NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1802-10T3

JAZMIN C. FLORES-GALAN,

Plaintiff-Appellant,

v.

J.P. MORGAN CHASE & CO., N.A.,
WASHINGTON MUTUAL BANK,
LAURA DESANTIS, JANICE R. GARRY
and INGRITH PADY,

Defendants-Respondents.

Argued November 1, 2011 - Decided November 23, 2011

Before Judges Reisner and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3138-10.

Michael G. Kane argued the cause for appellant (Cashdan & Kane, P.L.L.C., attorneys; Mr. Kane, on the brief).

Lawrence R. Sandak argued the cause for respondents (Proskauer Rose, L.L.P., attorneys; Mr. Sandak and Kelly Anne Targett, on the brief).

PER CURIAM

Plaintiff Jazmin C. Flores-Galan appeals from an October 29, 2010 order dismissing her Law Division complaint and

compelling her to submit her employment-related claims to binding arbitration. We affirm.

I

By way of background, on April 9, 2010, plaintiff filed a complaint against her employer Washington Mutual Bank (WaMu), its corporate successor J.P. Morgan Chase & Co., N.A., and three individual bank supervisors. According to the complaint, the supervisors knew that plaintiff, who worked in the Fairlawn branch of WaMu, was pregnant and having complications of pregnancy. Plaintiff, who was unaware of her rights under the Family and Medical Leave Act (FMLA or Act), 29 U.S.C.A. §§ 2601 to -16, initially resigned from her position. Shortly after sending in her resignation letter, she learned that she could apply for leave under FMLA. However, she was first told that she could not rescind her resignation and then was allowed to take short-term disability leave, and some FMLA leave, but defendants granted her less FMLA leave than she was entitled to under the Act. Defendants refused to let her return to work after her FMLA and short-term-disability leaves expired on April 28, 2008.

According to her complaint, plaintiff applied for an available position at a different WaMu bank branch, in Elmwood Park, in "early May, 2008 but she was not hired." Defendants

refused to re-hire plaintiff for the Elmwood Park position because she had asserted her rights under FMLA or because they knew that she was pregnant and suffered from a related disabling condition. Plaintiff claimed that the refusal to re-hire her also violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.

On September 29, 2010, defendants filed a motion to dismiss the complaint in favor of binding arbitration. In support of the motion, defendants submitted a copy of an arbitration agreement, which plaintiff signed when she was hired in December 2006. By its terms, the agreement was governed by "the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq.," and waived plaintiff's right to a jury trial for all claims, based on statute or public policy, relating to her employment or the termination of her employment:

> I, Jazmin C. Flores-Galan, in consideration of my employment with Washington Mutual, Inc. or any of its affiliates or subsidiaries ("Washington Mutual") agree with Washington Mutual as follows:
>
> 2. Washington Mutual and I understand that by entering into this Agreement, each of us is waiving any right we may have to file a lawsuit or other civil action or proceeding relating to my employment with Washington Mutual, and waiving any right we may have to resolve employment disputes through trial by jury.

3. This Agreement is intended to cover all civil claims that involve or relate in any way to my employment (or termination of employment) with Washington Mutual, including, but not limited to, claims of employment discrimination or harassment on the basis of race, sex, age, religion, color, national origin, sexual orientation, disability and veteran status (including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Fair Labor Standards Act, the Immigration Reform and Control Act, and any other local, state or federal law concerning employment or employment discrimination), claims for breach of contract or covenant, tort claims, claims based on violation of public policy or statute, and claims against individuals or entities employed by, acting on behalf of, or affiliated with Washington Mutual. The only exceptions to this are

> Claims for benefits under a plan that is governed by ERISA,
>
> Claims for unemployment and workers compensation benefits,
>
> Claims for injunctive relief to enforce rights to trade secrets, or agreements not to compete or solicit customers or employees.
>
> . . . .

