

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

JEFFREY R. GEORGE,

Plaintiff,

v.

Civil Action: 17-C-196
Judge Stowers

AC&S, INC.,

Defendant.

PUTNAM CIRCUIT CLERK
MAY 7 '19 PM2:44

ORDER

On a previous day came the Defendant, AC&S, Inc. ("AC&S"), and filed *AC&S, Inc.'s Motion to Dismiss or Stay and to Compel Arbitration* ("the Motion"), wherein it moved the Court to (1) compel the Plaintiff, Jeff George, to pursue his claims in arbitration and (2) to dismiss this civil action or hold it in abeyance until the conclusion of arbitration.

The Motion was brought on for hearing wherein AC&S argued in support of the Motion that the employment discrimination claims asserted in this case by the Plaintiff, Jeffrey R. George, are subject to mandatory arbitration pursuant to the terms of a Collective Bargaining Agreement ("CBA") between AC&S and The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union AFL-CIO ("the Union"), of which Mr. George was a member during his employment at AC&S. Conversely, Mr. George argues in opposition to the motion that the Court should not compel arbitration of his claims because the CBA does not contain a clear and unmistakable requirement to arbitrate the employment discrimination claims he has asserted in this lawsuit.

Upon mature consideration of the Motion and Mr. George's response brief in opposition thereto, and after hearing oral argument by the parties, the Court denies the Motion and sets forth the following findings of fact and conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, Jeffrey R. George, was employed by the Defendant, AC&S, before he was involuntarily terminated on or about April 26, 2016.

2. Mr. George filed this civil action against AC&S alleging that his termination violated the *West Virginia Human Rights Act* (“WVHRA”), the *West Virginia Workers Compensation Act* (“WVWCA”), and substantial public policies of the State of West Virginia. Mr. George’s Complaint alleges the following causes of action against AC&S: 1) Workers’ Compensation Retaliation/Discrimination in violation of the WVWCA; 2) Disability Discrimination in violation of the WVHRA; 3) Failure to Accommodate in violation of the WVHRA; and 4) a *Harless*-style¹ claim for retaliatory discharge in violation of substantial West Virginia public policy.

3. Mr. George was a member of the Union while he was employed at AC&S.

4. On or about September 1, 2014, the Union, as the sole and exclusive agent of Union employees such as Mr. George, entered into a CBA with AC&S regarding the terms and conditions of employment of Union members at AC&S’s chemical manufacturing facility located in Nitro, West Virginia.

5. The CBA contains an arbitration agreement at Article XI, Section 1, which provides, in relevant part, as follows:

ARTICLE XI

GRIEVANCE AND ARBITRATION PROCEDURES

SECTION 1: All complaints, disputes, controversies, or grievances arising between the Employer and any employee covered by this Agreement or the Union, as a representative of any employee covered by this Agreement, which involves only questions of interpretation or application of any provisions of this Agreement, shall be adjusted and resolved, by and between the parties in the manner provided

¹ See *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

by this **ARTICLE, ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES.**

Collective Bargaining Agreement at 19 (emphasis in original).

6. Article X of the agreement concerns disciplinary action and discharge of union members and prescribes that disputes regarding disciplinary actions taken by AC&S against Union employees must be resolved in accordance with the grievance and arbitration procedures prescribed by Article XI. Specifically, Article X provides, in relevant part, as follows:

ARTICLE X

DISCIPLINARY ACTION AND DISCHARGE

SECTION I: It is expressly understood and agreed by the parties to this Agreement that the Employer has the right to discipline, suspend, or discharge employees covered by this Agreement for good cause. When notified by the Employer of pending disciplinary action, the employee subject to such disciplinary action shall have the right to have a Union representative or Union Steward present, provided that the Union representative or Union Steward is readily available, this provision is in no way intended to prolong the time period prior to any such disciplinary action.

SECTION 2: It is expressly understood and agreed by all parties to this Agreement, the Employer, the Union, and Bargaining Unit employees that the sole remedy for disputes regarding disciplinary actions taken by the Employer against employees covered by this Agreement shall be in accordance with **ARTICLE XI, GRIEVANCE AND ARBITRATION PROCEDURES**, of this Agreement.

Id. at 16 (emphasis in original).

7. The CBA does not contain any language that explicitly incorporates the West Virginia statutory or common law under which Mr. George is asserting his claims – the WVVCA, WVHRA, and *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) – as part of the CBA.

8. The CBA does not contain any language explicitly requiring Union members to submit to arbitration “all causes of action” arising from their employment with AC&S.

9. The CBA does not contain a general anti-discrimination clause.

CONCLUSIONS OF LAW

A. AC&S is not entitled to a presumption that Mr. George’s employment discrimination claims are arbitral pursuant to the terms of the CBA.

10. In CBAs containing an arbitration agreement, “there is a presumption of arbitrability in the sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Wright v. Universal Maritime Service Corporation, et al.*, 525 U.S. 70 (1998) (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986)). However, such a presumption “does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of a CBA.” See *id.* (emphasis in original).

