Notes From the Field: Has #MeToo Changed ADR?

By Abigail Pessen

Who will believe thee, Isabel?
My unsoil'd name, the austereness of my life,
My vouch against you, and my place i' the state,
Will so your accusation overweigh,
That you shall stifle in your own report
And smell of calumny.

Angelo's confident prediction more than 400 years ago in Shakespeare's *Measure for Measure*[1] that his victim's accusation of sexual harassment would be discredited could have been uttered virtually *verbatim* by countless powerful men today, or at least until the zeitgeist incorporated #MeToo. Famous heads are now rolling as revelations about sexual misdeeds in high places continue to emerge. State and federal measures targeting non-disclosure agreements (NDAs), and mandatory arbitration of sexual harassment claims that serve to keep those misdeeds secret, have proliferated. Meanwhile, mediators in sexual harassment cases have observed certain differences in employers' attitudes, but have also questioned whether any fundamental change has occurred, especially in unglamorous workplaces such as restaurants and construction sites. Surveying the ADR landscape in #MeToo's wake, it's fair to say that the terrain is uneven.

Impact on Arbitration

In arbitration, a number of states including New York have already passed or are considering new laws banning mandatory arbitration of sexual harassment claims.[2] Microsoft, Uber, all 50 State Attorneys General, and the ABA have urged or adopted various proposals targeting mandatory arbitration of sexual harassment claims, and the bipartisan *Ending Forced Arbitration of Sexual Harassment Act* was introduced (but not passed) in the last Congress to amend the Federal Arbitration Act (FAA) to prohibit mandatory arbitration of such claims. Unless the FAA is amended, state laws prohibiting mandatory arbitration are almost certain to be preempted.[3]

The merits and disadvantages of mandatory employment arbitration have been passionately debated ever since the Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*[4]and *Circuit City Stores, Inc. v. Adams*.[5] While some employers, faced with administering multiple arbitrations and the absence of meaningful review, are re-thinking the advantages of the process, employees, conversely, are recognizing that the privacy arbitration affords, shielding sometimes salacious and unflattering allegations from internet trolls and prospective employers, can be extremely beneficial. And ardent opponents of mandatory arbitration question why sexual harassment claims should be singled out for release from arbitration, while victims of other categories of workplace discrimination remain bound by mandatory arbitration agreements.

Impact on Confidential Settlements

Galvanized by intense public sentiment against "secret" settlements of sexual harassment claims protected from outside scrutiny by NDAs, many states have passed or are considering legislation banning or penalizing the practice of requiring consent to NDAs as a condition of employment or of settlement. [6] A bipartisan EMPOWER bill introduced in the last Congress similarly would prohibit NDAs intended to prevent disclosure of workplace sexual harassment claims.

Notably, banishing the use of NDAs may impede some sexual harassment settlements. Statutes outlawing NDAs with no exceptions[7] may indeed reflect sound public policy, insuring that serial harassers cannot pay hush money to silence a victim while continuing to prey on unsuspecting successive victims. However, the benefit of transparency to the public, and to future victims in a harasser's workplace, may conflict with the individual victim's preference for privacy.[8] A less blunt instrument, such as a requirement that employers keep databases of settlements and disclose them to complainants, may be more effective than banning private settlements altogether. The EMPOWER bill, *supra,* takes an approach along these lines, requiring public companies to include details about settlements of sexual harassment claims in their annual SEC filings.

In addition to the plethora of legislative initiatives, the Internal Revenue Service recently added a provision to the Internal Revenue Code disallowing deductions of settlement payments and related attorneys' fees where the settlements are subject to NDAs.[9] Logic would suggest that the provision was intended to apply only to

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the attorneys' fees of the defendant insisting on the NDA. However, the provision's ambiguous wording has caused mischief in negotiating settlements that include NDAs; plaintiffs' attorneys fear that their own fees will be ruled non-deductible and accordingly negotiate for indemnification from the defendant.

Finally, it's worth filing under "Unintended Consequences" that the demise of NDAs may cause employers to tighten their fists in negotiating sexual harassment settlements, fearful that additional employees will come forward upon learning the details of a payout.

Impact on Mediation

Two actual cases in point illustrate #MeToo's impact, or lack thereof, on mediation. In one, "Jill," a young woman employed as a server at a chain restaurant, claimed that a co-worker frequently touched her inappropriately and made offensive comments. Jill claimed that she had complained repeatedly to her supervisor about the harasser, to no avail. Finally, after the co-worker had pulled Jill into a closet when they were alone in the restaurant at closing time, she managed to break away and never returned to work.

