

FILED
COURT OF APPEALS
DIVISION II

09 FEB -4 PM 12: 29

No. 38110-9-II

STATE OF WASHINGTON
BY *W*
DEPUTY

**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

GREG DAVIS,

Appellant,

v.

GENERAL DYNAMICS LAND SYSTEMS, ET AL.,

Respondents.

BRIEF OF RESPONDENTS

Bruce Michael Cross, WSBA No. 356
BCross@perkinscoie.com
Maralee M. Downey, WSBA No. 38239
MDowney@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Respondents

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. RESPONSE TO DAVIS'S ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	3
A. FACTS OF THE CASE.....	3
B. PROCEDURAL BACKGROUND	5
IV. ARGUMENT.....	7
A. STANDARD OF REVIEW.....	7
B. THERE IS A STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION	8
C. DAVIS ADMITS THAT THE ARBITRATION AGREEMENT IN THE DISPUTE RESOLUTION PROCESS IS VALID	10
D. DAVIS'S CLAIMS ARE COVERED BY THE DISPUTE RESOLUTION PROCESS	11
E. DAVIS EXPRESSLY AGREED THAT QUESTIONS OF ARBITRABILITY MUST ALSO BE ARBITRATED	16
V. CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
<u>Adler v. Fred Lind Manor</u> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	10, 11
<u>AT&T Techs., Inc. v. Commcn's Workers of Am.</u> , 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986).....	17
<u>Bailey v. State</u> , 147 Wn. App. 251, 191 P.3d 1285 (2008).....	7
<u>Chiron Corp. v. Ortho Diagnostic Sys., Inc.</u> , 207 F.3d 1126 (9th Cir. 2000).....	9
<u>EEOC v. Luce, Forward, Hamilton & Scripps</u> , 345 F.3d 742 (9th Cir. 2003).....	10
<u>Inlandboatmens Union of Pac. v. Dutra Group</u> , 279 F.3d 1075 (9th Cir. 2002).....	7
<u>Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.</u> , 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).....	10
<u>Mount Adams Sch. Dist. v. Cook</u> , 150 Wn.2d 716, 81 P.3d 111 (2003)	17, 18, 19
<u>Peninsula School District No. 401 v. Public School Employees of Peninsula</u> , 130 Wn.2d 401, 924 P.2d 13 (1996).....	13
<u>Preston v. Ferrer</u> , ___ U.S. ___, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008)	8, 9
<u>Rodriguez v. Windermere Real Estate/Wall St., Inc.</u> , 142 Wn. App. 833, 175 P.3d 604, <u>review denied</u> , 164 Wn.2d 1017 (2008).....	9, 10
<u>Sheehan v. Cent. Puget Sound Reg'l Transit Auth.</u> , 155 Wn.2d 790, 123 P.3d 88 (2005)	8
<u>Shields v. Morgan Fin., Inc.</u> , 130 Wn. App. 750, 125 P.3d 164 (2005)	8
<u>Zuver v. Airtouch Commcn's, Inc.</u> , 153 Wn.2d 293, 103 P.3d 753 (2004)	10, 13

TABLE OF AUTHORITIES
(continued)

	Page
Statutes	
9 U.S.C. § 4	8
Regulations and Rules	
Civil Rule 12.....	6, 7
Civil Rule 12(b).....	7
Civil Rule 12(b)(1)	7
Civil Rule 12(b)(6)	7
Civil Rule 56.....	6, 7
Civil Rule 56(f).....	6, 7
Rule of Appellate Procedure 2.5(a)	18
Rule of Appellate Procedure 9.12.....	18

I. INTRODUCTION

Greg Davis commenced this action in Pierce County Superior Court alleging that his employer General Dynamics Land Systems ("GDLS" or the "Company") and two GDLS employees, Ken Sharkey and Jeff Taylor (GDLS, Sharkey, and Taylor collectively, "Respondents"), discriminated against him and mistreated him while he was working as a contractor for GDLS in Auburn, Washington. However, when Davis was hired by GDLS, he agreed to arbitrate all claims he may have against GDLS and its employees. For that reason, Superior Court Judge Katherine Stolz dismissed his claims for failure to exhaust his administrative remedies. Davis appeals that dismissal.