11. Accordingly, where a dispute arises not out of contractual rights granted in the CBA, but rather out of requirements prescribed by law, such a dispute “is not a question which should be *presumed* to be included within the arbitration requirement.” *Id.* (emphasis in original).

12. In this case, the Court finds that Mr. George has asserted employment discrimination claims pursuant to requirements prescribed by West Virginia statutory and common law, including claims pursuant to the WVHRA, WVVCA, and *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

13. The Court finds that, even if AC&S proved that Mr. George committed some act properly subject to discipline pursuant to the terms of the CBA, Mr. George could still prevail on the causes of action asserted herein if he proves that his termination was motivated,

in whole or in part, by a discriminatory and/or retaliatory reason in violation of the WVHRA, WWCWA, and/or the substantial public policy of West Virginia. Therefore, the question that would be submitted to an arbitrator in this case would be what West Virginia law requires and not what the CBA requires. Accordingly, such claims arise not from the terms of the CBA, but rather from the requirements of West Virginia law and are distinct from any right conferred by the CBA. *See Wright*, 525 U.S. 70.

14. The Court finds that because Mr. George's claims do not require interpretation of the terms of the CBA, but rather the requirements of state law, such claims are not *presumed* to be included within the arbitration requirement of the CBA.

B. The CBA does not contain a clear and unmistakable requirement to arbitrate Mr. George's individual employment discrimination claims.

15. In order to compel an employment discrimination claim to arbitration pursuant to an arbitration agreement contained in a CBA, the requirement to arbitrate such claims must be particularly clear such that the waiver of a judicial forum is clear and unmistakable. *See Wright*, 525 U.S. 70; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009). The Court "'will not infer from a general contractual provision that the parties intended to waive a [legally] protected right unless the undertaking is explicitly stated.'" *See Wright*, 525 U.S. 70.

16. Numerous federal circuit courts of appeal have weighed in on what is required to constitute a clear and unmistakable requirement to arbitrate employment discrimination claims pursuant to a CBA. The consensus opinion among the federal circuits is that broad and general language does not suffice as the clear and unmistakable language required to force arbitration of employment discrimination claims pursuant to a CBA. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999); *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 52-53 (1st Cir. 2013); *Ibarra v. UPS*, 695 F.3d 354, 358-60 (5th Cir. 2012); *Wawock v. CSI*

Elec. Contractors, Inc., 649 F. App'x 556, 558-59 (9th Cir. 2016); *Mathews v. Denver Newspaper Agency LLP*, No. 09-1233, 2011 U.S. App. LEXIS 11454, at *17-20 (10th Cir. May 17, 2011). Rather, a CBA must plainly specify the intent to have an arbitrator decide the merits of individual employment discrimination claims.” *Carson*, 175 F.3d at 332.

17. Something close to specific incorporation of the relevant employment discrimination claims somewhere into the CBA is required to compel such claims to arbitration pursuant to the terms of a CBA. *See id.* (“When the parties use . . . broad but nonspecific language in the arbitration clause, they must include an “explicit incorporation of statutory antidiscrimination requirements” elsewhere in the contract.”); *Manning*, 725 F.3d at 52-53 (“[S]omething closer to specific enumeration of the statutory claims to be arbitrated is required.”); *Ibarra v. UPS*, 695 F.3d at 358-60 (“[C]ourts have concluded that for a waiver of an employee's right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the CBA must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims.”); *Wawock*, 649 F. App'x at 558 (“Making no reference to [discrimination] claims necessarily falls short of an explicit statement concerning them.”); *Mathews v. Denver Newspaper Agency LLP*, 2011 U.S. App. LEXIS 11454 at *17-20 (“[W]aiver [of a judicial forum] may only occur where the arbitration agreement expressly grants the arbitrator authority to decide statutory claims.”).

18. This Court adopts the test set forth by The United States Court of Appeals for the Fourth Circuit, *See Carson*, 175 F.3d at 331-32; *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 216 (4th Cir. 2007), which holds that the clear and unmistakable standard can be satisfied in the following two ways:

The first is the most straightforward. It simply involves drafting an explicit arbitration clause. Under this approach, the CBA must contain a clear and

unmistakable provision under which the employees agree to submit to arbitration all . . . causes of action arising out of their employment. . . .

The second approach is applicable when the arbitration clause is not so clear. General arbitration clauses, such as those referring to ‘all disputes’ or ‘all disputes concerning the interpretation of the agreement,’ taken alone do not meet the clear and unmistakable requirement of *Universal Maritime*. When the parties use such broad but nonspecific language in the arbitration clause, they must include an ‘explicit incorporation of statutory antidiscrimination requirements’ elsewhere in the contract. *Universal Maritime*, 119 S. Ct. at 396. If another provision, like a nondiscrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their [employment discrimination] claims.

Carson, 175 F.3d at 331-32. *See also Aleman* 485 F.3d at 216.

