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THE DANGERS OF ARBITRATING RACIAL DISCRIMINATION CLAIMS: A COMMENT ON *BOSSE V. NEW YORK LIFE*

By
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I. INTRODUCTION

The decision in *Bossé v. New York Life* demonstrates how arbitration agreements are widely construed to include remote employment issues, and why racial discrimination claims belong in the court system.[1] Ketler Bossé asserted a racial discrimination claim after New York Life terminated his position, but New York Life argued that his claims should be brought in arbitration. In *Bossé*, the First Circuit reversed the District of New Hampshire's decision, holding that the arbitration clause in Bossé's previous employment contract applied to his subsequent independent contractor position.[2] Notably, the court ignored issues about Bossé entering in subsequent agent agreements without an arbitration clause and, how Bossé's alleged racial discrimination occurred after he became an agent.[3] This comment begins with a summary of the facts that lead to the decision by the First Circuit. Next, it analyzes the First Circuit's decision and evaluates its significance to the field of arbitration. Finally, this comment provides a critique of the court's decision to demonstrate the need for Congress to pass legislation to mandate that federal civil rights actions be brought in federal court, rather than arbitration.

II. CASE BACKGROUND

A. Case Facts

Ketler Bossé began working as an agent for New York Life in 2001.[4] Bossé was the first African-American agent hired by the company in New Hampshire and remained the only African-American agent until 2012.[5] The original terms of his "Agent's Contract" explained that Bossé was authorized to sell applications for health, life, and annuity

1. *See generally*, Bossé v. N.Y. Life Ins. Co., 992 F.3d 20 (1st Cir. 2021).

2. *See id*. at 32.

3. *See id*. at 24-26.

4. *See id*. at 24.

5. *See id*.

policies.[6] New York Life paid Bossé on commission based on his success selling various insurance packages.[7] New York Life eventually promoted him to a partner.[8]

The partnership agreement between Bossé and New York Life, entered in March of 2004, created some additional requirements.[9] The agreement included an arbitration agreement that reads:

> "[t]he Partner and New York Life agree that any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) in violation of a statute (hereinafter 'the Claim'), as well as any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding administered by the [National Association of Securities Dealers ('NASD')] in accordance with its arbitration rules."[10]

The arbitration agreement also stipulated that if the NASD refused to arbitrate or if there was a disagreement to arbitrate between the two parties, the American Arbitration Association ("AAA") would settle the issue.[11] However, the Financial Industry Regulatory Authority ("FINRA") succeeded the NASD.[12] FINRA, like the AAA, stipulates that the panel has the power to interpret arbitrability.[13]

Finally, the partnership agreement contained a survival clause that would become important to this case.[14] The survival clause in the contract stated that "provisions of the contract 'shall survive termination of this . . . Employment Agreement by either party for any reason.'"[15] Therefore, the survival provisions preserved the arbitration clause.[16]

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6. *See Bossé*, 992 F.3d at 24.

7. *See id*.

8. *See id*.

9. *See id*.

10. *Bossé*, 992 F.3d at 24 (quoting the partner arbitration agreement).

11. *See id*.

12. *See id*.

13. *Id*. at 24-25 (citing *13413. Jurisdiction of Panel and Authority to Interpret the Code*, FIN. INDUS. REGULATORY AUTH., https://www.finra.org/rules-guidance/rulebooks/finra-rules/13413 (last visited Apr. 6, 2022)).

14. *See id*. at 25.

15. *Bossé*, 992 F.3d at 25.

16. *See id*.

