Mr. Alexander alleged that his discharge resulted from racial discrimination.

The grievant testified in the arbitration hearing that his discharge was the result of racial discrimination. The arbitrator concluded that Mr. Alexander had been discharged for just cause, without making any finding on his claim of race discrimination.

Mr. Alexander filed a Title VII case in federal district court. Judge Winner granted the employer’s motion for summary judgment, concluding that the arbitrator’s decision precluded the plaintiff from asserting a claim under Title VII in court. The Tenth Circuit affirmed.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52-53 (1974), the Supreme Court held that an award in an arbitration proceeding brought pursuant to a non-discrimination clause in a collective bargaining agreement does not preclude an action brought pursuant to Title VII. Justice Powell, writing for a unanimous Court, stated that, “[i]n submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.” *Id.* at 49-50.

The opinion in that case was based on the fact that rights under Title VII cannot be waived prospectively. While an employee can waive his or her Title VII rights through a settlement agreement, the Court concluded that “mere resort to the arbitral forum to enforce

contractual rights constitutes no such waiver.” *Id.* at 52. It emphasized that both the contractual right to submit a claim to arbitration and the statutory right against discrimination “have legally independent origins and are equally available to the aggrieved employee.” *Id.*

The Supreme Court later extended *Alexander* to claims under the Reconstruction Era Civil Rights Acts, including 42 U.S.C. § 1981, *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984), and to FLSA claims. *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981).

B. *Gilmer* Changes Things, Or Did It?

In 1991, the Supreme Court, in a 7-2 decision, held that an individual employee could be required as a condition of employment, to sign an agreement that requires arbitration of any claim brought under the Age Discrimination in Employment Act (“ADEA”) of 1967. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

The majority opinion in *Gilmer* rejected the petitioner’s argument that *Alexander* and its progeny precluded mandatory arbitration of statutory discrimination claims. *Id.* at 34-35. That decision distinguished those cases on three grounds. First, the *Gilmer* majority concluded, those earlier cases “involved the ... issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims,” which the majority stated was “quite different” from “the issue of the enforceability of an agreement to arbitrate statutory claims.” *Id.* at 35. Second, an important concern in those cases was “the tension between collective representation and individual statutory rights,” which was not involved in *Gilmer*. *Id.* Third, the majority stated that those cases were not decided under the Federal Arbitration Act. *Id.*

Gilmer caused some to claim that, notwithstanding the majority opinion’s distinction of its decision in that case from *Alexander* and its progeny, those earlier cases stood on shaky ground and might no longer be good law. That led to the Supreme Court’s decision to revisit the *Alexander* issues in its 2009 Term.

C. Night Watchmen Lose Some of Their Rights.

The Service Employees International Union, Local 32BJ, entered into a collective bargaining agreement (“CBA”) with the Realty Advisory Board on Labor Relations, Inc. (“RAB”), which bargained on behalf of the owners of a number of buildings in New York City. That CBA included the following provision:

§ 30 NO DISCRIMINATION. There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, ... or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedures (Articles V and

VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.

The owner of the 14 Penn Plaza building in New York City decided to reassign a group of night watchmen in that building to positions as night porters and light duty cleaners. Those night watchmen were employed by a maintenance service and cleaning contracting company. With the consent of SEIU Local 32BJ, the building's owners had agreed with a unionized security services contractor, an affiliate of the night watchmen's employer, to provide security guards for the building, which led to the reassignment of the night watchmen.

The union filed grievances on behalf of the night watchmen. One of the grounds in those grievances was that the building owner had violated the prohibition on age discrimination in the CBA. The union later withdrew that part of the grievance, based on the fact that it had consented to the agreement with the company that provided the new security officers.

Those employees filed an ADEA lawsuit in federal district court. The district court denied the defendants' motion to compel arbitration. *Pyett v. Pennsylvania Bldg. Co.*, 2006 WL 1520517 (S.D.N.Y. June 1, 2006). The Second Circuit affirmed, 498 F.3d 88 (2d Cir. 2007).

The Supreme Court granted cert. on the issue of whether "an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their statutory discrimination claims, [is] enforceable." 128 S. Ct. 1223 (2008).

In a 6-3 decision, *14 Penn Plaza LLC v. Pyett*, --- U.S. ----, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009), the Supreme Court held that the arbitration clause in that CBA precluded a statutory discrimination claim by any of those night watchmen. The majority began by noting that the union and the RAB had "collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration." 129 S.Ct. at 1464. The majority concluded that the union had the right to waive its members' right to bring ADEA claims in court unless the ADEA removed this class of grievances from the broad scope of the NLRA. *Id.* at 1464-65. In the light of *Gilmer*, the majority had little difficulty concluding that an employee could be required to submit ADEA claims to binding arbitration. *Id.* at 1465-66.

