

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 19-2984

ANTONIA LERNER,

Appellant

v.

CITIGROUP

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-16-cv-01573)
District Judge: Hon. Kevin McNulty

Submitted under Third Circuit L.A.R. 34.1(a)
September 15, 2020

Before: KRAUSE, RESTREPO, and BIBAS, *Circuit Judges*.

(Filed: December 15, 2020)

OPINION*

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

RESTREPO, *Circuit Judge*

Antonia Lerner appeals the denial of her motion to vacate the Arbitrator's award, which granted her former employer Citigroup Inc. (Citigroup) summary judgment and dismissed her claims of discrimination. On appeal, Ms. Lerner argues she never consented to arbitration and the Arbitrator committed misconduct by refusing to consider evidence of Citigroup's alleged retaliatory conduct. We agree with the District Court that Ms. Lerner failed to prove her misconduct claim. Furthermore Ms. Lerner forfeited her consent claim by raising it for the first time before this Court. We will therefore affirm the order sustaining the award.

I.

Ms. Lerner was employed by Citigroup, a global financial services firm, as an Apps Support Senior Analyst in Jersey City, New Jersey. She was terminated from her position in May 2015. **App. 266.** Citigroup maintained that the termination was due to a cost saving program which entailed moving her position to India. Ms. Lerner contended the termination was motivated by discrimination and filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging sex and disability discrimination. **App. 42.** The EEOC dismissed the complaint in February 2016, stating it was "unable to conclude" that any of the statutes enforced by the Commission had been violated. **App. 36.**

In March 2016 Ms. Lerner filed a complaint in the District Court, alleging that Citigroup failed to accommodate her disability, discriminated against her race, sex and disability, and illegally retaliated against her for filing a complaint with the EEOC. Ms.

Lerner asserted claims under Title VII of the Civil Rights Act, 42 U.S.C. §2000e, et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., and the New Jersey Law Against Discrimination (N.J. Stat. Ann. §10:5-1 et seq.) **App. 27, 267.**

Citigroup filed a motion to compel arbitration, which the District Court granted after concluding that a valid arbitration agreement existed between Ms. Lerner and the company. **App. 222-24.** Ms. Lerner did not object to the motion or the Court's order; she instead filed a demand for arbitration with the American Arbitration Association (AAA). **App. 227.**

An arbitrator was selected and entered scheduling orders to govern discovery. At the conclusion of discovery, Citigroup requested leave to file a motion for summary judgment. In December 2017 Ms. Lerner requested and was granted a conference call, during which the Arbitrator explained that it was her burden to provide facts and relevant law to establish her claims. **App. 275, n. 6.**

In March 2018 Citigroup filed its motion for summary judgment. Ms. Lerner filed her response along with her affidavit. **App. 269.** The Arbitrator granted the motion for summary judgment, finding that Ms. Lerner failed to establish her disability and discrimination claims and offered only speculation to support her retaliation claim. **App. 275-6.**

In the District Court, Ms. Lerner, proceeding *pro se*, moved to vacate the award, alleging that the Arbitrator failed "to understand that being laid off twice within weeks of each other is very traumatizing," that there was a conflict of interest between Citigroup and the AAA, and the Arbitrator failed to properly review facts in support of her claims.

App. 164-66. The District Court denied the motion, finding that Ms. Lerner did not establish grounds to vacate the award. With regard to the allegation that the Arbitrator failed to consider relevant facts, the Court found that “Ms. Lerner does not explain what pertinent evidence the arbitrator allegedly refused to hear.” App. 18.

On appeal, Ms. Lerner argues for the first time that she never consented to arbitration. She also renews her assertion that the Arbitrator committed misconduct by failing to consider evidence supporting her retaliation claim.¹ Neither claim entitles Ms. Lerner to relief and we therefore affirm the District Court’s order denying the motion to vacate the arbitration award.

II.

The District Court had jurisdiction under 9 U.S.C. § 9, and we have appellate jurisdiction under 9 U.S.C. § 16(a)(1)(D). We review *de novo* the District Court’s denial of a motion to vacate an arbitration award. *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003). Our review of the Arbitrator’s decision, however, is “extremely deferential.” *Id.* at 370 (“The net result of a court’s application of this standard is generally to affirm easily the arbitration award[.]”).

III.

