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United States District Court, N.D. Texas, Dallas Division.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
Nicolle Brennan GAFFNEY, Nicole Cleveland, Robyn Purvis McGehee, and Lisa Ramirez Thornton, Intervenors,
v.
HOOTERS ARLINGTON VENTURE I, a Texas Partnership, TWI IV Inc., and Texas Wings Inc. d/b/a Hooters Restaurant, Defendants.

No. Civ.A.3:01CV0619–P. | Oct. 16, 2001.

Opinion

MEMORANDUM OPINION AND ORDER

SOLIS, J.

***1** Now before the Court for its consideration are:

1. Defendants' Motion to Dismiss Original Complaint in Intervention, filed July 17, 2001 ("Motion to Dismiss");[1]

[1] Plaintiff EEOC filed its response to Defendants' Motion to Dismiss on August 3, 2001 and Intervenors filed their response to Defendants' Motion to Dismiss on August 6, 2001. (Intervenors erroneously titled their responsive brief "Brief in Reply to Defendants' Motion to Dismiss." For purposes of accuracy and to ease confusion, Intervenors' responsive brief will be referred to herein as "Intervenors' Response to Defendants' Motion to Dismiss.") Defendants' Reply to Plaintiff EEOC's Response to Defendants' Motion to Dismiss was filed August 16, 2001. Defendants' Reply to Intervenors' Response to Defendants' Motion to Dismiss was filed August 21, 2001.

2. Defendants' Objections to Plaintiff EEOC's Evidence in Support of Its Response to Defendants' Motion to Dismiss and Motion to Strike Same, filed August 16, 2001;[2]

[2] The EEOC did not file a responsive brief to this motion.

3. Defendants' Objections to Intervenors' Evidence in Support of Their Response to Defendants' Motion to Dismiss and Motion to Strike Same, filed August 21, 2001;[3]

[3] Intervenors did not file a responsive brief to this motion.

4. Plaintiff EEOC's Motion for Leave to File Surreply, filed September 6, 2001;[4]

[4] Plaintiff EEOC filed Plaintiff's Motion for Leave to File Sur-response on September 5, 2001, yet failed to include a certificate of conference as required by Local Rule 7.1(b). On September 6, 2001, Plaintiff EEOC filed Plaintiff's Amended Motion for Leave to File Sur-response to correct the error. Defendants filed their Response in Opposition to Plaintiff's Amended Motion for Leave to File Sur-response on September 18, 2001. Plaintiff EEOC did not file a reply brief. (For purposes of accuracy and clarity, the Court will refer to Plaintiff's motion as "Plaintiff's Motion for Leave to File Surreply to Defendants' Motion to Dismiss.")

5. Defendants' Motion for Leave to File First Amended Answer to EEOC Complaint, filed July 17, 2001.[5]

[5] The EEOC filed the EEOC's Response to Defendants' Motion for Leave to File First Amended Answer on August 6, 2001, and Defendants filed Defendants' Reply to EEOC's Response to Defendants' Motion for Leave to File First Amended Answer on August 21, 2001.

After careful consideration of the Parties' motions, briefing, and the applicable law, the Court hereby GRANTS in part and DENIES in part Plaintiff EEOC's Motion for Leave to File Surreply, DENIES Defendants' Motion to Dismiss, DENIES AS MOOT Defendants' Objections to Plaintiff EEOC's Evidence in Support of Its Response to Defendants' Motion to Dismiss and Motion to Strike Same, DENIES AS MOOT Defendants' Objections to Intervenors' Evidence in Support of Their Response to Defendants' Motion to Dismiss and Motion to Strike Same, and GRANTS Defendants' Motion for Leave to File First Amended Answer to EEOC Complaint.

I. *FACTS AND PROCEDURAL HISTORY*

On March 30, 2001 Plaintiff Equal Opportunity Employment Commission ("the EEOC") filed its Complaint against Defendants Hooters Arlington Venture I, TWI IV Inc., and Texas Wings Inc. d/b/a Hooters

Restaurant ("Defendants"). In the Complaint, the EEOC alleged that Defendants subjected four of its female employees[6] to a sexually hostile work environment, that Defendants discriminated against the women on the basis of their gender, and that Defendants unlawfully retaliated against the women and/or constructively discharged the women in violation of Title VII of the Civil Rights Act. (Compl. ¶ 7.) The women referred to in the EEOC's Complaint filed their own Complaint against Defendants on June 20, 2001 as intervenors in the original lawsuit. The intervenors ("Intervenors") accused Defendants of subjecting them to a sexually hostile work environment and discriminating against them on the basis of their gender in violation of Title VII of the Civil Rights Act. (*See generally* Orig. Compl. in Intervention and Jury Demand.)