In 2005, Bossé returned to work as an agent and was promoted to a district agent in 2013.[17] The agent and district agent contracts contained no arbitration agreement.[18] In fact, district agents were considered independent contractors as the contract said it "'does not and will not be construed to create the relationship of employer and employee between New York Life and [the] District Agent.'"[19] However, more than a decade later, Bossé was terminated by New York Life.[20] The company told him he was fired because he provided false information while processing a life insurance application for his ex-wife.[21] Bossé firmly denied such misconduct and instead alleged he was fired because of racial discrimination by the company.[22] Bossé also argued that New York Life and other employees undermined his relationships with agents and clients.[23] He alleged that his complaints went ignored and that white agents were not subjected to the same mistreatment.[24]

B. Procedural History

In February of 2016, Bossé brought an action in the federal court of New Hampshire, which alleged race discrimination "by New York Life in violation of 42 U.S.C. §§ 1981 and 1985 and other claims under state law."[25] In response, New York Life motioned to dismiss and attempted to invoke the arbitration clause in the Employment Agreement.[26] Further, New York Life explained that the survival clause in the employment contract also supported the use of arbitration.[27] Bossé opposed the motion to dismiss and compel arbitration.[28]

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17. *See id*.

18. *See id*.

19. *Id*.

20. *Id.*

21. *Bossé*, 992 F.3d at 25.

22. *See id*.

23. *See id*.

24. *See id*.

25. *Id*. at 23.

26. *See id.* at 24.

27. *See Bossé*, 992 F.3d at 23.

28. *See id*. at 23-24.

The United States District Court for the District of New Hampshire denied the motion to dismiss, finding that "the question of whether these disputes fell within the arbitration clauses was for it to resolve and not the arbitrator."[29] The District Court concluded that Section 2 of the FAA required some connection to the actual agreement for federal enforcement.[30] The court refused to enforce the arbitration clause, and reasoned that New York Life had not established a relationship between the Employment Contract and the alleged racial discrimination.[31] New York Life then appealed to the First Circuit.[32]

C. The First Circuit's Majority Holdings

In a split decision, the First Circuit concluded that the language in the arbitration agreement and employment contract was clear.[33] In particular, the majority cited Supreme Court precedent to determine that party decisions in contracts should be respected, and clear references to the delegation of arbitrability should be upheld.[34] Therefore, the court held that the textual interpretation of the agreement was an issue for the arbitrator.[35]

The First Circuit Court found that the text of the arbitration agreement contained an express delegation clause.[36] Specifically, the term "such claim" meant any dispute or claim arising between the two parties and the delegation clause unambiguously stated that "any dispute" arising between the parties is arbitrable.[37] On this point, the court further explained there was no exception in the arbitration agreement for racial discrimination claims and it was not the court's job to rewrite a valid contract.[38]

Next, the court turned to the Employment Agreement for the delegation clause.[39] There, the court explained the agreement contained more text supporting the existence of

29. *Id*. at 26.

30. *See id.*

31. *See id*.

32. *See id*.

33. *See Bossé*, 992 F.3d at 27.

34. *See id*. (quoting Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528-30 (2019)).

35. *See id*. at 28.

36. *See id.* at 28-29.

37. *Id.* at 29.

38. *See Bossé*, 992 F.3d at 29.

39. *See id*.

the delegation of arbitrability.[40] The arbitration agreement state that if NASD refuses to arbitrate, the AAA rules apply.[41] Rule 6(a) of the AAA states "'[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.'"[42] The court took Rule 6(a) as further proof that there was a clear and unmistakable delegation to the arbitrator.[43] The court also determined the survival clause was relevant and the clause reinforces the party's intent to reserve issues of arbitrability for the arbitrator, which is applicable even after the Employment Agreement was terminated.[44]

Additionally, the court held that the lower court's claim that Section 2 of the FAA "requires that an arbitration clause have some relationship or connection to the underlying contract to be enforceable," was an improper interpretation of current law.[45] The court identified no case that supported the idea that claims should have a strong connection to the contract as Bossé argued.[46]

The next main theme the court addressed was interpreting the ambiguity of the arbitration clause.[47] The court said that even if the arbitration clause was ambiguous, the court should apply it in favor of arbitrability for the arbitrator.[48] The majority cited *First Options*, which "made clear that where an agreement to arbitrate some issues exists, and there is a dispute over the scope of the arbitration agreement, the law requires that those matters be presumed to be arbitrable 'unless it is clear that the arbitration clause has not included them.'"[49] Based on the "broad language of the arbitration agreement" and the survival clause, the court ruled that Bossé could not prove the delegation clause did not include his discrimination claim.[50]

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40. *See id*.

