UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-81733-CV-MIDDLEBROOKS

KATHERINE HODGIN, M.D.,

Plaintiff,

v.

INTENSIVE CARE CONSORTIUM, INC.,
JFK MEDICAL CENTER LIMITED PARTNERSHIP,
HCA, INC., and HCA PHYSICIAN SERVICES, INC.,

Defendants.

_____/

ORDER COMPELLING ARBITRATION AND STAYING CASE

THIS CAUSE is before the Court upon Defendants' Joint Motion to Compel Arbitration and to Stay, filed on December 5, 2022. (DE 19). The Motion is fully briefed. (DE 23; DE 29). For the following reasons, the Defendants' Motion is granted.

Plaintiff, a physician, initiated this action on November 6, 2022, against several hospitals for, *inter alia*, sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and wrongful termination. (DE 1; DE 7). In May 2020, Plaintiff executed an employment agreement ("Agreement") with Intensive Care Consortium, Inc. ("ICC") that contained an arbitration clause. (*See* DE 20-1 at 8). Defendants now move to compel arbitration.

Agreements to arbitrate are enforced pursuant to the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 2[1]; *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001) ("the FAA

[1] Section two of the FAA 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 or transaction, . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

compels judicial enforcement of a wide range of written arbitration agreements"). When considering whether to enforce an arbitration agreement, a court must first determine whether the parties agreed to arbitrate their dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Disputes about the validity of an arbitration agreement are reviewed under similar standards as that of a motion for summary judgment.

DISCUSSION

Plaintiff's objection to compelling arbitration is twofold. First, that it violates the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. (DE 23 at 6). Second, that the Agreement is invalid for violating public policy and/or being unconscionable. (*Id.* at 4, 13). The Parties agree that Plaintiff's claims are "substantially intertwined" as to all Defendants and thus should be adjudicated in one forum to avoid inconsistent decisions and inefficiencies. (Def's Mot., DE 19 at 10); (Plaintiff's Resp., DE 23 at 3). The disagreement is over what forum that should be. I will address each objection in turn.

I. ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT OF 2021

President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 on March 3, 2022. Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. § 402) (hereinafter "the EFAA"). The EFAA amends the Federal Arbitration Act by invalidating any pre-dispute mandatory arbitration clause as it applies to plaintiffs alleging claims of or related to workplace sexual harassment. But for *timing*, Plaintiff's action would fall within that new carve out.

Temporally, the EFAA applies as follows: "This Act, and the amendments made by this Act, shall apply with respect to any **dispute or claim** that **arises or accrues** on or after the **date of enactment** of this Act." EFAA § 3. The date of enactment is March 3, 2022. Plaintiff's alleged

injuries occurred *before* that date, in 2021. (*See generally* Am. Compl.). On January 28, 2022, still before the date of enactment, Plaintiff filed numerous Charges of Discrimination with the EEOC. (Am. Compl. ¶ 12). In August of 2022, *after* the date of enactment, the EEOC sent Plaintiff a right to sue notice. (*Id.* ¶ 14). And on November 6, 2022, Plaintiff filed suit in this Court. (DE 1). Plaintiff argues that her *claim accrued* when EEOC sent a right to sue letter. (DE 23 at 11). I disagree.

Plaintiff's claim *accrued* when she was terminated in November of 2021. *See Green v. Brennan*, 578 U.S. 547, 556 (2016) ("The [Title VII] claim accrues when the employee is fired. At that point—and not before—he has a "complete and present cause of action." So at that point—and not before—the limitations period begins to run."). Granted, *Green* is not an interpretation of the EFAA, but the EFAA does not define accrue, and thus the term should be given the same legal meaning as that applicable to Plaintiff's Title VII claims. I was not able to locate circuit precedent on this issue. However, several federal district courts across the country have held that, under the EFAA, "accrue" means what it meant in *Green*. *See Newcombe-Dierl v. Amgen*, 2022 WL 3012211, at *5 (C.D. Cal. May 26, 2022); *Marshall v. Hum. Servs. of Se. Texas, Inc.*, 2023 WL 1818214, at *3 (E.D. Tex. Feb. 7, 2023); *Walters v. Starbucks Corp.*, 2022 WL 3684901, at *3 (S.D.N.Y. Aug. 25, 2022). Notably, *Newcombe-Dierl* contains the same fact pattern as here in that the Plaintiff received the right to sue *after* EFAA was enacted.

