KATZ BANKS KUMIN

Will Nixing Arbitration in Sexual Harassment Claims Affect Other Employment Claims?

By Joseph E. Abboud
May 1, 2018

In the wake of the #MeToo movement, lawmakers and employers across the country seeking to avoid public scorn are taking steps that benefit employees who experience sexual harassment in the workplace. For instance, in December 2017, the major U.S. technology company Microsoft announced it will no longer require employees to bring sexual harassment and sex discrimination claims through private, binding arbitration, a process that silences employees and deprives them of their right to be heard in court.

While any employee-friendly actions are welcomed developments, such modest advances raise questions. Why are only victims of sexual harassment allowed their day in court and not those employees who experience racial, religious, or other forms of prohibited harassment and discrimination? What other actions can employers and lawmakers take to show that their commitment to empower those who experience employment discrimination is real and not just a PR stunt?

Expansion of Title VII

As history has shown, public attention to specific concerns about the treatment of one group can provide an opportunity to make progress for all employees who face discrimination in the workplace. The federal Civil Rights Act passed in 1964 was originally designed to respond to widespread concerns with race discrimination in public accommodations, schools, and workplaces. The employment discrimination section, known as Title VII, originally did not address sex discrimination at all. The conventional wisdom is that "sex" was added as an amendment to Title VII purely as an effort to derail passage of the entire Civil Rights Act. When Title VII passed with the sex amendment in it, women workers immediately began taking their discrimination complaints to the Equal Employment Opportunity Commission and to court. Similarly, although the first harassment cases were brought to challenge racial and national origin harassment, women quickly adapted the principles of those cases and began to challenge sexual harassment as a form of sex discrimination.

Will Microsoft Expand Arbitration Exemptions?

The recent concerns motivating the #MeToo movement provide a similar opportunity to consider the ramifications of changes that benefit one group and how they might be expanded to benefit all workers.

In response to Microsoft's announcement exempting employee sexual harassment and sex discrimination claims from forced arbitration, United States Representatives Robin Kelly, Bonnie Watson Coleman, and Emanuel Cleaver, all members of the Congressional Black Caucus, wrote a letter to Microsoft's CEO, encouraging the company to extend the same treatment to other claims of employment discrimination, including those based on race, religion, sexual orientation, and gender identification or expression. Microsoft justified its decision to exempt sexual harassment and discrimination claims from forced arbitration by pointing to the value of diversifying the workforce,

the injustice caused by silencing victims of unlawful treatment, and the importance that all American workers should have a right to go to court and have their concerns heard. The Representatives rightly noted that these same rationales, especially in light of the widely perceived racial inequality in the tech industry, support exempting all employment discrimination claims from forced arbitration.

Forced arbitration agreements disempower victims of discrimination and, as is evident from the case of Gretchen Carlson, shield perpetrators from public scrutiny, making the workplace less welcoming to other potential victims of discrimination, regardless of whether the perpetrator engages in sexual, racial, or other unlawful discrimination. If Microsoft is truly committed to empowering its employees and eradicating unlawful discrimination in its workplace, Microsoft will follow the well-reasoned recommendations of the Representatives' letter and exempt all employment discrimination claims from its arbitration agreements.

Senator Pushes to Stop Sexual Harassment Arbitration

Microsoft's focus on sexual harassment to the potential detriment of employees who face other kinds of unlawful discrimination is not unique. For instance, in December 2017, Senator Kirsten Gillibrand introduced a bill entitled "Ending Forced Arbitration of Sexual Harassment Act of 2017," which would render unenforceable any arbitration agreement that would force an employee to arbitrate sexual harassment or sex discrimination claims. The bill is silent on other types of discrimination.

Since most arbitration agreements do not single out sex discrimination claims, but apply to all potential employment-related disputes between the employee and the employer, the bill, if signed into law, might incidentally benefit potential victims of other kinds of discrimination by rendering completely unenforceable all broad arbitration agreements. However, such benefits would be incidental to the ostensible purpose of the bill, which is narrowly focused on employees experiencing sexual harassment. Although the bill would be a positive development for workers' rights and all supporters of the #MeToo movement, we should aspire to use the current public awareness about sexual harassment in the workplace to fight all forms of discrimination that have contributed to the rampant inequalities in our workforce and economy.

How Addressing Sexual Harassment Can Help Others

Recent history contains examples – one rife with irony – of how concerns about sexual harassment and assault in the workplace can spark a legal change that combats all forms of employment discrimination. In 2005, Jamie Leigh Jones, then an employee of the large defense contractor Halliburton, was allegedly raped by multiple coworkers while serving in Iraq. Due to an arbitration provision in her employment agreement, Jones was unable to have her day in court. In 2009, moved by Jones' plight, then-Senator Al Franken – who has since resigned in the wake of allegations he engaged in inappropriate sexual conduct toward multiple women – strongly advocated for an amendment to the Defense Appropriations Act for Fiscal Year 2010, now known as the "Franken Amendment."

The Franken Amendment forbids a defense contractor receiving any contract in excess of $1 million from requiring its employees to arbitrate "any claim under Title VII of the Civil Rights Act of 1964." Although, as is evident from his floor speech, Senator Franken's motivation came from Jones' experience with sexual assault in the workplace, the language of the amendment also empowers victims of racial, ethnic, and religious discrimination, all of which are prohibited under Title VII. Similarly, when law students and faculty, motivated by the #MeToo movement, complained that large law firms like Munger Tolles & Olson were requiring summer associates to sign arbitration agreements, the law firms decided to revoke the arbitration agreements in their entirety, rather than narrowly exempting sexual harassment claims from their scope.

Changes Beyond Eliminating Arbitration

These examples show that our current consciousness of the harm of sexual harassment in the workplace can produce legal changes that benefit all workers who might face unlawful employment discrimination. If Microsoft and Congress learn these lessons, then all workers experiencing discrimination in the workplace might soon be free to bring their claims in court, unrestricted by arbitration provisions.

However, preventing employers from forcing employees to arbitrate discrimination claims is only one step to ensuring that employees have a full right to voice their concerns in public. Another crucial step would be to prohibit employers from requiring employees to waive their rights to a jury trial on all employment discrimination claims. Although having access to a public bench trial with a judge provides greater transparency then pursuing employment discrimination claims in private, confidential arbitration, jury trials hold employers even more accountable to the public and are more likely to deter employers from allowing harassment and discrimination to continue unchecked.

It is also time to consider lifting the caps on damages in Title VII cases, which provide a maximum recovery of $300,000 for claims against the largest employers. Damages were added to Title VII in 1991 because of the widespread concern that women experiencing sexual harassment in the workplace had no effective remedy because they could only obtain an award of backpay if they were fired or forced to quit their jobs because of egregious harassment. The damages caps Congress enacted may have made sense in 1991 but do not serve effective compensatory and deterrent purposes in today's economy.

In this vital cultural moment when the public is keenly aware of the tremendous harm caused by harassment and discrimination in the workplace, we have a rare opportunity to push for more than narrow, purely reactionary quick fixes. We should use this moment to articulate and advocate for comprehensive reforms that can address and remedy the many forms of discrimination that have long plagued the American workforce.

This post was subsequently published in Law360.