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Protecting against Employment Discrimination: The Ninth Circuit's Interpretation of Mandatory Arbitration of Title VII Claims - Renteria v. Prudential Ins. Co. of America

Todd C. Stanton

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I. INTRODUCTION

The growing trend toward reliance upon arbitration, rather than judicial adjudication, has resulted in a reformation regarding the resolution of disputes within the employment industry. It has become a standard practice of many employers to require that employees sign employment agreements before they are allowed to work. Recently, these types of agreements have begun to require that employees resolve any disputes or claims against their employers through arbitration rather than judicial adjudication. Unfortunately, the average employee is often unaware of the binding nature of these agreements until a dispute actually arises with his or her employer. The Ninth Circuit has sought to protect employees from these types of agreements, and preserve Title VII judicial remedies, by refusing to enforce such arbitration provisions when the employee does not have knowledge or notice of them. This Note will examine the Ninth Circuit’s unique interpretation of these mandatory arbitration agreements and the possible advantages and disadvantages of requiring employees to arbitrate their Title VII claims against employers. Furthermore, it will explore Renteria’s impact on that apparently continuing interpretation.

II. FACTS AND HOLDING

This case arose between the appellant, Rachel Renteria, and her employer, Prudential Insurance Company (“Prudential”). On March 22, 1992, Ms. Renteria was hired by Prudential. At that time, she signed a Uniform Application for Securities Industry Registration (“Form U-4”) which contained a clause requiring her to arbitrate, "any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the National Association of Securities Dealers ("NASD") Code, as may be amended from time to time, that she might have against Prudential." Although the agreement contained this clause,
neither it nor the NASD Code explicitly required the arbitration of disputes arising from an employee's termination. However, on October 1, 1993, the NASD Code was amended, mandating arbitration for such employment termination disputes. Ms. Renteria was fired six days later, and on October 7, 1994, she filed a complaint against Prudential alleging various claims, including sexual harassment under Title VII and Nevada state statutes.

Ms. Renteria's complaint was removed to the United States District Court for the District of Nevada where Prudential's motion to compel arbitration on the sexual harassment claim was denied, and Prudential appealed. On appeal, Prudential contended that Ms. Renteria should be held to the strict language requirements of the application; therefore, the amendment provision obligated her to abide by any future company policies. In addition, Prudential argued that the court should, at the very least, require an evidentiary hearing on the question of Ms. Renteria's subjective knowledge of the arbitration clause. Prudential asserted that ultimately she should be bound to arbitrate her dispute. On appeal, Ms. Renteria argued that she should not be forced to submit to such an agreement and arbitrate her claims. The appellate court, in denying Prudential's motion to compel arbitration, reasoned that the amendment provision of the application did not allow Prudential to alter the scope of the application without notice. Furthermore, the court emphasized the importance of the public policy requiring the protection of victims of sexual discrimination and harassment.

In rendering its decision on appeal, the United States Court of Appeals for the Ninth Circuit relied upon its earlier decision in Prudential Ins. Co. of America v. Lai, which held that "a Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." Applying Lai's "knowing waiver" test to the case at hand, the Ninth Circuit held that when a written employment agreement does not create knowledge or express notice of the requirement of binding arbitration of Title VII claims, there is no waiver of those remedies for sexual harassment claims.

organizations indicated in Item 10 [NASD] as may be amended from time to time," and the NASD Code provided that "any dispute, claim or controversy . . . arising in connection with the business of such member[s] or in connection with the activities of such associated person[s], shall be arbitrated under this Code."

5. Id.

6. Id. The amended provision included claims "arising out of the employment or termination of employment of such associated person[s] by and with such member," as a category of claims requiring adjudication through arbitration.

7. Id.

8. Id.

9. Id. at 1106-1107.

10. Id.

11. Id. at 1108.

12. Id. at 1106.

13. Id.

14. Id.

15. 42 F.3d 1299 (9th Cir. 1994).