Separately, I considered whether Plaintiff's "dispute" arose *after* March 2022 because she filed suit in November 2022. The court in *Walters* dismissed that possibility by reasoning that "[a] 'sexual harassment dispute' may arise in a lawsuit, in which 'claims' are asserted, or in other kinds of proceedings. [EFAA] may therefore refer to 'claims' and 'disputes' in order [to] encompass various kinds of proceedings." *Walters*, 2022 WL 3684901, at *3. I am not so sure that is right.

I read the statute to say that "disputes . . . arise[]" and "claims . . . accrue[]." That is the only way to reconcile the redundancy of saying that a claim arises *and* accrues—those dates would be the same. Moreover, I do not see how a "dispute" could "accrue." This interpretation accords with EFAA's definition of "predispute arbitration agreement" as being "any agreement to arbitrate a dispute that had not yet *arisen* . . . . " EFAA § 401(1).

So, when does a dispute arise? A dispute entails disagreement, not just the existence of an injury (which would be the claim accruing). *See Dispute*, Merriam-Webster's Online Dictionary 2023, https://www.merriam-webster.com/dictionary/dispute ("to engage in argument: Debate"). At first blush then, one might think that is when the lawsuit is filed. But "dispute" is a broad term that encompasses other forums. Consider the well-known phrase "alternative *dispute* resolution." That generally refers to disputes resolved before reaching a court, like with a mediator or arbitrator. In those instances, surely the dispute has arisen. Otherwise, there would be no dispute to alternatively resolve. Thus, to say that a dispute arises only once a lawsuit is filed is far too limiting.

Applying that reasoning here, I find that Plaintiff's dispute arose when she filed Charges of Discrimination against her employer with the EEOC in January 2022—still before EFAA's enactment in March 2022. The Charge of Discrimination initiates an administrative process whereby the EEOC attempts to mediate an early resolution and sometimes requests an answer from the employer.[2] By that point, the dispute had arisen because the Plaintiff was now in an adversarial posture with her employer in a forum with the potential to resolve the claim.

[2] What You Can Expect After You File a Charge, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited 3/31/2023).

II. AGAINST PUBLICY POLICY AND/OR UNCONSCIONABLE

Plaintiff alternatively argues that, even if the EFAA does not apply, the Court should void the arbitration clause as to these claims because the employer's failure to include an exception for sexual harassment is against public policy and/or unconscionable. These are contractual remedies under Florida law.

As to public policy, given that Congress made the policy decision not to apply EFAA to Plaintiff's situation, I am not in the position to second guess that choice. To inject Plaintiff's novel interpretation would be an inappropriate use of the Court's discretion.

Nor do I find that the arbitration clause is unconscionable. A contract is unconscionable if it is both procedurally and substantively unconscionable, though not necessarily to the same extent. *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1158-59 (Fla. 2014). Procedurally, Plaintiff argues that the contract was a "take it or leave it" deal that would have "jeopardized her ability to retain employment." (DE 23 at 14). And substantively, Plaintiff argues that it should "strike the court as 'outrageously unfair or otherwise shock the judicial conscience' in this new era" post EFAA. (DE 23 at 17) (citation omitted).

"In Florida . . . the take-it-or-leave-it nature of arbitration agreements is not dispositive." *Hobby Lobby Stores, Inc. v. Cole*, 287 So. 3d 1272, 1275 (Fla. Dist. Ct. App. 2020). Instead courts look to the "circumstances surrounding the execution of an arbitration agreement . . . . " *Id.* I have considered Plaintiff's declaration regarding those circumstances (DE 23-1) and am not persuaded that the Agreement is procedurally unconscionable. Plaintiff, a medical doctor, is a sophisticated actor who could have understood the agreement or even obtained legal counsel to do so. *Cf. id.* (finding arbitration clause not procedurally unconscionable, in part, because litigant with high

school education could have read agreement). There is also no evidence of coercion. As to her substantive argument, the same reasoning behind rejecting the public policy argument applies.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

(1) Defendants' Joint Motion to Compel Arbitration and to Stay (DE 19) is **GRANTED.**

(2) The Parties are **COMPELLED** to arbitrate. Meanwhile, this case is **STAYED**.

(3) The Clerk of Court shall **ADMINISTRATIVELY CLOSE THIS CASE** and **DENY AS MOOT** all other pending motions.

(4) The Parties shall file a joint status report within 14 days after the arbitration award is issued.

SIGNED in Chambers in West Palm Beach, Florida, this 31 day of March, 2023.

Donald M. Middlebrooks
United States District Judge

cc: Counsel of record