6 The four women are: Nicolle Brennan Gaffney, Nicole Cleveland, Robyn Purvis McGehee, and Lisa Ramirez Thornton. (Compl.¶ 6.)

On July 17, 2001, Defendants moved to dismiss the Intervenors' Complaint on the basis of lack of subject-matter jurisdiction. (*See* Defs.' Mot. to Dismiss.) Specifically, Defendants contend that each of the Intervenors specifically agreed to arbitrate any employment-related disputes, and thus, the case should be dismissed as to all Intervenors. (*See generally id.*)

In support of Defendants' Motion to Dismiss, Defendants attached as exhibits the arbitration agreements entered into between Defendants and three of the Intervenors. (*See* Mot. to Dismiss Exs. A–1—A–3.)[7] The one-page arbitration agreements are entitled "Texas Wings Inc. dba Hooters Agreement to Arbitrate Employment–Related Disputes" and are signed by Nicolle Brennan Gaffney (signed July 8, 1997) (*Id.* Ex. A–1), Nicole Cleveland (signed May 15, 1997) (*Id.* Ex. A–2), and Robin Purvis McGehee (signed October 26, 1997) (*Id.* Ex. A–3). The agreements basically state that "the employee and the company agree to resolve any claims pursuant to the Company's rules and procedures for alternative resolution of employment-related disputes." (*Id.* Ex. A–1—A–3.)

7 None of the Parties have complied with Local Rules 7.1(i) or 7.2(d) and (e), which describe in detail the appendix requirements and the requirements for the table of contents and table of authorities. In the future, the Court advises counsel for all Parties to consult the Local Rules of the Court before filing briefing.

***2** With respect to the fourth Intervenor, Lisa Ramirez Thornton ("Ramirez"), Defendants attached her employment application dated November 13, 1996, which states in relevant part: "In order to be considered for employment by [Defendants], you must agree to the terms and conditions of the Company's Agreement to Arbitrate Employment–Related Disputes [ ]." (*Id.* Ex. A–4.) According to the affidavit attached to Defendants' Motion to Dismiss, the "Company's Agreement to Arbitrate Employment–Related Disputes" was "in place at the time of [Ms. Ramirez's] commencement of employment with Defendants." (*Id.* Ex. A–4 ¶ 2.) Defendants attached a copy of the "Company's Agreement to Arbitrate Employment–Related Disputes" to Ms. Ramirez's employment application. (*Id.*) It is this document that has generated considerable confusion among the Parties.

Both the EEOC and the Intervenors filed response briefs to Defendants' Motion to Dismiss. The EEOC argues in its brief that the case should not be arbitrated because the arbitration agreements between Defendants and each of the Intervenors are invalid and unenforceable because they are violative of public policy. (*See generally* EEOC's Resp. to Mot. to Dismiss.) The EEOC contends that the "Company's Agreement to Arbitrate Employment–Related Disputes," a copy of which was attached to Defendants' Motion to Dismiss, does not provide an adequate forum for the Intervenors, severely restricts the types and amount of damages the Intervenors may recover, and gives Defendants complete control over the selection of the arbitration panel. (*Id.*) The EEOC relies primarily on a case decided by the Fourth Circuit that held the Hooters arbitration rules invalid and unenforceable based on the unfair provisions contained therein. (*See id.* citing *Hooters of America, Inc. v. Phillips,* 173 F.2d 933 (4th Cir.1999).) The EEOC spends twenty pages of briefing discussing and analyzing various provisions contained in the "Company's Agreement to Arbitrate Employment–Related Disputes" and asks the Court to find the agreements void and unenforceable based on their alleged unfairness and one-sidedness. (*Id.*)

The Intervenors' Response to Defendants' Motion to Dismiss contains arguments similar to those contained in the EEOC's brief as well as additional arguments based on state law contract principles. (*See generally* Intervenors' Resp. to Defs.' Mot. to Dismiss.) Like the EEOC, the Intervenors focus primarily on the language contained in the "Company's Agreement to Arbitrate Employment–Related Disputes." (*Id.*)