16. Id. at 1305.

17. Renteria, 113 F.3d at 1108.
The instant decision comes in the wake of a multitude of decisions that undermine, examine and support the Ninth Circuit's decision in Lai. Prior to Lai, courts had relied heavily on the decision of Gilmer v. Interstate/Johnson Lane Corp. in enforcing arbitration clauses of employment agreements to the preclusion of employees' statutorily based Title VII and discrimination claims. The Ninth Circuit, however, limited the Gilmer decision by recognizing the "knowing waiver" requirement of Lai. This "knowing waiver" requirement serves to protect employees from arbitration clauses, by allowing for a waiver of statutory remedies only when the employee has knowledge of such a waiver. Under Lai's "knowing waiver" requirement, mandatory arbitration provisions in employment agreements would potentially be invalidated and unenforceable in the Ninth Circuit. To provide a better analysis of the Ninth Circuit's instant decision it is important to first examine the brief history of employment agreements containing arbitration clauses and the recent judicial interpretations of the "knowing waiver" requirement.

In Alexander v. Gardner-Denver Co., the United States Supreme Court dealt with the issue of mandatory arbitration clauses in employment agreements and held that employees could not prospectively waive their right to a judicial forum under a Title VII claim in an employment agreement. The Court reasoned that the importance of eliminating the harms anticipated by Title VII outweighed the importance of arbitration and the valuable judicial economy it facilitates. The Court also stressed the congressional intent behind Title VII and the essential role of the Title VII private cause of action in combating discriminatory employment practices. In addition, the Court questioned the practical and procedural suitability of arbitration in resolving Title VII disputes. Other jurisdictions have relied upon the Court's reasoning in Alexander in holding that individuals cannot waive their Title VII protected rights in an employment agreement.

The Alexander interpretation of mandatory arbitration agreements was undermined by the United States Supreme Court's decision in Gilmer. In Gilmer, the Court held that employees can be required to arbitrate statutory discrimination claims pursuant to employment agreements that contain mandatory arbitration provisions. The agreement at issue in Gilmer was the same U-4 Securities

19. 42 F.3d at 1305.
20. Id.
21. Id.
23. Id. at 51.
24. Id.
25. Id.
26. Id. at 56-57.
29. Id.
Registration Application that was involved in *Lai* and the instant decision.\(^\text{30}\) In *Gilmer*, the Court examined the Federal Arbitration Act ("FAA")\(^\text{31}\) and recognized that, in order to attain the full benefits of the arbitration process, there is a presumption in favor of arbitrability under the FAA.\(^\text{32}\) In making that determination, the Court ultimately reasoned that individuals could obtain the same statutory remedy through the forum of arbitration as they could through the judicial forum, thereby stressing the validity of mandatory arbitration clauses in employment agreements.\(^\text{33}\) After *Gilmer*, a large number of appellate court decisions have explored its holding, many in the specific context of Title VII claims where an employer attempted to bind an employee to arbitration.\(^\text{34}\)

While recognizing the validity of mandatory arbitration clauses in employment agreements, the Ninth Circuit tried to limit the practical implication of such clauses by creating the "knowing waiver" requirement in *Lai*.\(^\text{35}\) The court based its decision on many of the policy concerns detailed in *Alexander*, and held that the importance of protecting victims of employment discrimination created a stronger interest than that requiring arbitration.\(^\text{36}\) Therefore, they held that employees could not unknowingly waive their Title VII right to adjudication through a judicial, rather than arbitral, forum.\(^\text{37}\) Furthermore, the Ninth Circuit detailed reasons why a judicial forum provides a more adequate procedural and practical remedy for Title VII claimants. They suggested that the limited discovery process of a judicial forum is necessary to protect potential victims of sexual harassment from unwarranted investigation into, and publicity regarding, their sexual history.\(^\text{38}\) The *Lai* decision directly contradicted the Supreme Court's holding in *Gilmer* that both judicial and arbitral forums provide an identical substantive remedy.

