

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEE A. VARALLO : CIVIL ACTION  
: :  
: :  
v. : :  
: :  
ELKINS PARK HOSPITAL and : NO. 01-785  
TENET HEALTHCARE CORP. :

**MEMORANDUM**

Giles, C.J.

March \_\_\_\_\_, 2002

Plaintiff Lee Varallo files this action against her former employer, Elkins Park Hospital (“Elkins Park”), and Tenet Healthcare Corp. (“Tenet”), a national health services corporation that purchased Elkins Park Hospital in November 1998, for wrongful termination in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., the Pregnancy Discrimination Act of 1978 (“PDA”), 42 U.S.C. § 2000e(k), the Family Medical Leave Act of 1993 (“FMLA”), 29 U.S.C. §§ 2601, et seq., and the Pennsylvania Human Relations Act (“PHRA”), 42 P.S. §§ 951, et seq.

Now before the court is defendants’ Motion to Dismiss or Stay Action and Compel Arbitration pursuant to the employment agreement which, defendants argue, controls even after plaintiff’s termination. For the reasons that follow, defendants’ motion is denied.

## **I. FACTUAL BACKGROUND**

Plaintiff Lee Varallo began her employment as a Staff Pharmacist with defendant Elkins Park Hospital in August 1992. In November 1998, defendant Tenet assumed operational control of Elkins Park. In December 1998, Varallo received a copy of the Tenet Employee Handbook, which contains a “Fair Treatment Process” requiring employees to submit to arbitration

all disputes relating to or arising out of an employee’s employment with the company or the termination of employment. . . . includ[ing] claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Americans with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims, or any other legal claims or causes or actions recognized by local, state, or federal law or regulation.

(Tenet Employee Handbook, at 65.)

Varallo, who had risen to the position of Pharmacy Manager and was the only full-time female staff pharmacist employed by defendants, notified defendants in late 1999 that she was pregnant, and requested the leave allowed to her under the FMLA, beginning on December 3, 1999. Her baby was delivered three days later, on December 6, 1999, but was diagnosed with a serious sleep apnea condition, requiring Varallo to take the full 12 weeks allowed under the FMLA. When she returned to work 12 weeks later, on March 1, 2000, Varallo was told by defendant that her position of Pharmacy Manager had been eliminated and that her employment was terminated. Her request to be retained as a Staff Pharmacist was denied without explanation. Following Varallo’s termination, Elkins Park sought applications for her former position, as well as for Staff Pharmacist positions. Despite her availability and application for these open positions, Varallo was not retained by Elkins Park. As a result, Varallo claims she has suffered

loss of employment, promotion benefits, earnings and earnings potential, as well as harm to her reputation and emotional distress.

## **II. DISCUSSION**

The standard for evaluating a motion to compel arbitration parallels the standard for summary judgment. Trott v. Paciolla, 748 F. Supp. 305, 308 (E.D. Pa. 1990) (citing Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n.9 (3d Cir. 1980)). Thus defendants, as movants, must provide through “pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, . . . that there is no genuine issue of material fact and [therefore], [they are] entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, a court must all of the non-moving party’s evidence and construe all reasonable inferences in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Versarge v. The Township of Clinton N.J., 984 F.2d 1359, 1361 (3d Cir. 1993).

Defendants contend that all of plaintiff’s claims fall under the arbitration agreement, therefore arbitration must be compelled. In the alternative, defendants argue that at least some of plaintiff’s claims fall within the scope of the arbitration clause, thus those claims should proceed to arbitration and the remaining claims should be stayed by this court in the meantime.

Plaintiff counters that her duty to arbitrate disputes between her and defendants ended when her employment was terminated, thus she cannot be compelled to arbitrate her refusal to hire claims. Further, plaintiff argues that because her non-arbitrable claims are “inextricably entwined” with her arbitrable claims, she should not be compelled to arbitrate any of those

claims.

When faced with a motion to compel arbitration under the Federal Arbitration Act (“FAA”), a court must consider the following issues: 1) does a valid agreement to arbitrate exist between the parties, and 2) do the plaintiff’s claims fall within the substantive scope of the valid arbitration agreement. PaineWebber v. Hartmann, 921 F.2d 507, 510-11 (3d Cir. 1990) (citing AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 649 (1986); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 546-47 (1964); Laborers’ International Union v. Foster Wheeler Corp., 868 F.2d 573, 576 (3d Cir. 1989)). Where the contract contains an arbitration clause, 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. Doubts should be resolved in favor of coverage.” AT&T Techs., 475 U.S. at 650 (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)); see also Battaglia v. McKendry, 233 F.3d 720, 725 (3d Cir. 2000) (quoting AT&T Techs. and applying “presumption of arbitrability” to application of arbitration agreements under FAA).