The majority distinguished *Alexander* and its progeny on the basis of the first ground on which the *Gilmer* majority had distinguished them. *Id.* at 1466-69. Specifically, the *14 Penn Plaza* majority quoted from the *Gilmer* majority opinion that since the employees in those earlier cases "had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Id.* at 1468.

The holding in *14 Penn Plaza* is a narrow one. That case held that "a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *Id.* at 1474.

Two aspects of that opinion are worth noting. First, the majority concluded that the employees could not argue in the Supreme Court that the CBA did not clearly and unmistakably

require them to arbitrate ADEA claims, since they had not made that argument below. *Id.* at 1473-74. Second, the majority did not decide whether the CBA allowed the union to prevent its members from effectively vindicating their federal statutory rights in an arbitral forum. *Id.* at 1474. In part, the majority stated that this issue would require resolving disputed factual allegations and that this issue was not fully briefed in the Supreme Court or in any lower court in that case.

D. The Progeny of *14 Penn Plaza*.

1. Cases Precluding Statutory Discrimination Claims.

Johnson v. Tishman Speyer Properties, L.P., 2009 WL 3364038 (S.D.N.Y. Oct. 16, 2009) (plaintiff's race discrimination claims within scope of CBA's arbitration clause).

Borrero v. Ruppert Housing Co., Inc., 2009 WL 1748060 (S.D.N.Y. June 19, 2009) (CBA clearly and unmistakably required plaintiff to arbitrate his Title VII claims).

Mathews v. Denver Newspaper Agency LLP, 2009 WL 1231776 (D. Colo. May 4, 2009) (notwithstanding a finding that the defendant had presented "undisputed evidence that union employees are not required to arbitrate their statutory discrimination claims under the CBA but rather may directly pursue their administrative and judicial remedies," the court concluded that "*Gardner-Denver* does not preclude me from finding that Plaintiff waived his right to seek a judicial remedy by voluntarily pursuing arbitration under the CBA and that his discrimination claims are now barred by the doctrine of *res judicata*").

Cf. *Tewolde v. Owens & Minor Distribution, Inc.*, 2009 WL 1653533 (D. Minn. June 10, 2009) (arbitrators' decision that the arbitrators' decision in construing and applying the CBA was entitled to substantial deference).

2. Cases Not Precluding Statutory Discrimination Claims.

Edwards v. Cascade County Sheriff's Dept., 2009 WL 5160007 (Mont. Dec. 31, 2009) (CBA did not clearly and unmistakably cover plaintiffs' statutory discrimination and wage claims).

Markell v. Kaiser Foundation Health Plan of Northwest, 2009 WL 3334897 (D. Ore. Oct. 15, 2009) (CBA did not require arbitration of statutory claims).

Betancourt v. A.M. Ortega Const., Inc., 2009 WL 3246390 (Cal. App. Oct. 9, 2009) (CBA did not clearly and unmistakably require employees to arbitrate wage claim).

Figueroa v. District of Columbia Metropolitan Police Dept., 2009 WL 3113241 (D.D.C. Sept. 30, 2009) (CBA did not state that it covered statutory claims)

Mendez v. Starwood Hotels & Resorts Worldwide, Inc., 2009 WL 2379985 (2d Cir. Aug. 3, 2009) (side agreement between employer and individual employee was unenforceable because it covered subjects over which the union had exclusive bargaining power; *14 Penn Plaza* was distinguished because that agreement was outside the collective bargaining process).

Warfield v. Beth Israel Deaconess Medical Center, Inc., 910 N.E.2d 317, 454 Mass. 390 (2009) (arbitration clause did not cover statutory discrimination and retaliation claims).

Catrino v. Town of Ocean City, 2009 WL 2151205 (D. Md. July 14, 2009) (CBA required arbitration only of contractual disputes).

St. Aubin v. Unilever HPC NA, 2009 WL 1871679 (N.D. Ill. June 26, 2009) (no clear and unmistakable waiver of right to bring statutory claims in court).

Shipkevich v. Staten Island University Hosp., 2009 WL 1706590 (E.D.N.Y. June 16, 2009) (no clear and unmistakable waiver of right to bring statutory claims in court).

Kravar v. Triangle Services, Inc., 2009 WL 1392595 (S.D.N.Y. May 19, 2009) (in case in which plaintiff claimed that her union refused to arbitrate her claims of disability discrimination, court concluded that the CBA operated to preclude plaintiff from litigating those claims in any forum).