41. *See id*.

42. *Id*.

43. *See id*.

44. *See Bossé*, 992 F.3d at 29.

45. *Id*. at 31.

46. *See id*.

47. *See id*. at 31-32.

48. *See id*. at 31.

49. *See Bossé*, 992 F.3d at 31 (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995)).

50. *Id*. at 31-32.

D. The Dissent

The majority's logic in *Bossé* was not unanimous, however, as evidenced by a lengthy response from Judge Barron. The dissent first attacked the plain reading of the delegation clause.[51] Judge Barron addressed the modifier "such" altering "claim" in the delegation clause meaning that the language "'any dispute, claim or controversy arising between them' to define 'the Claim'" simply referred to the class of claims that can be arbitrated.[52] Also, he argued that Rule 6(a) of the AAA is only applicable in arbitration if the Financial Industry Regulatory Authority ("FINRA") refuses to arbitrate.[53]

Next, the dissent turned its focus to the survival provision. Judge Barron argued that the survival provision only covered racial discrimination issues while Bossé was an employee, not while he was an agent.[54] Therefore, he asserted that the provision did not cover Bossé's claims "because it was grounded in alleged misconduct by New York Life that first occurred after he had left New York Life's employ".[55]

Finally, the dissent makes its strongest argument by arguing that Bossé's claim that he was discriminated against while an independent contractor did not apply to the meaning of "claim" in the arbitration agreement.[56] He was not an employee when the alleged discrimination occurred and such claims do not arise out of employment.[57]

III. ANALYSIS OF WHETHER BOSSÉ'S DISCRIMINATION CLAIMS APPLY TO THE ARBITRATION AGREEMENT

The District Court of New Hampshire may have correctly identified that a valid arbitration clause existed, but there are certain considerations the First Court did not pursue, and other public policy questions that should be analyzed. Bossé did not argue that the Employment Agreement was invalid. Instead, he argued the agreement did not apply to his discrimination claims.[58] The dissent also admits that there is some "textual basis for construing the arbitration agreement to exclude from its scope suits that arise

51. *See id*. at 34-36.

52. *Id*.

53. *See id*. at 36.

54. *See id*. at 37-41.

55. *Bossé*, 992 F.3d at 37.

56. *See id*.

57. *See id*. at 38.

58. *See Bossé*, 992 F.3d at 28.

from conduct by New York Life toward Bossé that only occurred after he was no longer a Partner of New York Life."[59]

The majority validly point out text of the arbitration agreement that unambiguously delegates arbitrability issues to the arbitrator.[60] Specifically, the delegation clause, which was supported by the clear intentions of the Employment Agreement, includes "any dispute." The court also correctly explains that it should not rewrite valid agreements.[61] Also, the favorable federal policy towards arbitration mandates that the court construes ambiguity in favor of arbitration.[62] However, the dissent also states there is no similar textual basis for the current claim Bossé is asserting, "including this one seeking recovery for race discrimination, and not others, such as one stemming from the hypothesized late-occurring slip-and-fall or traffic accident."[63] The dissent's admission that there was a valid agreement, but that the agreement could not possibly have included allegations of racial discrimination after employment was over, is the stronger argument.

It would be dangerous to conclude that the Employment Agreement covered every possible claim between Bossé and New York Life, especially since Bossé served as a contractor for many years after his short stint as a partner.[64] Like the dissent explains, "[W]e ought to be wary of reading the arbitration agreement in the Employment Agreement to be so disconnected from the employment relationship that brought it about that it may be read to encompass literally 'any . . . claim.'"[65] For example, the First Circuit has already experienced the residual effects of the *Bossé* holding in *Patten v. AVDG, LLC*.[66] In that case, the District Court of New Hampshire held that an employment agreement, which lacked the company's information, applied to a dispute after the employee requested time off to take care of his child.[67] The judge openly criticizes the standards set in *Bossé*.[68] As the Supreme Court has said in *Granite Rock*, an

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59. *Id*. at 40.