17. Because of the interstate nature of Washington Mutual's business, this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq ("FAA"). The provisions of the FAA (and to the extent not preempted by the FAA, the provisions of the law of the state of my principal place of employment with Washington Mutual that generally apply to commercial arbitration agreements, such

> as provisions granting stays of court actions pending arbitration) are incorporated into this Agreement to the extent not inconsistent with the other terms of this agreement.

About two weeks after defendants filed their motion to compel arbitration and a day after the last motion brief was filed, plaintiff filed an amended complaint, which by its terms was "[a]mended to delete [paragraphs] 62 and 69 from the original complaint." Those paragraphs appeared, respectively, in the sections of the original complaint asserting that the failure to re-hire plaintiff constituted disability discrimination under the LAD and constituted pregnancy discrimination under the LAD. In identical language, both paragraphs asserted that WaMu "retaliated against Plaintiff as it had assured her that she was eligible for re-hire and led her to believe that she would in fact be rehired." However, plaintiff's amended complaint recited the same core of essential facts as the original complaint, and she continued to assert that defendants' refusal to re-hire her constituted LAD-prohibited retaliation for her earlier assertion of her rights against employment discrimination.

In an oral opinion placed on the record on October 29, 2010, Judge Sebastian P. Lombardi granted defendants' motion to compel arbitration. He found that the arbitration agreement was

comprehensive enough to cover plaintiff's FMLA and LAD claims. He reasoned that, regardless of the legal theories pled in her complaint, plaintiff's complaint was factually based on events that occurred during her employment. Even the later refusal to re-hire her arose out of her employment, because it was allegedly based on plaintiff's having asserted protected rights while she was employed, or was based on defendants' knowledge of her health conditions while she was employed at WaMu. He also concluded that the reprisal and refusal-to-hire claims were inextricably intertwined with plaintiff's other claims and all of her claims should be arbitrated together. The judge rejected plaintiff's argument that either FMLA itself or the federal Department of Labor's FMLA regulations prohibited agreements to arbitrate FMLA claims.

II

"Our standard of review of the applicability and scope of an arbitration agreement is plenary." EPIX Holdings Corp. v. Marsh & McLennan Companies, Inc., 410 N.J. Super. 453, 472 (App. Div. 2009) (quoting Harris v. Green Tree Fin. Corp., 183 F.3d 173, 176 (3d Cir. 1999)). Having engaged in that plenary review, we find no basis to disturb Judge Lombardi's decision. We affirm substantially for the reasons stated in his opinion. We add the following comments.

There is a strong federal policy in favor of arbitration, as expressed in the Federal Arbitration Act. See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S. Ct. 1647, 1652, 114 L. Ed. 2d 26, 37 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 625, 105 S. Ct. 3346, 3353, 87 L. Ed. 2d 444, 454-55 (1985); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983). Our State also has well-recognized legislative and judicial policies favoring arbitration of disputes. See N.J.S.A. 2A:24-1 to -11 (New Jersey Arbitration Act); Martindale v. Sandvik, 173 N.J. 76, 84-85 (2002); Garfinkel v. Morristown OB. & Gyn. Assocs., 168 N.J. 124, 132 (2001). While an agreement to arbitrate statutory anti-discrimination claims must be specific enough to put the employee on notice of the claims encompassed, an arbitration clause need not specify every conceivable statute that it covers. Martindale, supra, 173 N.J. at 95-97; Garfinkel, supra, 168 N.J. at 135.

In holding that an overly-general arbitration clause did not apply to a plaintiff's LAD claim, the Garfinkel Court added:

> That said, we do not suggest that a party need refer specifically to the LAD or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights. To pass muster, however, a waiver-of-rights provision should at least provide

> that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., workplace discrimination claims.
>
> [Ibid.]

In this case, the arbitration clause is both broad and specific enough to require arbitration of claims under FMLA. See Martindale, supra, 173 N.J. at 96-97 (upholding agreement to arbitrate claims under New Jersey's Family Leave Act (FLA), N.J.S.A. 34:11B-1 to -16, although the agreement did not specifically cite the FLA). Plaintiff's arguments to the contrary are without sufficient merit to warrant further discussion here. R. 2:11-3(e)(1)(E).