Jill initiated mediation, claiming constructive discharge caused by sexual harassment.

At the mediation, perhaps due to #MeToo's effects, rather than invoking the customary "he said/she said" defense, the employer acknowledged that Jill's claims of sexual harassment were credible, but claimed that Jill had never reported her complaints to management. In light of the absence of any record of complaint, the restaurant believed it was highly likely to prevail in arbitration, and accordingly was willing to offer only nuisance value in settlement.

In the second example, "Jane," the female employee of a major corporation, claimed that she was fired in retaliation for having complained, via the company's hotline, of a sexual assault committed by a co-worker. Here, too, during mediation the company did not challenge Jane's credibility as to the sexual assault, but, as in Jill's case, denied any record of a complaint, contending that Jane's termination was due to performance issues. The company therefore predicted that, if the case went to trial, its defense would succeed that Jane had unreasonably failed to take advantage of the company's sexual harassment hotline and other channels for complaints; its settlement offer was accordingly low. (The case eventually settled, after fierce negotiations arising from the company's desire for an NDA and Jane's attorney's concern that IRC § 162(q), *supra,* might jeopardize the deductibility of his fees.)

The employers' confidence of success in both cases stemmed from the law governing employers' liability for sexual harassment committed by a co-worker. In 2013, the Supreme Court held in *Vance v. Ball State University* that in such situations, an employer is responsible only if proven to have been negligent in permitting the harassment to occur, i.e., "did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed…".[10] To prevail at trial or arbitration, Jill and Jane would therefore need to establish that they did complain and that their employers failed to respond, or that they were discouraged from complaining. Accordingly, their credibility remained an issue in their mediations, but in contrast to the pre-#MeToo era, the focus shifted from doubts that sexual harassment had occurred to doubts that the victims had complained about it.

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The above scenarios, which anecdotal evidence indicates are far from unique, suggest that the criteria for employer negligence set forth in *Vance,* and in particular, failure to "provide a system for registering complaints," would benefit from further refinement. If purchasing a frying pan from Amazon instantly generates an online order number, why not mandate that complaints of sexual harassment—to any supervisor, Human Resources staff, or hotline—be automatically registered and confirmed, by text message or some other means? This simple requirement would virtually eliminate credibility issues relating to whether a complaint had been made. Moreover, even if a victim of sexual harassment did fail to complain, #MeToo has made it abundantly clear that in many workplaces, it is simply too dangerous to do so, either because the harasser is "the boss" or the victim fears a negative impact on her career. Greater acknowledgement of this reality may gradually lead courts to erode the "she didn't complain" defense invoked by many employers.

Conclusion

#MeToo's impact on ADR continues to evolve, as victims, employers, counsel, state and federal government, and society at large struggle to find solutions to the pernicious problem of sexual harassment in the workplace. While victims' accusations of harassment may be believed more readily in the current climate than in Shakespeare's day, employers continue to find refuge in the defense that the victims did not complain, reflecting a failure to recognize the reality that such complaints are ineffective or downright dangerous to career prospects in many workplaces. Legislative efforts to respond to the problem have been robust, although some may backfire. In both mediation and arbitration, individuals' interests in maintaining their privacy may collide with #MeToo's rallying cry of transparency. In sum, it's too early to tell whether #MeToo's effects on ADR will be a sea change or a ripple.

Endnotes

1. Measure for Measure, Act II, Scene 4.
2. In addition to New York, Vermont and Washington have passed such laws.
3. New York's statute is in the form of a new CPLR provision, § 7515. Subsection 4(b) tacitly acknowledges the preemption threat, by voiding mandatory arbitration of sexual harassment claims "except where inconsistent with federal law."
4. 500 U.S. 20 (1991).
5. 532 U.S. 105 (2001).
6. A Google search identified Arizona, California, Colorado, Delaware, Maryland, New York, New Jersey, Pennsylvania, Tennesee, Vermont, and Washington as states with such enacted or pending legislation. New York's new law is codified at CPLR 5003-b and General Obligations Law § 5-336.
7. California's SB820 permits only the settlement amount and the claimant's identity (if requested by the claimant) to be kept confidential; the facts underlying the settlement may not be kept secret.
8. For example, the New York Times reported on Dec. 11, 2018 that the financial terms of a settlement with CBS over sexual harassment claims "were confidential, at the request of the women." New York's new law gives victims the option to keep their settlements confidential following a mandatory, non-waivable waiting period.
9. IRC § 162(q).
10. *Vance v. Ball State Univ.*, 133 S.Ct. 2434; 570 U.S. 421, at 428 (2013).