All material facts are undisputed. The parties agree that

- Davis worked as a contractor for GDLS from October 10, 2005 to April 10, 2006;
- He was hired by GDLS on April 10, 2006;
- On April 10, 2006, when he became a GDLS employee, Davis signed an agreement to submit all "covered claims" to the Company's Dispute Resolution Process – a process that ends with final and binding arbitration; and
- Davis remains employed by GDLS.

The parties disagree over whether the claims in Davis's amended complaint are "covered claims" for which the Dispute Resolution Process is the sole and exclusive avenue for resolution.

Respondents maintain, and Judge Stolz found, that once Davis agreed to the Dispute Resolution Process, he agreed to submit *all claims* that he may have against GDLS and its employees to that process, regardless of when the claims arose. Davis contends that, because his amended complaint is limited to his time as a contractor, the Dispute Resolution Process does not apply. Thus, at a minimum, there is a dispute as to the *scope* of the arbitration agreement, which raises a question of arbitrability. The parties have clearly and unmistakably agreed that questions of arbitrability are for the arbitrator to decide. Therefore, even if the Court finds that Davis has raised a question as to the scope of the arbitration agreement, a court of law is not the proper forum for resolving that issue. Under the parties' agreement, that issue must be resolved by the arbitrator. Therefore, Judge Stolz's order dismissing Davis's claims should be affirmed.

II. RESPONSE TO DAVIS'S ASSIGNMENTS OF ERROR

Davis assigns error to the trial court's decision to dismiss his claims for failure to exhaust his administrative remedies. Respondents reframe the corresponding issues for review as follows:

- (1) Was the trial court correct in concluding that Davis agreed to utilize GDLS's Dispute Resolution Process, a process that ends in final and binding arbitration, to resolve all disputes against GDLS and its employees?
- (2) Was the trial court correct in concluding that questions concerning arbitrability are covered by the Dispute Resolution Process and must also be arbitrated?

III. STATEMENT OF THE CASE

A. FACTS OF THE CASE

Davis began working at GDLS's Auburn warehouse on October 10, 2005, as a contractor. CP 37. He applied for a job as a regular GDLS employee on March 20, 2006, and he was hired by GDLS on April 10, 2006. CP 37-38. He is still employed by GDLS. CP 38.

When he was hired, Davis signed an agreement to submit all claims that he may have against GDLS and its employees to GDLS's Dispute Resolution Process – a process that ends with final and binding arbitration. CP 41-42 (Davis's agreement to the Dispute Resolution Process, which he signed on April 10, 2006), 43-65 (GDLS's dispute resolution handbook that describes the Dispute Resolution Process). The Introduction to the Dispute Resolution Process states, in part, "This process applies to those employees who believe they have been treated unfairly or in an unlawful manner." CP 48. In addition, Section 4.1.3 of the Dispute Resolution Process states:

The Arbitration Process extends to all employment related legal claims or theories . . . between an employee and the Company including but not limited to discrimination, retaliation, violation of public policy, tort claims, contract claims, and specifically any claims that could be made under any State or Federal Civil Rights Laws . . . or any other employment related statute or legal theory.

CP 53 (§ 4.1.3). Finally, Section 4.9.1 of the Dispute Resolution Process states:

This Arbitration Process is intended to be the sole and exclusive forum and remedy for all claims that are within its scope Exhaustion of this Arbitration Process is Mandatory.

CP 58 (§ 4.9.1).

Instead of utilizing the Dispute Resolution Process as he agreed to do, Davis commenced the present action on December 18, 2007. CP 1-7. In response, Respondents asked him to voluntarily dismiss his claims and proceed under the Dispute Resolution Process. CP 19-20. Davis declined and sought to evade the Dispute Resolution Process by filing an amended complaint. CP 8-13. Davis's amended complaint is purportedly limited to the time he worked as a contractor for GDLS, yet it contains various allegations of race discrimination, hostile work environment, disparate treatment, disparate impact, unlawful retaliation, negligent retention, negligent supervision, and negligent (and/or intentional) infliction of emotional distress. CP 8-13.