Likewise, we find no merit in plaintiff's argument that her LAD claims were not covered by the arbitration agreement because they arose after her termination. The facts she pled in both her original and amended complaints demonstrate that her LAD claims were related to her employment and were inextricably intertwined with her FMLA claims. Plaintiff alleged that defendants refused to rehire her because they knew she was pregnant and had medical complications, and because they were retaliating against her for asserting rights under FLMA.

"[I]n determining the scope of an arbitration agreement," we "'focus on the factual allegations in the complaint rather than the legal causes of action asserted.' If these factual allegations 'touch matters covered by the parties' contract, then those claims must be arbitrated, whatever the legal labels attached to them.'" EPIX, supra, 410 N.J. Super. at 472-73 (citations omitted). Plaintiff agreed to arbitrate all disputes "that involve[d] or relate[d] in any way" to her employment. Clearly, her LAD claims were factually related to her employment, despite her eleventh hour attempt to circumvent the arbitration clause by amending her complaint.

Finally, we cannot agree with plaintiff's argument that FMLA prohibits arbitration agreements. In broad outline, FMLA entitles an employee to take leave from work to address the employee's serious medical condition or to enable the employee to care for a new baby or an ailing family member. 29 U.S.C.A. § 2612. The Act permits an aggrieved employee to file an administrative complaint with the federal Secretary of Labor, or to file suit in either state or federal court, to seek redress for a violation of FMLA rights. 29 U.S.C.A. § 2617(a); 29 C.F.R. § 825.400.

There are a plethora of reported decisions holding that individual employees may agree to submit FMLA claims to binding

arbitration and that employment contracts requiring arbitration of FMLA claims are enforceable. See, e.g., McNamara v. Yellow Transp. Inc., 570 F.3d 950, 957 (8th Cir. 2009); O'Neil v Hilton Head Hosp., 115 F.3d 272, 274 (4th Cir. 1997); Jann v. Interplastic Corp., 631 F. Supp. 2d 1161, 1164-66 (D. Minn. 2009); Martin v. SCI Mgmt. L.P., 296 F. Supp. 2d 462, 467 (S.D.N.Y. 2003); Satarino v. A.G. Edwards & Sons, Inc., 941 F. Supp. 609, 613 (N.D. Tex. 1996); Kindred v. Second Judicial Dist. Ct., 996 P. 2d 903, 909 (2000). Plaintiff cites no case law to the contrary.[1]

Instead, based on the text of the Act and the federal Department of Labor's (DOL) implementing regulations, as well as a footnote in an amicus brief the DOL filed several years ago, plaintiff argues that FMLA prohibits employers from requiring employees to waive their rights to file suit. Plaintiff first premises her argument on 29 U.S.C.A. § 2615(a), which prohibits an employer from interfering with an employee's exercise of "any right" provided under the Act. She contends that the word "any"

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[1] In O'Hara v. Mt. Vernon Bd. of Educ., 16 F. Supp. 2d 868, 883 (S.D. Ohio 1998), the court held that an arbitration clause could not be enforced in a FMLA case because the clause was included in a collective bargaining agreement and not in an employment contract between the individual employee and the employer. It is questionable whether O'Hara remains viable in light of 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009), which approved similar arbitration clauses in union contracts.

includes procedural rights and that, by requiring an employee to sign an arbitration agreement, an employee improperly interferes with the employee's right to file a lawsuit to enforce FMLA rights. Plaintiff further contends that the 2006 version of DOL's implementing regulations should be construed as prohibiting arbitration agreements.

