CAUSE NO. 2018-27762

STEFANI BAMBACE	§	**IN THE DISTRICT COURT OF**
Plaintiff(s),	§	
vs.	§	
	§	**HARRIS COUNTY, TEXAS**
BERRY Y&V FABRICATORS, LLC	§	
Defendant(s),	§	
	§	**234TH JUDICIAL DISTRICT**

ORDER ON DEFENDANT'S PLEA IN ABATEMENT AND MOTION TO COMPEL CONTRACTUALLY AGREED ADR

Pending before this Court is Plaintiff's request for re-hearing and reconsideration of the Court's September 17, 2018 Order compelling this matter to arbitration. For the reasons stated herein, the Court's September 17, 2018 Order is VACATED, Defendant's Plea in Abatement and Motion to Compel Arbitration is DENIED, and the abatement in this matter is LIFTED.

I. Background

On November 16, 2016, Plaintiff Stefani Bambace executed a contract with Defendant Berry Y&V Fabricators, LLC that included an arbitration provision (the "Agreement"). The Agreement provided that "all disputes, claims, damages, injuries, losses, and causes of action" would be submitted to binding arbitration and applied to all situations including "[c]laims of discrimination or harassment." According to Plaintiff's Petition, she worked in a sexually charged and hostile work environment, including being subjected to sexually explicit images from her employer, sexual advances, and groping. On June 26, 2017, Bambace complained to Human Resources about the harassment. Three weeks later, she was terminated.

On April 25, 2018, Bambace filed suit in this Court, alleging a violation of Chapter 21 of the Texas Labor Code. Specifically, Plaintiff alleges that the Defendant intentionally engaged in

unlawful sexual harassment, discrimination, and retaliation. Bambace also seeks a declaratory judgment pursuant to Section 37.004 of the Texas Civil Practice and Remedies Code that the Agreement is void based on public policy and therefore not subject to arbitration.

Defendant filed a Plea in Abatement and Motion to Compel Arbitration on June 15, 2018. This Court, through its prior judge, granted relief on September 17, 2018. Bambace filed a petition seeking mandamus relief, which was denied by the Fourteenth Court of Appeals. The Fourteenth Court of Appeals, however, issued its En Banc Order on February 8, 2019, which allowed Bambace to present her opposition to the Court's September 17, 2018 order on re-hearing. The Court has considered the pleadings, evidence, supplemental briefing, and arguments of counsel.

II. Discussion

A party may revoke an arbitration agreement on a ground that exists at law or in equity for the revocation of a contract. TEX. CIV. PRAC. & REM. CODE ANN. §171.001(b) (Vernon 2005). A contract with provisions that are against public policy is unenforceable. *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex. App.—Dallas 1986, no writ). "As a general rule, parties in Texas may contract as they wish so long as the agreement reached does not violate positive law or offend public policy." *Phila. Indemnity Ins. Co. v. White*, 490 S.W.3d 468, 475 (Tex. 2016). The appropriate test when considering whether a contract violates public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury." *City of The Colony v. N. Texas Mun. Water Dist.*, 272 S.W.3d 699, 730 (Tex. App.—Fort Worth 2008, no pet.) citing *Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 210 (Tex.App.—Houston [14th Dist.] 2006, no pet.). Furthermore, while "it is by now axiomatic that legislative enactments generally establish

public policy," such enactments are not the sole determiners of public policy. *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W. 3d 494, 504 (Tex. 2015).

III. Analysis

With that foundation, the Court confronts the question – does the Agreement, which requires Plaintiff to litigate sexual harassment claims in confidential and binding arbitration, violate public policy? Does the Agreement injure the public good? This Court believes that it does.

A competent and productive workforce serves the public good. Chapter 21 of the Texas Labor Code describes its purposes, in part, to "preserve the public safety, health, and general welfare" and "promote the interests, rights, and privileges of persons in this state." TEX. LAB. CODE §21.001(7)&(8). Sexual harassment in the workplace undermines these purposes and subjects victims to negative consequences, including the tension between reporting the harassment and risk losing their job. Employer-mandated confidential arbitration agreements exacerbate this tension by further forcing victims into silence.

While Congress and the Texas legislature have yet to pass legislation specifically addressing this harm, fifty-six attorneys general (including Texas' own, Ken Paxton) signed an open letter to Congress calling for an end to forced arbitration in sexual harassment cases (Plaintiff's Supp. Brief, Ex. B). Their letter specifically raises the public policy concerns presented by mandatory arbitration:

> "Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and settlements confidential. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims."

As chief legal officers of their respective states, the attorneys general "serve as counselors to state government agencies and legislatures, and as representatives of the public interest."[1] Therefore, while the legislature has not yet codified such a prohibition, this Court believes that the mandatory arbitration provision in the Agreement for sexual harassment claims violates public policy and is therefore void and unenforceable.

Furthermore, this Court is unpersuaded by Defendant's argument that, even if the provision requiring arbitration for harassment claims is void, then the Court shall enforce the remainder of the Agreement that would allow the *arbitrator* to determine if the sexual harassment claim is subject to arbitration. This is illogical. Either the Agreement requiring arbitration of sexual harassment claims is against public policy or it is not. This Court holds that it is.

IV. Conclusion

Accordingly, the September 17, 2018 order abating the case and compelling the parties to arbitration is VACATED and Defendant's Plea in Abatement and Motion to Compel Arbitration is DENIED.

It is so ORDERED.

Signed March 8, 2019

LAUREN REEDER
Judge, 234th District Court

[1] National Association of Attorneys General - https://www.naag.org/naag/about_naag.php