Since *Lai*, various jurisdictions have provided differing interpretations of mandatory arbitration clauses in employment agreements, with the majority of courts declining to follow *Lai*.\(^\text{39}\) In *Beauchamp v. Great West Life Assur. Co.*,\(^\text{40}\) the Eastern District of Michigan declined to adopt the reasoning provided by *Lai* and enforced an arbitration clause similar to the one rendered void by *Lai*.\(^\text{41}\) The *Beauchamp* court held that the Ninth Circuit's decision in *Lai* "flies in the face of the language of the Civil Rights Act of 1991, the Supreme Court's decision in *Gilmer*, and the fundamental principles of contract law."\(^\text{42}\) Accepting the *Gilmer* holding, the court then turned to a contractual examination of the employment agreement and found

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30. *Id* at 23.
33. *Id.* at 30-32.
35. *Lai*, 42 F.3d at 1304.
36. *Id.* at 1305.
37. *Id.* at 1305 n.4.
38. *Id.*
41. *Id.* at 1096.
42. *Id.*
the mandatory arbitration clause to be enforceable because it was "substantially reasonable and not oppressive or unconscionable."\(^{43}\)

The Southern District of New York posited that "the reasoning of Lai has been criticized by courts in this and other Circuits as contrary to Supreme Court precedent and as based on citation of inadequate legislative history."\(^{44}\) These courts argue that the policy considerations detailed in Lai and Alexander should not compel a court to "turn contract law on its head."\(^{45}\)

Yet the Ninth Circuit has held strong. In Nelson v. Cyrus Bagdad Copper Corporation,\(^{46}\) the Ninth Circuit extended its holding in Lai to cover mandatory arbitration clauses requiring for the arbitration of statutory claims under the Americans with Disabilities Act ("ADA")\(^{47}\) as well as under Title VII.\(^{48}\) However, the Ninth Circuit, in enforcing a mandatory arbitration clause, has held that a party attempting to avoid arbitration has the burden of showing that the Act underlying the statutory claim includes a "knowing waiver" requirement.\(^{49}\) In Kuehner, the Court held that the plaintiff had failed to meet that burden and therefore enforced a clause requiring arbitration of claims arising under the Fair Labor Standards Act ("FLSA").\(^{50}\)

### IV. INSTANT DECISION

The Ninth Circuit's decision in Renteria relies upon its own reasoning in Lai, decided under similar factual circumstances. As in Lai, the plaintiff in Renteria filed a sexual discrimination suit under Title VII, signed a Form U-4 containing an arbitration clause, and requested relief against the same defendant in Prudential.\(^{51}\) In both cases, the primary issue was whether the arbitration clause signed by the plaintiffs included Title VII claims.\(^{52}\) The Renteria decision echoed the policy reasons underlying the Lai decision.\(^{53}\) The court examined the policy concerns regarding protecting victims of employment discrimination balancing them against the FAA presumption in favor of arbitration, and it looked at the procedural and practical advantages of a judicial forum over an arbitral forum.\(^{54}\) Because of these

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\(^{43}\) Id. at 1098-99.


\(^{46}\) 119 F.3d 756 (1997).


\(^{48}\) Nelson at 761. The court held that, "just as a knowing agreement to arbitrate disputes covered by the act is required by Title VII, so too a knowing agreement is required under the ADA."

\(^{49}\) Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996). When recognizing this holding in its Renteria decision, the Ninth Circuit explained Kuehner's holding in a broad fashion, citing it for the express proposition that "the 'knowing waiver' requirement did not apply to [any] claims under the FLSA."

\(^{50}\) Id.

\(^{51}\) Renteria, 113 F.3d at 1105.

\(^{52}\) Id.

\(^{53}\) Id. at 1106.