60. *See id*. at 28.

61. *See id*. at 29-30.

62. *See id*. at 31 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

63. *Id.* at 40 (the District Court uses an example of how an employee would not expect a random slip-and-fall accident to apply to arbitration well after the signing of the employment contract).

64. *See Bossé*, 992 F.3d at 25.

65. *Id*. at 37.

66. *See* Patten v. AVDG, LLC, No. 21-cv-0849-SM, 2022 U.S. Dist. LEXIS 67698, at *2-*11 (D.N.H. Apr. 12, 2022).

67. *See id*.

68. *See id*. at *10-*11("Although for reasons that might be apparent, I think the dissent had the better view, still, since, . . . in this circuit, avoiding arbitration is highly unlikely in the face of even ambiguous contractual clauses, and far more remote and unconnected circumstances than are presented here. Parties can expect that

"arbitration of a claim is appropriate 'only where the court is satisfied that the parties agreed to arbitrate that dispute.'"[69]

The New Hampshire District Court warned of the problems with an "unrestrained" arbitration clause, as the current arbitration clause "is so expansive that it literally covers any conceivable dispute that might arise between the contracting parties at any time in the future, and under any set of facts or circumstances."[70] The District Court also explained that no rational person would have believed that a partnership agreement signed in 2004 would have encompassed every cause of action that could occur in the future.[71] The Supreme Court Case *Litton* indicates that "[t]he object of an arbitration clause is to implement a contract, not to transcend it."[72] Courts should indeed defer to arbitration agreements, but the incredible expansiveness of Bossé's arbitration agreement, signed many years prior and after several changes in his position, requires the agreement to have some minimal connection to the dispute.[73] Therefore, Bossé's Employment Agreement would not have been expected to include racial discrimination allegations years after Bossé was no longer an employee, but rather an independent contractor.[74]

The survival provision does highlight potential issues for Bossé, as the opinion reasons that a survival provision "reinforces the parties' intent that issues of arbitrability be decided by an arbitrator even after that Agreement was terminated."[75] However, the dissent argues that the survival provision does not address the scope of the arbitration clause, rather the delegation clause is only affected by causes of action that occurred while Bossé was a partner.[76] Thus, according to the dissent, the survival provision does not have any bearing on the delegation clause for future claims.[77] The District Court points out that the events that led Bossé to bring the suit occurred twelve years after the

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arguable obligations will routinely be referred to arbitrators to decide arbitrability, including, initially, whether the parties entered into a valid contractual agreement to arbitrate a particular dispute.").

69. Bossé v. N.Y. Life Ins. Co., No. 19-cv-016-SM, 2019 U.S. Dist. LEXIS 196555, at *8 (D.N.H. Nov. 13, 2019) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010)).

70. *Id*. at *10.

71. *See id*. at *11.

72. *Id*. (quoting Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 205 (1991).

73. *See id*. at *14 (citing Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (U.S. 2019)).

74. *See* Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 12-16 (1st Cir. 1999) (The First Circuit held that independent contractors could assert racial discrimination claims based on hostile work environment theory, but other claims, like Title VII, could not be asserted).

75. *Bossé*, 992 F.3d at 29.

76. *See id*. at 36-37.

77. *See id*.

Partner's Agreement expired.[78] Also, the arbitration survival clause should not create "a perpetual obligation to arbitrate any conceivable legal . . . claim of any nature that plaintiff might ever have against the company."[79] This goes against the principle of contract formation (meeting of the minds) and the FAA's relatedness requirement.[80] The District Court and the dissent provide stronger arguments about the survival provision, while the majority relies too heavily on the significance of the survival provision. Reasonable people would not expect the survival provision to apply to discrimination claims arising years later after that person was no part of the Partnership Agreement.

