

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>ANATOLIY GAVRILYUK Plaintiff/Petitioner(s) VS. NOR CAL CARPENTERS UNION, a business entity, form unknown Defendant/Respondent (s)</p>	<p>No. 23CV051442 Date: 08/02/2024 Time: 7:09 PM Dept: 25 Judge: Jenna Whitman ORDER re: Ruling on Submitted Matter filed by ANATOLIY GAVRILYUK (Plaintiff) on 05/22/2024</p>
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The Court, having taken the matter under submission on 06/20/2024, now rules as follows:

The motion of defendant Nor Cal Carpenters Union (defendant or NCCRC) to Compel Arbitration is DENIED.

Plaintiff was employed by NCCRC (a union) as a field representative from November 1, 2014 to July 18, 2023. He signed defendant’s arbitration agreement on October 30, 2014. The agreement provides that the sole and exclusive method of resolving any employment-related claims will be through final and binding arbitration. The agreement also provides that all remedies available through court litigation, and upon request, discovery, will be available in arbitration. (Petition to Compel Arbitration ¶ 4, Carder Dec., Ex. 1.) It further provides that the Union “will pay all costs associated with the arbitration that the employee would not otherwise be required to bear if he or she were free to bring the action in court;” and that “the decision of the Arbitrator shall be in writing and shall set forth the essential findings and conclusions on which the award is based.” (Id.) The Arbitrator is further granted the discretion to award attorneys’ fees to the Employee. (Id.) It also provides that a party prevailing on a motion to compel arbitration may recover attorneys fees and costs incurred in obtaining such an order. (Id.)

On November 15, 2023, plaintiff filed his complaint alleging discrimination and harassment based upon ethnicity, national origin and sex, and retaliation for reporting and resisting illegal activity, termination in violation of public policy. The complaint alleges that plaintiff was forced to endure sexual harassment from approximately July 2020 until his termination in July 2023, including that he was “often” subject to specific statements which can fairly be described as sexually explicit, demeaning and offensive; that he complained about this treatment; and no action was taken to prevent or rectify his treatment and he was told that no action would be taken. (Complaint paras. 14-18.) After this motion was filed, on the same date their opposition was filed, plaintiff filed a First Amended Complaint. This complaint similarly alleged that the

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conduct continued until his termination, including specific threats of physical violence in April 2023. (First Amended Complaint, paras. 14, 20, 37, 39, 40.) It also alleged plaintiff was retaliated against for reporting his harassment in July 2023, when he was terminated. (Id., paras, 22, 26, 28, 73-77. 79, 81, 85-86, 89-90.)

Plaintiff asserts that even if the arbitration agreement were otherwise valid and enforceable, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“EFAA”) (9 U.S.C. §§ 401, 402) eliminated the “liberal federal policy” favoring arbitration agreements for sexual harassment claims, and where it applies, it applies to the entire action, not just to the sexual harassment claim. The EFAA provides that a predispute arbitration agreement or joint-action waiver will not “be valid or enforceable” in a sexual assault or sexual harassment dispute. (Id. at § 402(a).) It applies to “any dispute or claim that arises or accrues on or after the date of enactment of this Act [March 3, 2022].” (Betancourt v. Rivian Auto., LLC (C.D. Ill. Aug. 21, 2023) No. 22-1299-JES-JEH, 2023 WL 5352892, at p. *2.)

While plaintiff’s claims allegedly accrued before the EFAA became effective, the parties’ “dispute” arose after the EFAA became effective. Plaintiff also pleads that the sexual harassment continued after the EFAA’s effective date, bringing the claim within the ambit of the EFAA. (See Kader v. Southern California Medical Center, Inc. (2024) 99 Cal.App.5th 214, 224-225; Olivier v. Stifel (E.D. N.Y. 2023) 2023 WL 2740846, *6 [in circumstances when a continuing violation is alleged, claim accrues on the date of the last act in furtherance of the violation]; Watson v. Blaze Media LLC (N.D. Tex. Aug. 3, 2023) 2023 WL 5004144, at *3 [same]; Betancourt, supra, 2023 WL 5352892 at p. *5 [“The alleged misconduct represents a continuing violation which was ongoing on the date the EFAA was enacted with the result that the Arbitration Agreement and joint-action waiver are nonenforceable.”].)