Ms. Lerner asserts she never consented to the arbitration clause in Citigroup’s employee handbook and the District Court erred by finding a valid arbitration agreement existed. She claims for the first time on appeal that acknowledging the arbitration clause

¹ Ms. Lerner filed the motion to vacate in District Court *pro se* but was represented by counsel before this Court.

in the employee handbook did not constitute a valid waiver of a judicial forum, and the arbitration award should therefore be vacated. **Appellant's brief, 9.**

Ms. Lerner did not present this non-consent argument to the District Court or at any stage of the arbitration proceedings. The failure to do so precludes relief on appeal. “Our Circuit adheres to a ‘well established principle that it is inappropriate for an appellate court to consider a contention raised on appeal that was not initially presented to the district court.’” *Lloyd v. HOVENSA, LLC.*, 369 F.3d 263, 272-73 (3d Cir. 2004) (quoting *In re City of Phila. Litig.*, 158 F.3d 723, 727 (3d Cir. 1998)). Ms. Lerner’s argument that she did not consent to arbitration does not constitute a jurisdictional matter that can be raised at any stage of the proceeding. Whether an agreement to arbitrate existed between the parties constitutes a contract claim that Ms. Lerner forfeited by not raising it before the District Court. *Id.* at 272. Further, Ms. Lerner has not alleged any exceptional circumstances that would warrant review of her non-consent claim. *Birdman v. Office of the Governor*, 677 F.3d 167, 173 (3d Cir. 2012) (“It is axiomatic that arguments asserted for the first time on appeal are deemed to be waived and consequently are not susceptible to review in this Court absent exceptional circumstances.”) (internal quotation marks omitted).

Ms. Lerner’s ability to raise the claim at this stage is further compromised by her full engagement in the arbitration process. She did not object to Citigroup’s motion to compel arbitration but instead filed a demand for arbitration with the AAA after the motion was granted. She produced documents, gave depositions, and filed a response to Citigroup’s motion for summary judgment, all without making any objection to or

argument before the Arbitrator concerning her consent to arbitration. **App. 268-69.** Ms. Lerner did not cite any opposition to arbitration in her motion to vacate. **App. 164-66.** Because Ms. Lerner never indicated her alleged lack of consent to Citigroup, the Arbitrator or the District Court, she forfeited this basis for overturning the arbitration award.

IV.

Ms. Lerner next asserts that the Arbitrator committed misconduct by refusing to consider evidence that Citigroup retaliated against her by blocking her access to its internal job listings. We disagree.

The Federal Arbitration Act permits a court to vacate an arbitration award where the Arbitrator “refus[ed] to hear evidence pertinent and material to the controversy.” 9 U.S.C. § 10(a)(3). However, “[v]acatur is appropriate only in ‘exceedingly narrow’ circumstances[.]” *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 578 (3d Cir. 2005) (quoting *Dluhos*, 321 F.3d at 370). There is a strong presumption in the Act that favors enforcing arbitration awards, and an “award is presumed valid unless it is affirmatively shown to be otherwise[.]” *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 241 (3d Cir. 2005).

Although we are mindful of our obligation to construe *pro se* filings liberally, *see Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009), Ms. Lerner failed to demonstrate any misconduct on the part of the Arbitrator. Although her motion to vacate alleged that Citigroup blocked her “internal access” to job listings, she never attributed the alleged blocking to an act of retaliation by her former employer. App. 164. Because Ms. Lerner

failed to “explain what pertinent evidence the arbitrator allegedly refused to hear,” the District Court properly dismissed her allegations of arbitrator misconduct. App. 18. On appeal, Ms. Lerner attempts to remedy her failure by arguing the allegations of blocked access constituted pertinent evidence of retaliation that the Arbitrator refused to consider. We agree with Citigroup that this claim of retaliation is too speculative and attenuated to pose a viable cause of action, rendering Ms. Lerner’s claim of Arbitrator misconduct meritless.

V.

Having considered Ms. Lerner’s arguments and deemed them insufficient to warrant relief, we will affirm the order dismissing the motion to vacate the arbitration award.

NOT FOR PUBLICATION**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY****ANTONIA LERNER,****Plaintiff,****v.****CITIGROUP,****Defendant****Civ. No. 16-cv-1573 (KM) (MAH)****MEMORANDUM OPINION
& ORDER**

The plaintiff, Antonia Lerner, *pro se*, brought this action for money damages against her former employer, Defendant Citigroup Inc., for alleged racial, gender and disability discrimination arising out the termination of plaintiff's employment. Lerner has asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., and the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. § 10:5-1 et seq. Citigroup has moved to compel arbitration of the dispute and to dismiss the complaint or stay further proceedings. (Dkt. No. 8) The plaintiff has not opposed the motion. For the reasons set forth below, the motion to compel arbitration will be granted and proceedings in this Court will be stayed.

Where a suit is brought in a district court on an issue that is referable to arbitration under a valid arbitration agreement, the Federal Arbitration Act instructs that the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. In determining whether to compel arbitration, a court must then analyze (1) whether there is an agreement to arbitrate, and (2) whether the dispute falls within the scope of the agreement. *See Century Indemn. Co. v. Certain Underwriters at Lloyd's*, 584 F.3d 513, 523 (3d Cir.

2009). This inquiry is guided, however, by a presumption of arbitrability. *AT&T Techs. v. Commc'n Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415 (1986). Thus, ambiguities as to the scope of the arbitration agreement are resolved in favor of arbitration. *See Volt Indo. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 476, 109 S.Ct. 1248 (1989).