Bossé's independent contractor status is something the majority fails to fully consider in the opinion. Both the District Court and the dissent use an example of a slip and fall occurring after the employment was terminated as an example of how ridiculous the idea that a racial discrimination claim can be connected to the arbitration provisions in the Partner's Agreement.[81] Like the District Court, the dissent correctly identifies that courts should be careful including claims that have very remote connections to employment with New York Life.[82] The majority does not touch on this point and instead focuses almost entirely on the fact that the plain reading of the arbitration agreement is clear.[83] While the language does demonstrate that any dispute arising out of employment must be submitted to arbitration, the racial discrimination alleged occurred years after Bossé was no longer an employee. The arbitration agreement and the delegation clause should have been limited to disputes arising from the actual employment of Bossé as a partner, but not as an independent contractor.

IV. WHETHER ARBITRATION IS THE CORRECT ADJUDICATORY PROCESS FOR RACIAL DISCRIMINATION

Finally, Congress should convey exclusive authority to the courts to address civil rights issues, including racial discrimination. Such issues should not be arbitrable. Arbitration is better suited for commercial agreements because it promotes efficiency, affords expert arbitrators, and permits discretion to avoid public information about a company and its transactions. This idea has also reached international commercial disputes.[84] However, arbitrating employment contracts creates a strong risk that arbitration agreements may be the result of adhesion contracts. In this case, a more

78. *See Bossé*, 2019 U.S. Dist. LEXIS 196555 at *8.

79. *Id*. at *15.

80. *See id*.

81. *See id*. at *11; *see also Bossé*, 992 F.3d at 38.

82. *See Bossé*, 992 F.3d at 37-38.

83. *See id.* at 28-30.

84. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 638 (1985).

powerful employer, New York Life, is forcing one independent contractor with little resources to arbitrate every dispute through an expansive arbitration agreement. Additionally, such critical civil rights issues should not be left to an adjudicatory system that does not result in appeals. For example, a hardline arbitrator could rule against an obvious discrimination case, and the claimant would be barred from seeking a higher authority. Here, Bossé might receive an extremely unfair and one-sided proceeding, and he would then be barred from appealing his important discrimination claims in the future.

Social activist groups, like Public Citizen,[85] and scholars insist on making civil rights claims the exclusive jurisdiction of the court system.[86] Currently, the FAA allows revocation for "corruption, fraud, or undue means," evident partiality, when arbitrators are guilty of misconduct, and arbitrators exceed their powers.[87] However, Congress should either rewrite FAA or modify the FAA to allow discriminatory and other civil rights issues to be resolved in court if plaintiffs bring federal causes of action like racial discrimination.[88] The court system allows for a jury trial and ensures individuals receive adjudication publicly. Additionally, arbitration does not pressure an employer to change its discriminatory habits because the arbitrations are private.

V. CONCLUSION

The *Bossé* holding should have been limited only to issues arising from Bossé's position as a partner. Bossé's alleged discrimination occurred while he was an independent contractor, and a reasonable person would not have believed that the previous Partnership Agreement's arbitration section would have applied to Bossé's racial discrimination claims.[89] The New Hampshire District Court and the dissent from the Honorable David Jeremiah Barron correctly asserted that the arbitration agreement should not have applied in this instance as there is no connection to the original arbitration agreement.[90] Finally, there are strong public policy justifications addressing why an arbitration panel should not be handling civil rights issues. Arbitral decisions cannot be appealed and there is often an imbalance of power between employers and employees. Further, many employers use arbitration agreements to get out of litigating serious issues like racial discrimination. The FAA should be amended to allow plaintiffs to bring racial discrimination and other civil rights issues to court if they desire it.

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85. *Mandatory Arbitration Clauses Are Discriminatory and Unfair*, PUBLIC CITIZEN, https://www.citizen.org/article/mandatory-arbitration-clauses-are-discriminatory-and-unfair/.

86. *See* Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOKLYN L. REV. 779, 783-89 (1994).

87. 9 U.S.C.S. § 10 (LEXIS 2021).

88. *See* 42 U.S.C.S. § 1981 (LEXIS 2021).

89. *See Bossé*, 992 F.3d at 25-26.

90. *See id,*at 33-41; *see also Bossé*, 2019 U.S. Dist. LEXIS 196555 at *6-16.