In the analogous statute of limitations context, California law applies the continuing violation doctrine to, inter alia, sexual harassment claims, permitting a party to bring claims for a series of wrongful acts that are similar in kind, some falling within the statute of limitations, and others without. (See, e.g., Trovato v. Beckman Coulter, Inc. (2011) 192 Cal.App.4th 319, 326.) Plaintiff alleges such continuing conduct, including that the acts of sexual harassment continued to occur after March of 2022. She also alleges retaliation, related to his reporting of sexual harassment, which occurred after the EFAA’s effective date. (See Molchanoff v. SOLV Energy, LLC (S.D. Cal. March 1, 2024) 2024 WL 899384, at *3-5 [finding that retaliation claim, related to sexual harassment allegations, falls within EFAA’s definition of a sexual harassment dispute, and that retaliation that occurred after the effective date, relating to harassment that occurred before the effective date, brings the case within the EFAA’s arbitration exception].)

Defendant counters that plaintiff fails to plead facts which, if true, would be sufficient to prove a sexual harassment claim because the alleged conduct was not sufficiently severe or pervasive and the allegations are not particularized or specific to tie the offensive remarks to the Union. However, plaintiff alleges he “often” subjected to highly offensive and demeaning comments which were sexual in nature, and that he reported this conduct to his managers, who expressly declined to address it, amplifying the severity of the conduct and its likely impact on plaintiff. Plaintiff has alleged sufficient factual matter to state a claim for sexual harassment under the FEHA. (Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal.App.3d 590, 611 [elements of a FEHA claim]; Ashcroft v. Iqbal (2009) 556 U.S. 662, 678 [pleading must contain sufficient

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factual matter, accepted as true, to “state a claim to relief that is plausible on its face,” i.e., more than a “sheer possibility” that defendant acted unlawfully]. See also *Johnson v. Everyrealm, Inc.* (S.D.N.Y. 2023) 657 F.Supp.3d 535, 551 n.13 [pleading retaliation claim “related” to reporting sexual harassment also suffices].)

Although defendant contends that plaintiff’s sexual harassment allegations are not made in good faith, but in a bad faith effort to add sexual harassment to his “primary” claim based upon ethnicity in order to invoke the EFAA’s arbitration exclusion, defendant has not provided any admissible evidence suggesting that the sexual harassment allegations are fabricated.

Defendant argues that, at a minimum, plaintiff’s claims other than for sexual harassment must be severed and remain in court. However, the sexual harassment and retaliation claims are plausibly pleaded, fall within the EFAA’s exception, and are intertwined with plaintiff’s other claims; thus, the entire case is inarbitrable. (*Johnson, supra*, 657 F.Supp.3d at pp. 558-561 [“the EFAA, at the election of the party making such an allegation [of sexual harassment], makes pre-dispute arbitration agreements unenforceable with respect to the entire case relating to that dispute.”]; *Turner v. Tesla, Inc.* (N.D. Cal. 2023) 686 F. Supp. 3d 917, 925 [where resolution of sexual harassment claims as defined by the EFAA is intertwined with resolution of remaining claims for workplace injuries and retaliation, court may find the arbitration agreement is unenforceable with respect to entire case].) Plaintiff alleges the sexual harassment as part of an ongoing pattern of wrongful conduct which was both harassing and discriminatory (on the basis of sex/gender and ancestry/national origin), and that the conduct, defendant’s failure to address it appropriately, and defendant’s retaliation against plaintiff for reporting or opposing this conduct in terminating plaintiff’s employment, all gave rise to the same damages – emotional distress and lost wages and benefits. (See generally First Amended Complaint.) Defendant has not presented any evidence to show that the claims are sufficiently distinct that severance is feasible.

In light of the foregoing, the court need not address plaintiff’s waiver and unconscionability arguments.

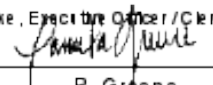
The motion to compel arbitration, including the request for an award of fees and costs to defendant, is DENIED.

Dated : 08/02/2024



Jenna Whitman / Judge

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SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 08/05/2024
PLAINTIFF/PETITIONER: ANATOLIY GAVRILYUK	Chad Finke, Executive Officer / Clerk of the Court By:  Deputy
DEFENDANT/RESPONDENT: NOR CAL CARPENTERS UNION, a business entity, form unknown	P. Greene
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: 23CV051442

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the Order re: Ruling on Submitted Matter filed by ANATOLIY GAVRILYUK (Plain... entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

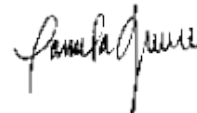
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Dated: 08/05/2024

Chad Finke, Executive Officer / Clerk of the Court

By:



P. Greene, Deputy Clerk