Interestingly, Defendants strenuously argue in their reply brief that the arbitration rules referred to and relied upon by the EEOC—and attached as an exhibit to Defendants' own brief—"do not exist, have never been utilized by the Defendants in this case and would not apply to any arbitration filed by the Intervenors." (Defs .' Reply to Pl. EEOC's Resp. to Defs.' Mot. to Dismiss at 2.) They explain that the "Company's Agreement to Arbitrate Employment–Related Disputes" were rules "suggested by the franchiser of Defendants but were never utilized by Defendants and do not apply to any arbitration filed by

any of the Intervenors." (*Id.*) Instead, Defendants point out, the ADR procedures followed by Defendants are contained in Hooters' handbook, the relevant provision of which is attached to the reply brief as Exhibit A–1. Exhibit A–1 is described as a copy of Hooters' ADR procedures and states that the employee agrees that all employment-related disputes "will be submitted to and resolved through binding arbitration administered by the American Arbitration Association or J.A.M.S./ENDISPUTE (both hereafter referred to as the "Association"), as selected by Hooters ... The Association's 'Rules for Employee Dispute Resolution' will be used in any arbitration proceeding. A copy of these rules is available from the Director of Human Resources." (*Id.* Ex. A–1 at 10–11.) Upon reading Defendants' reply brief, it became clear to the Court—and apparently to the EEOC and Intervenors as well—that the Parties are confused or in disagreement as to precisely what document(s) constitute the arbitration agreements governing these disputes.

***3** Due to the confusing nature of the facts presented in Defendants' reply brief, the EEOC filed a motion for leave to file a surreply and requested a continuance pursuant to Rule 56(f) of the Federal Rules of Civil procedure to enable the Parties to conduct written discovery and take depositions concerning the facts of this case. (Pl.'s Am. Mot. for Leave to File Sure-response at 1–2.) Defendants responded to the motion for leave to file the surreply by arguing—without presenting any legal authority whatsoever—that the EEOC is not a proper party to ask for the relief sought and that the reply brief did not raise new issues. (*See generally* Defs.' Resp. in Opp'n to Pl.'s Am. Mot. for Leave to File Sur-response.)

II. *MOTION TO FILE SURREPLY AND MOTION TO DISMISS*

When confronted with the question of arbitrability, a district court must determine, as a threshold matter, whether the grievance before it is subject to arbitration. *See Folse v. Richard Wolf Med. Instruments Corp.,* 56 F.3d 603, 605 (5th Cir.1995); *Oil, Chem. & Atomic Workers Int'l Union Local 4–227 v. Phillips 66 Co.,* 976 F.2d 277, 278 (5th Cir.1992). This determination mandates two specific inquiries. The Court first asks whether there is a valid agreement to arbitrate; if so, the Court then asks whether the dispute in question falls within the scope of the agreement. *See Webb v. Investacorp, Inc.,* 89 F.3d 252, 257–58 (5th Cir.1996).

In this case, the Court cannot determine based on the record before it whether there is a valid agreement to arbitrate. In this case, the Parties have failed to identify for the Court the precise arbitration agreement at issue between the Parties. Based on the Parties' briefing, it is clear that the EEOC and Intervenors have been under the impression that the arbitration agreement between the Parties was the document attached to Defendants' motion entitled "Company's Agreement to Arbitrate Employment–Related Disputes." Defendants' revelation in their reply brief that the terms of the arbitration agreement between the Parties are *not* contained in the document attached to their motion, but rather are contained in the J.A.M.S./ENDISPUTE's or the American Arbitration Association's "Rules for Employee Dispute Resolution" leaves the Court with the task of determining precisely which document constitutes the arbitration agreement. The issue of which document constitutes the arbitration agreement has not been adequately briefed by the Parties. Before the Court can determine the validity of the arbitration agreement—an issue that has been briefed by the Parties, to some extent—the Court must be able to make a well-reasoned decision based on competent evidence as to what constitutes the arbitration agreement and its terms.

Because the briefing did not reveal there was a dispute about what constitutes the arbitration agreement and its terms until Defendants filed their reply brief, the Court hereby GRANTS in part the EEOC's Motion for Leave to File Surreply to Defendants' Motion to Dismiss and considers the surreply at this time. The Court DENIES the EEOC's Motion for Leave to File Surreply to Defendants' Motion to Dismiss to the extent the EEOC seeks a continuance pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. Rule 56(f) of the Federal Rules of Civil Procedure applies to summary judgment motions, not motions to dismiss. *See* Fed.R.Civ.P. 56(f).