A valid arbitration agreement exists in this case. Citigroup's U.S. Employee Handbook contains an Appendix entitled "Employment Arbitration Policy." (Dkt. No. 8, Ex. B p. 53) The policy provides that arbitration is

the required and exclusive forum for the resolution of all employment-related disputes (other than disputes which by statute are not subject to arbitration) which are based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) and arise between you and Citi[.]

Id. Included in a list of sample disputes are those brought under Title VII, the ADA, and "any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment," etc. *Id.* A separate appendix in the Employee Handbook sets forth what are termed "Principles of Employment." *Id.* at p. 68. The fourth principle provides that "you and Citi agree to follow Citi's dispute resolution/arbitration procedure for resolving all disputes arising out of or relating to your employment with and separation from Citi." *Id.*

Employees at Citigroup are required to sign a form acknowledging that they understand their obligation to review the Employee Handbook. This acknowledgement form also includes the following:

Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you to submit employment-related disputes to binding arbitration (see Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.

Dkt. No. 8, Ex. C. Plaintiff electronically signed this acknowledgement form on three occasions: December 18, 2008, December 29, 2010, and December 20, 2012. *Id.*

I find that there valid agreement to arbitrate employment-related disputes. Additionally, all of Plaintiff's claims concern matters covered by the arbitration provision. Indeed, the provision explicitly includes claims brought under Title VII, the ADA, and state discrimination laws, such as NJLAD. Accordingly,

IT IS this 1st day of August, 2016,

ORDERED that Defendant's motion to compel arbitration and stay this matter is **GRANTED**.



HON. KEVIN MCNULTY, U.S.D.J.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

ANTONIA LERNER,

Plaintiff,

Civ. No. 16-cv-1573 (KM) (MAH)

v.

ORDER

CITIGROUP,

Defendant

THIS MATTER having come before the Court on the motion of Plaintiff Ms. Lerner to vacate the arbitration award (DE 23); and Defendant Citigroup having opposed the motion (DE 28); and the Court having considered the papers before it without oral argument pursuant to Fed. R. Civ. P. 78(b); for the reasons stated in the Opinion filed on this date, and for good cause shown:

IT IS this 12th day of April, 2019,

ORDERED that the Plaintiff's motion (DE 23) to vacate the arbitration award is **DENIED**.



HON. KEVIN MCNULTY, U.S.D.J.

Image_Report

2009 U.S. Employee Handbook Acknowledgement Receipt

When you click on the "I Acknowledge" button below, you are acknowledging that:

- You have opened the e-mail that directed you to this Web site.
- You have received the Web link to the Employee Handbook.
- You understand that it's your obligation to read the Handbook and become familiar with its terms.
- Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you to submit employment-related disputes to binding arbitration (see Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.
- **WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY, YOU UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK, NOR THE HANDBOOK ITSELF, IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT YOUR EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. YOU UNDERSTAND THAT YOUR EMPLOYMENT WITH CITI IS AT-WILL, WHICH MEANS IT CAN BE TERMINATED BY YOU OR CITI AT ANY TIME, WITH OR WITHOUT NOTICE, FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.**

Please click the "I Acknowledge" button below. Once you acknowledge, you'll have the ability to download and print your copy of the Handbook.

This form was electronically acknowledged by:

NAME: Elizarov, Antonia
GEID: 0004808445
DATE: 12/18/2008

Sample_Report_EN

2011 U.S. Employee Handbook Acknowledgement Receipt

When you click on the "I Acknowledge" button below, you are acknowledging that:

- You have opened the e-mail that directed you to this Web site.
- You have received the Web link to the Employee Handbook.
- You understand that it's your obligation to read the Handbook and become familiar with its terms.
- Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you to subject employment-related disputes to binding arbitration (See Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.
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Please click the "I Acknowledge" button below. Once you acknowledge, you'll have the ability to download and print your copy of the Handbook.

This form was electronically acknowledged by:

NAME: Elizarov, Antonia
GEID: 0004808445
DATE: 12/29/2010

2013 U.S. Employee Handbook Acknowledgment Receipt

When you click on the "Acknowledge" button below, you are acknowledging that:

- You have opened the e-mail that directed you to this Web site.
- You have received the Web link to the Employee Handbook.
- You understand that it's your obligation to read the Handbook and become familiar with its terms.
- Appended to the Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require you and City to submit employment-related disputes to binding arbitration (See Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of your or City's right to compel arbitration of employment-related disputes.

• WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY, YOU UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK, NOR THE HANDBOOK ITSELF, IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT YOUR EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. YOU UNDERSTAND THAT YOUR EMPLOYMENT WITH CITY IS AT-WILL, WHICH MEANS IT CAN BE TERMINATED BY YOU OR CITY AT ANY TIME, WITH OR WITHOUT NOTICE, FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.

Please click the "Acknowledge" button below. Once you acknowledge, you'll have the ability to download and print your copy of the Handbook.

This form was electronically acknowledged by:

NAME: Antonia Elizarov
GEID: 0004608446
DATE: 12/10/2012