Although arbitration upon demand is the general rule, it has been held that where a party’s arbitrable and non-arbitrable claims cannot be practically separated, it may be appropriate to deny arbitration of any of the claims. Sibley v. Tandy Corp., 543 F.2d 540, 542-43 (5th Cir. 1976), cert. denied, 434 U.S. 824 (1977); In the Matter of the Complaint of Jubilant Voyager Cop. S.A., of Panama, 1982 WL 2280, at \*1 (E.D. Va. 1982) (citing Sibley); Fox v. Merrill Lynch & Co., Inc., 453 F. Supp. 561, 567 (S.D.N.Y. 1978); Money Point Diamond Corp. v. Bomar Resources, Inc., 654 F. Supp. 634, 636 (E.D. Va. 1987) (applying Jubilant Voyager but

finding that “although there may be some overlap in the factual determinations with the plaintiff’s contract claims and Count III, the claims are not ‘intertwined’ in the legal sense and can be practically separated”). Where arbitral claims are “inextricably intertwined” with nonarbitrable federal claims, arbitration should not be permitted. Miley v. Oppenheimer & Co., 637 F.2d 318, 334-37 (5th Cir. 1981) (but finding claims in that case not to be so intertwined); Breyer v. First National Monetary Corp., 548 F. Supp. 955, 961-62 (D.N.J. 1982) (citing Miley and staying arbitration pending resolution of non-arbitrable claims); Mansbach v. Prescott Ball & Turben, 598 F.2d 1017, 1030-31 (6th Cir. 1979); De Lancie v. Birr, Wilson & Co., 648 F.2d 1255, 1258-59 (9th Cir. 1981) (dicta); Pitria Star Nav. Co. v. Monsanto Co., 1983 WL 625, at \*2 (E.D. La. 1983) (finding that “the non-arbitral cross-claim is so intertwined with the main demand it is appropriate to deny arbitration of any of the claims”).

#### A. The Arbitrability of Plaintiff’s Claims

It is undisputed that plaintiff’s wrongful termination claims fall within the scope of the arbitration clause. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001), the Supreme Court held that all employment contracts are within the purview of the FAA, unless they are specifically excluded in the statute.<sup>1</sup> The Court examined the text of section 1 of the FAA, applying principles of statutory interpretation, and concluded that this interpretation was “in full accord with other sound considerations bearing upon the proper interpretation of the clause.” Id. at 115. The Court also found another reason for honoring arbitration agreements in employment

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<sup>1</sup>The statute specifically exempts only employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1.

contracts was one of efficiency. The Court held that there were

real benefits to the enforcement of arbitration provisions. . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others.

Id. at 123. The Court in Circuit City did not address whether its outcome would change when a case did not offer such “real benefits” to the parties.

It is undisputed that plaintiff cannot be compelled to submit to arbitration claims that are not covered by the arbitration agreement. See Money Point Diamond, 654 F. Supp. at 636 (citing Marbeni America v. Hanyang, 1977 A.M.C. 1130 (E.D.Va.1977)).

The court finds that plaintiff’s failure to hire claims are not within the scope of her employment contract, and thus not subject to arbitration. Nothing in the employment agreement can be construed to bind plaintiff past the termination of her employment. Moreover, plaintiff cannot be bound by an employment contract beyond the termination of her employment, thereby putting her in a worse position, for failure-to-hire purposes, than applicants who had never worked for defendants.

## B. The Appropriateness of Arbitration in Light of Intertwining Non-Arbitrable Civil Rights

## Claims

Defendants contend that the line of cases compelling litigation of otherwise arbitrable claims because of inextricably intertwined non-arbitrable claims, supra, has been abrogated by the Supreme Court in Dean Witter v. Byrd, 470 U.S. 213 (1985). In Byrd, the Court held that the FAA requires district courts to compel arbitration of pendent arbitrable claims when one party files a motion to compel, even where this would result in inefficient maintenance of separate proceedings in different fora. Id. at 217-18. The Byrd Court stated:

[P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered. . . . We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act - enforcement of private agreements and encouragement of efficient and speedy dispute resolution - must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation, *at least absent a countervailing policy manifested in another federal statute.*

Id. at 221 (emphasis added, footnote omitted). The opinion provided no example of such a “countervailing policy.”