\(^{54}\) Id. at 1107.
considerations, the court held that mandatory arbitration clauses in employment agreements are only enforceable when the employee has knowledge and/or notice of the binding requirement of the agreement. 55

At the time Ms. Renteria signed her employment agreement, the arbitration provision in the NASD Code was essentially the same as when the Lai plaintiffs signed their agreement. 56 The only difference between Lai and Renteria is that the arbitration clause in Renteria included all disputes listed in the NASD Code as may be amended from time to time (emphasis added). 57 In Renteria, the court held that "the 'as amended' language does not take the case out of the [knowing waiver] rule," arguing that the language only made explicit what was implicitly considered in the Lai provision. 58 Extending Lai, the court added that the precise wording was not at issue in nullifying the arbitration provision because the agreements failed to describe the types of disputes subject to mandatory arbitration. 59

V. COMMENT

In the face of criticism from nearly every jurisdiction that has examined this issue, the Ninth Circuit was given a second chance to "correctly" decide the issue of mandatory arbitration clauses in employment agreements. Surprisingly, however, when presented with this opportunity for redemption in Renteria, the Ninth Circuit actually extended their own holding in Lai. 60 The facts in Renteria are distinguishable from those in Lai, in that the employment agreement in Renteria contained an amendment provision binding the employee to any future NASD policies. 61 However, the Renteria court rallied behind the same reasoning it provided in Lai and applied the "knowing waiver" requirement. It held that, regardless of the language of the agreement, Ms. Renteria did not have explicit knowledge or notice of the arbitration requirement and therefore that it was unenforceable. 62 The ultimate question regarding Renteria is whether it is the second decision in a new line of reasoning regarding arbitration clauses, or merely a dying ripple from the splash of a failed Ninth Circuit experiment.

In evaluating the Ninth Circuit's stubborn reliance on its own "knowing waiver" requirement, it is important to examine the delicate balance of public policy considerations underlying that requirement. The Lai and Renteria decisions emphasize the importance of the public policy requiring protection of victims of employment discrimination, at the expense of the need to encourage arbitration under the FAA. 63 The Renteria court specifically recognized the legislative history of Title VII and concluded that "the public policy of protecting victims of sexual
discrimination and harassment . . . is at least as strong as our public policy in favor of arbitration." 64 Other jurisdictions have not been so quick to adopt a similar conclusion in order to justify preserving a judicial forum for Title VII plaintiffs. 65 These courts generally stress the importance of traditional notions of contract law and the congressional intent behind the FAA in support of their enforcement of mandatory arbitration clauses in employment agreements.

The public policy considerations cited in *Lai* and *Renteria* in support of the "knowing waiver" requirement include: the promotion of Title VII claims, the protection of victims of sexual discrimination and harassment, the right to a jury trial of one's peers, and the discovery process. The arbitral forum, contrary to *Gilmer*, is inadequate to protect victims of Title VII discrimination and harassment when compared to the judicial forum. 66 In a judicial forum, a Title VII plaintiff would be entitled to a jury trial and protected from unwarranted investigations into his or her sexual history. 67 In addition, the public nature of a judicial forum better facilitates the prevention of future sexual discrimination and harassment. 68 One theory behind this principle is that employers will become more aware of the possible consequences of their behavior, and discriminatory conduct will likely be reduced. 69

While the Ninth Circuit extended its holding in *Lai*, it appears that the "knowing waiver" requirement is limited to a factually narrow spectrum of cases. The special policy considerations and circumstances surrounding a Title VII sexual discrimination claim necessitate a judicial forum, while other claims may be adequately resolved through an arbitral forum. In *Cione v. Foresters Equity Services Inc.*, 70 a California Appellate Court did not apply the *Renteria* decision in enforcing a Form U-4 arbitration clause under the unamended NASD Code. 71 The *Cione* court pointed to *Kuehner* and *Renteria*, in reasoning that the "knowing waiver" requirement only applies to Title VII sexual discrimination claims, and not age discrimination claims. 72 That court also noted that "even as to Title VII cases, the 'knowing waiver' portion of *Lai* restated in *Renteria* has been severely criticized by other federal courts and by another California appellate court." 73

As the law in the Ninth Circuit, *Renteria* currently serves to protect the judicial forum for Title VII plaintiffs. In the future, however, it is difficult to determine what impact this decision might have on mandatory employment agreements. At the very least, it will protect employees from "hidden" arbitration clauses in employment agreements.

