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Indeed Worker's Rape-Based Harassment Suit Sent for Arbitration

- Arbitration not barred by N.Y. law on sex harassment, bias
- Public policy, other unconscionability arguments also nixed

By Patrick Dorrian

(Bloomberg Law) -- A female Indeed Inc. account executive who says she was raped two weeks into her career and that the company turned a blind eye to her complaints about that and other workplace harassment must take her case to arbitration, a federal judge in Manhattan ruled.

Taylor Gilbert's May 2018 lawsuit in the U.S. District Court for the Southern District of New York also accuses the online job search engine of subjecting female sales employees to a "misogynistic culture" in which they are sexual prey for male managers who favor women who accede to their demands.

Judge Lewis J. Liman became the latest jurist to find that New York's ban on mandatory arbitration of sexual harassment and other workplace discrimination claims—which took effect July 11, 2018—is preempted by the Federal Arbitration Act's policy favoring the enforcement of valid arbitration agreements. He granted a motion by Indeed and three individual defendants to compel arbitration of the dispute.

At least one New York state court has reached the opposite conclusion, and the issue has percolated up to the appellate level.

Congress couldn't have foreseen when it enacted the FAA in 1925 that it might be applied to bar litigation of state and city law claims that the state or city intended to be litigated in a court or other public forum, he said. It's also "anomalous" to think that Congress has the power to deprive the states of their ability to provide victims of sexual abuse in the workplace of a non-waivable right to sue in a public forum, Liman said.

But he was bound by precedent, Liman said. The U.S. Supreme Court has long held that the FAA declares a national policy favoring arbitration when parties contract to do so. Gilbert agreed to arbitrate when she joined Indeed in 2015, the judge said.

Gilbert's contention that the agreement was unconscionable because it violates public policy also is "legitimate and weighty," the court said, citing the public cost of requiring sexual assault victims to raise their allegations strictly in a private forum as well as depriving "those who are at risk from a sexual predator of the information necessary or helpful to protect themselves."

But again he was bound by precedent, Liman said.

Gilbert argued that her claims under various federal, state, and New York city laws fell outside the scope of her arbitration agreement. But the agreement delegates questions of arbitrability to the arbitrator, the court said.

Liman rejected her other arguments for avoiding arbitration, including that she freed herself from any obligation to arbitrate by not signing the latest "performance unit" agreement Indeed presented to her in 2020.

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Gilbert may have relinquished her right to continuing long-term performance incentive awards by refusing to sign a new agreement, but she was still bound by her prior promise to arbitrate, the court said. She had no right to “unilaterally relieve herself of the obligations she has to arbitrate,” it said.

A provision in the arbitration pact requiring her to pay Indeed’s legal fees if she tried to sue in court and was ordered to arbitrate was unconscionable, but that wasn’t enough to invalidate the entire agreement, the court said.

The court dismissed the suit as to a fourth individual defendant—Aaron Schwartz, the Austin, Texas-based manager Gilbert says raped her—for want of jurisdiction.

Schwartz didn’t trigger New York’s authority to haul him into court in the state by sending Gilbert a LinkedIn invite that she received in New York, Liman said. And his limited trips to New York for Indeed trainings or his phone calls with New York-based managers likewise weren’t enough, the judge said.

The alleged rape occurred in Connecticut, not New York, and “the ‘first effects’ of that rape” were likewise felt in Connecticut, the court said.

Golenbock Eiseman Assor Bell & Peskoe LLP and Young & Ma LLP represent Gilbert. Seyfarth Shaw LLP and Waller Lansden Dortch & David LLP represent Indeed. Waller Lansden represents individual defendants Alexa Wachstein, Gabrielle Verbaro, and Michelle Lam. Cokinos Young and Fox Rothschild LLP represented Schwartz.

The case is *Gilbert v. Indeed, Inc.*, 2021 BL 16693, S.D.N.Y., No. 1:20-cv-03826, 1/19/21.

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