In Washburn v. Corcoran, 643 F. Supp 554 (S.D.N.Y. 1986), the court found such a countervailing policy in the McCarran-Ferguson Act, which establishes an “express federal policy of noninterference in insurance matters” and a clear “[congressional mandate] that regulation of the insurance industry be left to the individual states.” 643 F. Supp. at 555 (quoting Levy v. Lewis, 635 F.2d 960, 963-64 (2d Cir. 1980)). The court held that the McCarran-Ferguson Act barred application of the FAA regarding arbitration of a reinsurance dispute.

[In Byrd, t]he Court ruled that federal courts were required to compel arbitration of pendant arbitrable state claims “even if the result is ‘piecemeal’ litigation, *at least absent a countervailing policy manifested in another federal statute.*” *Id.* at 1243 (*emphasis supplied*). *The underlined clause, however, shows the inapplicability of Dean Witter to this dispute. Here, “another federal statute” has dictated “a countervailing policy.” It is the express purpose of McCarran Ferguson to override federal statutes not expressly directed to insurance matters that would impair the autonomy of states in dealing with the regulation of insurance. This decision is therefore wholly compatible with Dean Witter.*

643 F. Supp. at 555 (emphasis in original).

Similarly, such a countervailing policy is readily found at the heart of the Civil Rights Act. Over several decades, courts have found that, with regard to claims unencumbered by arbitration agreements, a plaintiff’s right to litigate a Civil Rights claim in federal court is critical to the Act’s purpose, and must be afforded to a plaintiff with as minimal burden to him or her as possible. See *McNeese v. Board of Education for Community Unit School District 187, Cahokia, IL*, 373 U.S. 668 (1963) (finding that when federal civil right is not “entangled in a skein of state law that must be untangled before the federal case can proceed,” then “[s]uch claims are entitled to be adjudicated in the federal courts”); *Damico v. California*, 389 U.S. 416 (*per curiam*) (1967) (applying *McNeese*); *Herbst v. Ryan*, 90 F.3d 1300, 1304-05 (7th Cir. 1996) (finding that in allocating liability for § 1988 attorney fee award, broad remedial purposes of Civil Rights Act and, *inter alia*, goal of achieving most fair solution possible without transforming consideration of fee petition into second major litigation); *Stradley v. Andersen*, 456 F.2d 1063 (8th Cir. 1972) (finding that purpose of Civil Rights Act § 1983 precludes forcing forum choice on plaintiff by requiring exhaustion of state’s avenues of litigation in a case where

right alleged is plainly federal in origin and nature); Rodgers v. Berger, 438 F. Supp. 713 (D. Mass. 1977) (finding that since remedy afforded by employment discrimination provisions of Civil Rights Act exists apart from analogous remedies provided by contract or federal and state law, it is unnecessary for plaintiff to exhaust grievance proceedings under a collective bargaining agreement before bringing an action in federal court); Lynch v. Milwaukee, 747 F.2d 423, 426 (7th Cir. 1984) (noting that the purpose of the Civil Rights Act is “to permit and encourage plaintiffs to enforce their civil rights”).

The fundamental theme throughout the aforementioned cases is that purpose of the Civil Rights Act is consistent with the right to litigate swiftly such claims in federal court. As determined by the Court in Circuit City, this value is offset by the value of honoring employment agreements to arbitrate, which are valid under the FAA. In the instant case, however, that latter value is simply not present in plaintiff’s failure to hire claims, which, as discussed supra, are not subject to arbitration as a matter of law. The countervailing policy of litigating civil rights claims unencumbered by arbitration agreements in federal court constitutes that “countervailing policy” “manifested” in the Civil Rights Act that trumps the prohibition on denying motions to compel arbitration by the Supreme Court in Byrd. 470 U.S. at 221.

In short, the line of cases that allows a court discretion to refuse to submit cases to arbitration that are “inextricably intertwined” with non-arbitrable cases, supra, is still good law as applied to non-arbitrable civil rights claims. As such, this court finds that plaintiff’s failure-to-hire claims are so intertwined with her wrongful termination claims that it is appropriate to deny arbitration of any of the claims.

### **III. CONCLUSION**

For the foregoing reasons, defendants' motion to dismiss or stay the instant action and compel arbitration is denied.

An appropriate order follows.

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**ORDER**

Giles, C.J.

AND NOW, this \_\_\_\_ day of March 2002, upon consideration of Defendants'  
Motion to Dismiss or Stay Action and Compel Arbitration, for the reasons outlined in the  
attached memorandum, it is hereby ORDERED that the Defendants' Motion is DENIED.

BY THE COURT:

\_\_\_\_\_  
JAMES T. GILES C.J.

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