***4** As stated *supra,* the Parties—and the Court—need additional information before the Court can come to a fair and well-reasoned determination as to which arbitration agreement(s) to analyze for validity. Defendants' Motion to Dismiss was filed, and the Parties' briefing was filed, before any formal discovery had taken place. (EEOC's Surreply to Defs.' Mot. to Dismiss at 4.) Because this case is still in its infancy, and because the Parties and the Court need additional information, Defendants' Motion to Dismiss is DENIED.

Therefore, the Court hereby DENIES Defendants' Motion to Dismiss, DENIES AS MOOT Defendants' Objections to Plaintiff EEOC's Evidence in Support of Its Response to Defendants' Motion to Dismiss and Motion to Strike Same, and DENIES AS MOOT Defendants' Objections to Intervenors' Evidence in Support of Their Response to Defendants' Motion to Dismiss and Motion to Strike Same.

III. *DEFENDANTS' MOTION FOR LEAVE TO FILE AMENDED ANSWER TO EEOC COMPLAINT*

Finally, the Court considers Defendants' Motion for Leave to File Amended Answer to the EEOC Complaint. Defendants seek to raise additional defenses in their answer to the EEOC Complaint in light of the issues raised in the Original Complaint in Intervention. (Defs.' Mot. for Leave to File Am. Answer to EEOC Compl. at 2.) Specifically, Defendants seek to add new paragraphs 18–20, which raise defenses relating to the arbitration issues raised in the motion to dismiss briefing. (*Id.; See* Defs.' First Am. Answer to the EEOC's Orig. Compl. ¶¶ 18–20.) The EEOC responds to this motion by reiterating its argument that the arbitration agreements are contrary to public policy and Title VII, and stress that the motion to amend to add these defenses should be denied. (*See generally* Pl.'s Resp. to Defs.' Mot. for Leave to File First Am. Answer.)

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading "shall freely be granted when justice so requires." Fed.R.Civ.P. 15(a); *Foman v. Davis,* 371 U.S. 178, 182 (1962). Unless there exists a substantial reason for denying leave to amend, the district court should permit the filing of a proposed amendment. *See Dussouy v. Gulf Coast Inv. Corp.,* 660 F.2d 594, 598 (5th Cir.1981). Nevertheless, the parties' ability to amend their pleadings is by no means unlimited. *See In re Southmark,* 88 F.3d 311, 315 (5th Cir.1996). Thus, leave to amend may be appropriately denied if the suggested amendment would cause undue delay or prejudice to the non-movant, or if it is motivated by bad faith or dilatory motives on the part of the movant. *Foman,* 371 U.S. at 182. Furthermore, in deciding upon a motion for leave to amend, the Court may also consider whether the amendment would compromise the goals of judicial economy and expedient resolution of disputes. *See Dussouy,* 660 F.2d at 598. This court exercises its discretion by determining the most efficient means for ensuring the fair administration of justice while controlling the court's own docket.

***5** Allowing Defendants to add these additional defenses at this early stage of the litigation will not cause any undue delay or prejudice to the EEOC. It should come as no surprise to the EEOC that Defendants seek to assert these arbitration-based defenses since both the EEOC and Defendants have spent hours briefing the issue. Further, the Court does not believe—and the EEOC does not allege—that the motion is motivated by bad faith or dilatory motives on the part of Defendants. Finally, allowing the amendment will not compromise the goals of judicial economy and expedient resolution of disputes. Defendants correctly point out in their reply brief that a refusal to allow the amendment based on the EEOC's reasoning would amount to a preliminary substantive ruling on the arbitration issues that were raised in the Motion to Dismiss. (Defs.' Reply to EEOC's Resp. to Defs.' Mot. for Leave to File Am. Answer at 2.) Therefore, the Court hereby GRANTS Defendants' Motion for Leave to File First Amended Answer to the EEOC Complaint.

THEREFORE, for the reasons stated herein, the Court hereby GRANTS in part and DENIES in part Plaintiff EEOC's Motion for Leave to File Surreply, DENIES Defendants' Motion to Dismiss, DENIES AS MOOT Defendants' Objections to Plaintiff EEOC's Evidence in Support of Its Response to Defendants' Motion to Dismiss and Motion to Strike Same, DENIES AS MOOT Defendants' Objections to Intervenors' Evidence in Support of Their Response to Defendants' Motion to Dismiss and Motion to Strike, and GRANTS Defendants' Motion for Leave to File First Amended Answer to EEOC Complaint.