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64. *Id.*
67. *Id.* at n.4.
70. 68 Cal. Rptr. 2d 167 (Ca. Ct. App. 1997).
71. *Id.* at 179.
72. *Id.*
73. *Id.* Referring to *Brookwood*, supra note 45.
agreements. It is unlikely, however, that it will have a practical impact on Title VII claims, as employers will likely bypass the “knowing waiver” test by explicitly drafting the mandatory arbitration clause into the employment agreement itself. While this will avoid the problems highlighted in Renteria and Lai by putting the employees on notice that they will be bound by arbitration, it will not effectively protect against the dangerous ramifications that these decisions argue will result from the arbitration of Title VII claims. Once employees have notice of the arbitration clauses when they sign the required employment agreements, Lai and Renteria will no longer provide a basis for rendering the agreements unenforceable. In that scenario, employees would be forced to arbitrate Title VII claims that would be most appropriately resolved in a judicial forum.

Commentators have suggested amending Title VII to specifically include language preserving a judicial forum for plaintiffs by codifying the legislative history detailing the importance of the public policy protecting against sexual discrimination and harassment. This would, ideally, send a message to courts to consider that public policy when attempting to interpret these agreements, without requiring the enactment of explicit anti-arbitration language in Title VII. Another solution might be for the legislature to amend the FAA, allowing for a more liberal balancing test regarding the application of the strong public policy interest in favor of arbitration. In such a system, the right to a judicial forum for special statutory remedies like Title VII sexual discrimination claims, would depend upon a determination of the appropriateness of an arbitral forum in relation to the desired remedy. A court could then apply the Alexander, Lai or Renteria public policy considerations in determining whether or not to enforce an arbitration clause. It appears that, regardless of what possible alternatives might exist, the Renteria decision will provide a limited impact on arbitration clauses in future employment agreements. Once employers get past the “knowing waiver” requirement, the only purpose the decision will serve is to demonstrate the policy considerations and legislative intent in favor of the judicial adjudication of this type of claim. One commentator has suggested that the reasoning used in Lai could logically be used to assert a claim that an employee cannot waive a judicial statutory remedy unless he or she is aware of the waiver and the waiver is voluntary. This “voluntary requirement” would help to support an employee’s right to maintain a judicial cause of action under Title VII by protecting employees that have no choice but to sign their employers required employment forms. However, unless this line of reasoning in Lai and Renteria evolves into a requirement that employees cannot involuntarily waive their statutory remedies under Title VII, it likely will not have a great deal of impact upon future mandatory arbitration agreements.

76. Id.
VI. CONCLUSION

It appears from the many jurisdictions around the country that have failed to follow Lai, that Renteria is quite possibly nothing more than the Ninth Circuit's insistent reliance upon its own unique interpretation of arbitration clauses in employment agreements. While the public policy considerations detailed in these decisions are tremendously important to justify protecting an employee's right to an appropriate forum under Title VII, the Ninth Circuit's "knowing waiver" requirement is not an adequate solution. Employers will likely draft their agreements so that they satisfy the "knowing waiver" requirement, and Title VII plaintiffs that would more properly be in a judicial forum will be forced to arbitrate their claims. Unless the legislature amends the FAA or Title VII to ensure a judicial remedy in sexual discrimination cases, the Renteria decision will be unable to play its intended role of protecting employees from mandatory arbitration clauses.

TODD C. STANTON