Viewed in context, neither the Act nor the regulations support plaintiff's argument. We quote section 2615 in its entirety:

> (a) Interference with rights.
>
> (1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter [29 USCS §§ 2611 et seq.].
>
> (2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter [29 USCS §§ 2611 et seq.].
>
> (b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--
>
> (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter [29 USCS §§ 2611 et seq.];

> (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter [29 USCS §§ 2611 et seq.]; or
>
> (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter [29 USCS §§ 2611 et seq.].
>
> [29 U.S.C.A. § 2615.]

The DOL regulations, 29 C.F.R. § 825.220 (2006 version), on which plaintiff relies, provided:

> § 825.220 How are employees protected who request leave or otherwise assert FMLA rights?
>
> (a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:
>
> (1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.
>
> ***
>
> (d) Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.
>
> [29 C.F.R. § 825.220 (2006).]

Reading the statute and the regulations together, we readily infer that both enactments prohibit employers from (a) attempting to deprive employees of substantive rights, and (b)

interfering with any ongoing proceedings that employees have filed to enforce those rights. These provisions do not prohibit agreements to submit FMLA claims to arbitration. See Jann, supra, 631 F. Supp. 2d at 1164-66.

Indeed, given the overarching federal policy in favor of arbitration, and the Supreme Court's repeated approval of arbitration clauses in the employment context, if Congress intended to prohibit arbitration of FMLA claims, Congress would have included a specific prohibition on arbitration, rather than a more general reference to "any rights." See Gilmer, supra, 500 U.S. at 29, 111 S. Ct. at 1653, 114 L. Ed. 2d at 39 (noting that "Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the [Age Discrimination in Employment Act].")

As the Supreme Court stated in Mitusbishi Motors, supra:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an

> intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate
>
> [Mitusbishi Motors, supra, 473 U.S. at 628, 105 S. Ct. at 3354, 87 L. Ed. 2d at 456 (citation omitted).]

More recently, the Court emphatically approved the arbitration of statutory employment discrimination claims and resoundingly rejected the view that by agreeing to arbitration of such claims an employee was waiving substantive rights. 14 Penn Plaza LLC v. Pyett, supra, 556 U.S. at ___, 129 S. Ct. at 1469-72, 173 L. Ed. 2d at 415-18 (2009).

Plaintiff's reliance on a footnote from a DOL motion brief is equally misplaced. See DOL Amicus Brief in Dougherty v. Teva Pharmaceuticals, U.S.A., Inc., 2005 U.S. Dist. Ct. Motions 2336D, note 6, 2006 U.S. Dist. Ct., Motions LEXIS 40754 (Nov. 3, 2006).[2] The DOL footnote commented on Faris v. Williams WPC-I, Inc., 332 F.3d 316 (5th Cir. 2003), which held that an employee, who had been terminated, could accept a monetary payment from her employer in exchange for a release of her right to sue the employer under the FMLA. After signing the release, the

[2] The opinion of a federal agency, expressed in a brief, concerning the proper interpretation of a statute it is responsible for implementing, is entitled to some deference. Chase Bank U.S.A , N.A. v. McCoy, ___ U.S. ___ , 131 S. Ct. 871, 880, 178 L. Ed. 2d 716, 726 (2011).

employee attempted to sue the employer, claiming she was fired in retaliation for exercising rights under FMLA. The court held that the release was enforceable, reasoning, in part, that 29 C.F.R § 825.220(d) prohibited the prospective waiver of substantive rights (such as the right to take leave to care for a sick relative) but did not prohibit waiver of the right to sue for retaliation. Faris, supra, 332 F.3d at 320-21.

In disagreeing with that language in Faris, the DOL brief stated that "[t]he Department construes the regulation as barring the prospective waiver of any right under the FMLA." Taken in context, nothing in this language suggests that DOL opposed arbitration of FMLA claims, an issue not presented in Faris. Rather, the footnote meant that, while an employee may accept a payment for the release of a claim based on an employer's past acts, the employee cannot waive rights against an employer's future illegal acts, such as a future refusal to allow the employee to take FMLA leave or a future reprisal for taking such leave.

To the extent not specifically addressed here, plaintiff's additional arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION