APPENDIX

App. 1

United States Court of Appeals
For the Eighth Circuit

No. 21-2056

Yufan Zhang

Plaintiff - Appellant

v.

UnitedHealth Group; Sujatha Duraimanickam

Defendants – Appellees

Appeal from United States District Court for the District of Minnesota

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Submitted: December 23, 2021

Filed: December 29, 2021

[Unpublished]

Before BENTON, KELLY, and KOBES, Circuit Judges.

PER CURIAM.

In this employment discrimination action, Yufan Zhang appeals the district court's[1] denial of his motion to vacate an arbitration award. After careful review of the record and the parties' arguments on appeal, we find no basis for reversal. See Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney, LLC, 894 F.3d 894, 897 (8th Cir. 2018) (standard of review). Accordingly we affirm.

See 8th Cir. R.47B. We also deny Zhang's pending motions.

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[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

App. 3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Yufan Zhang,

Plaintiff,

v.

UnitedHealth Group and
Sujatha Duraimanickam,

Defendants.

MEMORANDUM OPINION
AND ORDER
Civil No. 18-1454 (MJD/KMM)

Plaintiff, pro se.

Sandra L. Jezierski and Sarah B. Riskin, Nilan Johnson Lewis PA, Counsel for Defendants.

This matter is before the Court on Plaintiff's motion to vacate the Arbitrator's Decision. [Doc. No. 42]

I. Background

A. Plaintiff's Claims

Plaintiff was an employee of Defendant UnitedHealth Group ("UnitedHealth") from December 2014 through November 14, 2016.

(Amended Complaint ¶¶ 3, 11.) In the Amended Complaint, Plaintiff asserted claims of age discrimination under the ADEA and the MHRA and a claim of defamation.

B. Arbitration

By Order dated February 14, 2019, this Court granted Defendants' motion to compel arbitration and stayed this case pending arbitration. The parties then proceeded to litigate Plaintiff's claims according to the Rules of the American Arbitration Association ("AAA"), as modified by the Policy. (Jezierski Decl. ¶ 2.) The parties were each entitled to serve up to 25 Requests for Production of Documents and conduct two eight-hour days of fact witness depositions. (Id., Ex. A, ¶¶ 14.b and 14.c.) Plaintiff was represented by counsel throughout the arbitration proceedings. (See Doc. No. 36 (Memorandum in Support of Motion to Withdraw as Counsel for Plaintiff).)

Former Magistrate Judge Jeffrey Keyes served as the Arbitrator and heard evidence over a four-day period on August 4, 5, 18 and 19, 2020. (Id. ¶ 5.) The parties also submitted post-hearing briefs.

On October 5, 2020, the Arbitrator issued his decision in favor of Defendants on all counts. (Id. ¶ 10, Ex. D.) First, the Arbitrator found that Plaintiff had failed to prove that age discrimination was the cause of his termination. (Id. at 4.) Second, the Arbitrator found that the alleged defamatory statements concerning his poor performance in his performance review were subject to a qualified privilege and could not lead to liability absent a

finding of actual malice. (Id. at 5.) The Arbitrator noted that Plaintiff's argument as to actual malice was premised on his age discrimination claim, and because Plaintiff had failed to prove his age discrimination claim, there was no showing of actual malice or improper motive to overcome the qualified privilege afforded the alleged defamatory statements in the performance reviews. (Id.) The Arbitrator also rejected Plaintiff's additional argument that his supervisor, Duraimanickam, was acting in bad faith by building a file of false statements about Plaintiff, as evidence was submitted to show there were reasonable grounds to support the alleged statements.

Plaintiff is now pro se and has filed a motion to vacate the Arbitrator's decision.

II. Motion to Vacate Arbitration Award

A. Standard

The Federal Arbitration Act ("FAA") provides that any agreement to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds that exist in law or equity for the revocation of any contract."

9 U.S.C. § 2. The FAA further instructs, in relevant part:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved

in such suit or proceeding is referable to arbitration under such an agreement, 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.

Once an arbitrator issues a decision, the FAA provides four grounds for which a court may vacate that award upon application of any party to the arbitration. Those grounds are:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4).

"Judicial review of the arbitrator's ultimate decision is very deferential and should not be disturbed 'as long as the arbitrator is even arguably

construing or applying the contract and acting within the scope of his authority.'" N. States Power Co. v. Int'l Broth. of Elec. Workers, Local 160, 711 F.3d 900, 902 (8th Cir. 2013) (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

B. Arguments

Plaintiff moves to vacate the Arbitration Award on the following bases: that the Award was procured by fraud and that the Arbitrator engaged in misconduct by failing to consider evidence and for failing to postpone the hearing.

To prevail on his motion to vacate the arbitration award based on fraud, Plaintiff must "prove[] the fraud by clear and convincing evidence, show[] the fraud was not discoverable by due diligence either before or after the proceeding and show[] that the fraud was materially related to an arbitration issue." MidAmerican Energy Co. v. Int'l Bhd. of Elec. Workers Local 499, 345 F.3d 616, 622 (8th Cir. 2003). "Fraud is established if the plaintiff proves that 'the defendant made false representations of material fact, intended to induce plaintiff to act, the representations were made with knowledge of, or reckless disregard for, their falsity, and the plaintiff justifiably relied upon those false representations to [his] detriment.'" Goff v. Dakota, Minnesota & Eastern R.R. Corp., 276 F.3d 992, 996 (8th Cir. 2002) (quoting Pac. & Arctic Ry. & Navigation v. United Transp. Union, 952 F.2d 1144, 1148 (9th Cir. 1991)). "But given 'the strong federal policy favoring arbitration,' fraud under the FAA demands a 'greater level of improper conduct' than is typically required."

Wolfson v. Allianz Life Ins. Co. of North America., 2015 WL 2194813, at* 6 (D. Minn. May 11, 2015) (citing Goff, 276 F.3d at 996)).

Plaintiff argues the Award was procured by fraud because his supervisor, Sujatha Duraimanickam and other witnesses, lied during their testimony before the Arbitrator, and that Defendants failed to produce records from three project management databases: BaseCamp, CodeHub and service-now. As a result, Plaintiff asserts the Arbitrator was not fully informed as to the requirements of Plaintiff's job and prevented Plaintiff from proving his claims.

Defendants argue that Plaintiff has failed to demonstrate an intentional deception of material fact or any other improper conduct by Defendants or witnesses. Plaintiff was aware of the documents he requested, the documents produced and the documents identified as exhibits for the hearing. Plaintiff did not identify missing documents and took no steps to procure any missing documents prior to the hearing. Further, Plaintiff could have sought assistance from the Arbitrator to obtain any missing documents, but he did not do so.

As to the alleged lies told by defense witnesses, Plaintiff only makes generalized statements without evidentiary support. This is not sufficient to meet his burden of providing fraud by clear and convincing evidence.

The Court finds that Plaintiff has not demonstrated, by clear and convincing evidence, that the Arbitration Award was procured by fraud. Other than his own self-serving testimony as to his job

performance, Plaintiff did not present any evidence that any of the witnesses had lied during the arbitration hearing.

The Arbitrator found that Duraimanickam's testimony was credible based on his finding that Duraimanickam had demonstrated problems with Plaintiff's job performance, and that she spent a great deal of time coaching him on how to improve his performance. (Jezierski Decl., Ex. D (Arbitration Award at 3).) Further, the Arbitrator found that the "issue here is not whether there was a cause to terminate Claimant who was an at-will employee. Rather, the issue is whether Claimant has proven that intentional age discrimination was the cause of his termination. What matters is that Claimant's poor performance in his job was the true reason for the termination even if the decision to terminate Claimant was unwise, unfair, or based on mistakes of fact." (Id. at 4.) Ultimately, the Arbitrator found that "Claimant's claims under the ADEA and MHRA fail because he did not prove that age discrimination was the cause of his termination." (Id.)

The Court further finds that Plaintiff has failed to show the Arbitrator was guilty of misconduct by failing to postpone the hearing or in refusing to hear evidence pertinent and material to the controversy. The record demonstrates that Plaintiff never sought such evidence in discovery, and never raised the issue before the Arbitrator.

Plaintiff also complains that the Arbitrator did not give proper consideration to a compilation of contemporaneous notes he prepared regarding his work performance and meetings with

Duraimanickam. As to these notes, the Arbitrator wrote:

> But Claimant's typed compilation of notes does not constitute reliable evidence supporting the claim. It was not clear when Claimant created the compilation of notes, and he did not come forward with the original documents that he relied upon in compiling the notes to prove that he recorded the content of the compilation at or near the time when Duraimanickam allegedly made the comments. Claimant's allegation that Duraimanickam made the comments that showed a bias against older workers is simply not enough to overcome the well-documented record of poor performance that caused Claimant's termination.

(Id. at 3-4.)

Thus, it is clear the Arbitrator considered this evidence, but found it did not constitute reliable evidence supporting Plaintiff's claim.

The Court further finds that Plaintiff has not demonstrated that he requested the Arbitrator to postpone the hearing to obtain additional documents. Failure to complain about alleged errors generally results in a waiver of such complaints. See PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship,, 187 F.3d 988, 995 (8th Cir. 1999). Plaintiff claims he raised these concerns in a letter to the Arbitrator, but such letter was not provided to the Defendants, not filed with the Court and it is unclear whether it was delivered to the Arbitrator. (Jezierski Decl. ¶ 14.) In any event, the claims were not raised during the proceeding.

As to Plaintiff's claim that the Arbitrator misapplied the law on qualified privilege, it is no longer a ground to vacate an arbitration award based on a manifest disregard of the law. Air Line Pilots Ass'n Intern. v. Trans States Airlines, LLC, 638 F.3d 572, 578-79 (8th Cir. 2011) (finding the Supreme Court eliminated judicially created vacatur standards under the FAA, and finding an arbitral award may be vacated only for the reasons enumerated in the FAA) (citing Hall Street Assoc., LLC v. Mattel, Inc., 552 U.S. 576, 586-87 (2008)).

IT IS HEREBY ORDERED that Plaintiff's Motion to Vacate the Arbitration Award [Doc. No. 42] is **DENIED**. This matter is hereby dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: April 26, 2021

s/Michael J. Davis

Michael J. Davis

United States District Court

AMERICAN ARBITRATION ASSOCIATION

Case Number: 01-19-0001-0069

Yufan Zhang,

Claimant,

v. **Award and Memorandum**

UnitedHealth Group Inc. and
Sujatha Duraimanickam,

Respondents

Award of Arbitration

1, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties and dated January 12, 2015, and having been duly sworn and having duly heard the proofs and allegations at the hearings held on August 4-5, 2020 and August 1829, 2020, hereby AWARD as follows:

JUDGMENT IS RENDERED IN FAVOR OF RESPONDENTS ON ALL CLAIMS IN THIS ARBITRATION.

The administrative fees of the AAA totaling $2,950.00 are to be borne by the Respondent UnitedHealth Group. The compensation and expenses of the arbitrator totaling $33,810.00 are to be borne by the Respondent UnitedHealth Group. This award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are expressly denied.

Dated: October 5, 2020

Hon. Jeffrey J. Keyes (ret.)
Arbitrator

Memorandum

The arbitration agreement entered into by the parties provides that "the arbitrator shall issue an opinion in writing, which shall set forth in summary form the reasons for the arbitrator's determination."

I. Age Discrimination

Respondents' decision to terminate Claimant's employment was based on legitimate, nondiscriminatory reasons. Respondents showed that Claimant was not meeting performance expectations. Claimant failed to demonstrate that Respondents' explanation that Claimant was terminated because of poor performance was merely a pretext for age discrimination. Claimant did not show that, but for age discrimination, he would not have been terminated or that his age actually motivated Respondents' decision. Thus, his claims under the ADEA and the MHRA fail.

Claimant began working as a Senior Java Developer in January 2015 in Respondent's Software Development and Support Services division within Optum Technology. He worked on a team of software developers who were responsible for developing business solutions by creating or modifying software applications. Claimant contends that, motivated by age bias, Sujatha Duraimanickam, team manager, targeted him for close scrutiny, unfair criticism, and deliberately set him up for failure. Claimant says that Duraimanickam created an inaccurate and misleading record of his performance in order to build a case against him and to ultimately terminate his employment. And that Duraimanickam denied him

the necessary resources and leeway to perform his job while favoring younger co-workers.

However, the record in this case shows that there were numerous instances of poor performance on Claimant's part that led to Claimant's co-workers having to expend significant time correcting his mistakes and redoing assigned tasks. The documented performance problems included: missing deadlines; failing to complete tasks thus causing delays and rework; failing to demonstrate an understanding of the requirements of team projects; working on irrelevant tasks; and failing to communicate with other team members. Although Claimant contends that in each of these instances he was not at fault, there was sufficient evidence to support Duraimanickam's critique of Claimant's performance as fair and not simply a pretext for age discrimination. This evidence included not only Duraimanickam's evaluation of Claimant's poor performance but also the evaluations of his co-workers, including lead developer Sean Woods who described how Claimant's delays and mistakes adversely affected the whole team.

Throughout the period from when she took over management of the team in March 2016 until Claimant's termination in November 2016, Duraimanickam spent a great deal of time in one-on-one meetings with Claimant, coaching him on how to improve his performance. Claimant had ample notice of the deficiencies in his performance and opportunity to improve, not only through his one-on-one meetings with Duraimanickam, but also through the formal thirty day improvement plan that went into effect on September 19, 2016, and the final thirty day plan that

went into effect on October 24, 2016. However, Duraimanickam showed that the performance problems continued through to his termination in November 2016.

Claimant claims that Duraimanickam made comments to him that old people brought less value to the organization, that young people learned faster, and that Optum might not be a good place to work for a person his age. However, Duraimanickam denies making these statements, and the other witnesses who worked with Claimant denied ever hearing Duraimanickam speak in such a way. Claimant says that he took handwritten notes at the one-on-one meetings with Duraimanickam and that these cotemporaneous notes prove that Duraimanickam made these comments about age. But Claimant's typed compilation of notes does not constitute reliable evidence supporting the claim. It was not clear when Claimant created the compilation of notes, and he did not come forward with the original documents that he relied upon in compiling the notes to prove that he recorded the content of the compilation at or near the time when Duraimanickam allegedly made the comments. Claimant's allegation that Duraimanickam made the comments that showed a bias against older workers is simply not enough to overcome the well documented record of poor performance that caused Claimant's termination.

The issue here is not whether there was cause to terminate Claimant who was an at-will employee. Rather, the issue is whether Claimant has proven that intentional age discrimination was the cause of his termination. What matters is that Claimant's poor performance in his job was the true reason for the

termination even if the decision to terminate Claimant was unwise, unfair, or based on mistakes of fact. Dorsey v. Pinnacle Automation Co., 278 F.3d 830, 837 (8th Cir. 2002) ("The threshold question when considering pretext is whether [the employer's] reasons for its employment actions are true, not if they are wise, fair or correct, Claimant's claims under the ADEA and MHRA fail because he did not prove that age discrimination was the cause of his termination.

II. Defamation

Claimant claims that Duraimanickam defamed him by stating in the Corrective Action Form for the thirty-day Corrective Action Plan, which commenced on October 24, 2016, that Claimant was unable to demonstrate all the competency skills necessary to perform his job independently and timely in a consistent fashion. Claimant contends that Duraimanickam communicated this allegedly false statement to UnitedHealth Group's Human Resources Department.

The statement that Claimant was not meeting the performance requirements of his position was made as part of a performance review and thus subject to a qualified privilege and cannot lead to liability absent a finding of malice. *Stuempges v. Parke, Davis & Co.*, 297 N.W. 2d 252,256 (Minn. 1980); Bol v. Cole, 561 N.W.2d 143, 149 (Minn. 1997) ("Statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory"); *Kletschka v. Abbott-Northwestern Hosp.*, 417 NW 2d

752, 755 (Minn. Ct. App. 1988) (statement in performance review privileged).

Claimant argues that because the evidence showed that Respondents' putative reasons for Claimant's termination were a pretext for age discrimination, this proved actual malice or improper motive, thus precluding the claim of qualified privilege for the statements about Claimant's performance. However, as described above, I have found that Claimant failed to prove that the reasons proffered by Respondents for Claimant's termination relating to his poor performance were a pretext for age discrimination. Claimant failed to show that his termination was motivated by age discrimination. Thus, there was no showing of actual malice or improper motive to overcome the qualified privilege afforded to Duraimanickam's statements in the performance reviews.

Claimant also argues that even if age discrimination was not the impetus for his termination, Duraimanickam was acting in bad faith by building a file with false statements about Claimant's performance to justify his termination. However, the evidence in this case showed that there were reasonable grounds to support the statements made by Duraimanickam about Claimant's performance deficiencies. Thus, there was no showing of ill will, improper motive, or malice to overcome the qualified privilege. I find in Respondents' favor on the defamation claim.

Date: 10/5/20 .

Hon. Jeffrey J. Keyes (ret.)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-2056

Yufan Zhang

Appellant

v.

UnitedHealth Group and Sujatha Duraimanickam

Appellees

Appeal from U.S. District Court for the District of Minnesota (0:18-cv-01454-MJD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

February 15, 2022

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE SUPREME COURT OF THE UNITED STATES

No. 22____

YUFAN ZHANG

Petitioner,

v.

UNITEDHEALTH GROUP, AND

SUJATHA DURAIMANICKAM

Respondents

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8443 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 08, 2022

/s/ Yufan Zhang

Yufan Zhang (Petitioner Pro Se)

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