19. Ultimately, the clear and unmistakable standard “require[s] that collective bargaining agreements eliminate any doubt that a waiver of a [judicial] forum was intended.” *See id.*

20. The Court finds that, in this case, the subject CBA does not contain an explicit arbitration clause with a clear and unmistakable requirement to arbitrate the employment discrimination claims asserted by Mr. George or “all causes of action” arising from Union members’ employment. Rather, the arbitration clause in this CBA contains more general, non-specific language referring to “complaints, disputes, controversies, or grievances.” Such an arbitration clause, taken alone, does not meet the clear and unmistakable requirement. *See Carson*, 175 F.3d at 331-32; *Aleman*, 485 F.3d at 216. “When the parties use such broad but nonspecific language in the arbitration clause, they must include an ‘explicit incorporation of statutory antidiscrimination requirements’ elsewhere in the contract.” *See id.*

21. The Court further finds that there is no provision elsewhere in the CBA that explicitly incorporates as part of the agreement the West Virginia statutory and common law anti-discrimination requirements under which Mr. George has asserted his claims. Although

AC&S argues that Article X, Section 2 of the CBA contains a clear and unmistakable requirement to arbitrate disputes related to disciplinary actions, the Court finds that Article X, Section 2 falls short of a clear and unmistakable requirement to arbitrate Mr. George's employment discrimination claims because such claims are not explicitly set forth in Article X, Section 2.

22. Rather, Article X, Section 2 contains broad, non-specific language prescribing that the sole remedy for *disputes* regarding disciplinary actions shall be subject to the arbitration procedures set forth in Article 11. In light of the absence of an explicit incorporation of the employment discrimination causes of action asserted in this case by Mr. George and the use of the term "disputes," the Court finds that Article X, Section 2 requires arbitration of any contractual disputes under the terms of the CBA regarding disciplinary actions and not arbitration of employment discrimination causes of action asserted herein by Mr. George.

23. Moreover, any argument that Article X, Section 2 clearly and unmistakably requires arbitration of employment discrimination causes of action is belied by the language of the general arbitration provision contained in Article 11, Section 1, which provides that "[a]ll complaints, disputes, controversies, or grievances . . . , which *involves only questions of interpretation or application of any provisions of this Agreement*, shall be adjusted and resolved, by and between the parties" pursuant to the arbitration and grievance procedures.

24. Here, Mr. George's employment discrimination claims do not involve "only questions of interpretation or application of any provisions of [the CBA]." Rather, Mr. George's claims involve questions of interpretation and application of West Virginia statutory and common law.

25. Based upon the foregoing, the Court finds that, at the very least, the CBA at issue in this case does not eliminate all doubt that a waiver of a judicial forum was intended by the parties and may be read to explicitly exclude such claims from arbitration. Therefore, the CBA does not contain a clear and unmistakable requirement to arbitrate Mr. George's claims.

C. Mr. George's prior filing of a union grievance does not preclude his right to pursue his causes of action for employment discrimination in a judicial forum.

26. AC&S argues that Mr. George's course of conduct in filing a union grievance regarding his termination demonstrates that he understood his claims must be pursued via arbitration.

27. However, the Court finds that Mr. George's course of conduct is of no consequence to the Court's determination of whether the CBA at issue in this case requires arbitration of his employment discrimination claims. Specifically, "[n]either historical practice nor the parties' unexpressed intent can fulfill [the clear and unmistakable] standard. CBA waivers of the right to a judicial forum must be 'explicitly stated.'" *Wawock*, 649 F. App'x at 558-59.

28. Moreover, the Court finds that a ruling regarding whether Mr. George's prior filing of a union grievance evidences his understanding that the claims he is asserting in this action must be arbitrated would constitute a determination of fact that the Court is not permitted to make on a motion to dismiss.

Based upon the foregoing, the Court finds that the subject CBA does not require arbitration of Mr. George's causes of action for employment discrimination and, therefore, hereby **DENIES** *AC&S, Inc.'s Motion to Dismiss or Stay and to Compel Arbitration*. Accordingly, the Court **ORDERS** that this case shall remain on its active docket and shall

proceed in the Circuit Court of Putnam County, West Virginia. The Court notes and preserves AC&S' objections and exceptions to this Order.

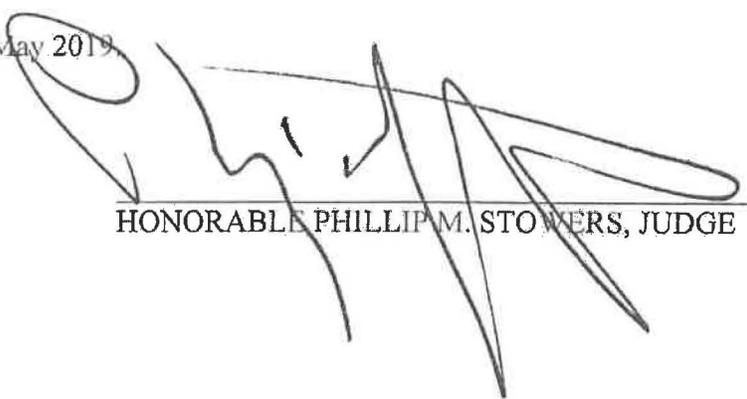
The Court **DIRECTS** the Clerk of Court to send a copy of this Order to all counsel of record as follows:

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ENTERED this 7th day of May 2019.



HONORABLE PHILLIP M. STOWERS, JUDGE