Davis contends that his amended claims are not subject to arbitration under the Dispute Resolution Process because he limited them to events that allegedly occurred when he worked as a contractor for GDLS, before he applied to become a GDLS employee. Respondents disagree. Once Davis became an employee and agreed to the Dispute Resolution Process, all his covered claims are subject to that process – no matter when they arose. For legally protected rights such as those asserted in his amended complaint, Davis agreed that arbitration under the Dispute Resolution Process is his exclusive external remedy. CP 38-39, 49 ("Arbitration is the exclusive external remedy for employees and the Company to resolve their disputes based on certain legally protected rights.").

At a very minimum, Davis's contention raises a question of arbitrability: an issue that the parties clearly and unmistakably agreed is itself to be submitted to arbitration. CP 53. Therefore, arbitration is the sole and exclusive forum for Davis's claims.

B. PROCEDURAL BACKGROUND

Davis's original complaint, filed on December 18, 2007, claimed that he had been discriminated against based on his race in violation of Washington law. CP 1-7. On January 22, 2008, Respondents asked Davis to voluntarily dismiss his lawsuit and proceed under GDLS's Dispute

Resolution Policy. CP 19-20. Davis responded on January 25, 2008, by filing an amended complaint. CP 8-13. In his amended complaint, Davis limited his allegations of discrimination to the period of time when he worked as an independent contractor at GDLS's Auburn, Washington facility. Id.

Respondents filed a motion to dismiss on February 7, 2008. Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies, CP [--]-[--].¹ Because the motion included evidence outside the complaint, Respondents treated it as a motion for summary judgment, in accordance with Civil Rules ("CR") 12 and 56, noting it for March 7, 2008: 28 days after filing. Note for Motion Docket, CP [--]-[--]. In response, Davis filed a motion for a CR 56(f) continuance to allow him to conduct additional discovery. Plaintiff's Motion and Declaration of Thaddeus P. Martin for CR 56(f) Continuance of Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies, CP [--]-[--]. On February 29, 2008, the trial court granted Davis's motion and entered an

¹ Respondents have filed a Supplemental Designation of Clerk's Papers with the Pierce County Superior Court and the Washington State Court of Appeals, Division Two. Respondents are supplementing the Clerk's Papers to include (1) Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies (filed on February 7, 2008); (2) Note for Motion Docket (filed on February 7, 2008); (3) Plaintiff's Motion and Declaration of Thaddeus P. Martin for CR 56(f) Continuance of Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies (filed on February 20, 2008); (4) Order Granting Plaintiff's Motion for a CR 56(f) Continuance of Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies (entered on February 29, 2008); and (5) Note for Motion Docket (filed on June 10, 2008).

order allowing him 90 days to conduct additional discovery on any and all matters related to his lawsuit. Order Granting Plaintiff's Motion for a CR 56(f) Continuance of Defendants' Motion to Dismiss for Failure to Exhaust Administrative Remedies, CP [--]-[--]. After giving Davis over 100 days to conduct additional discovery, Respondents filed their renewed motion to dismiss on June 13, 2008. CP 66-75. As with their initial motion, Respondents noted their renewed motion in accordance with the 28-day schedule required by CR 56. Note for Motion Docket, CP [--]-[--]. Following oral argument, Judge Stolz granted Respondents' motion on July 11, 2008. CP 315-16. Davis filed a notice of appeal on July 29, 2008. CP 318-23.

IV. ARGUMENT

A. STANDARD OF REVIEW

Davis appeals the trial court's order granting Respondents' motion to dismiss for failure to exhaust his administrative remedies. "[A] motion to dismiss for a failure to exhaust non-judicial remedies is properly considered a 'non-enumerated' Rule 12(b) motion." Inlandboatmens Union of Pac. v. Dutra Group, 279 F.3d 1075, 1078 n.2 (9th Cir. 2002).²

² Davis's procedural arguments (Brief of Appellant 20-23) are misplaced. In the first two sections of his argument, Davis provides a host of legal standards governing motions to dismiss pursuant to CR 12(b)(6) and 12(b)(1), but Respondents did not bring a motion under either of these subsections. Davis also argues that, in deciding the motion, the Court should review nothing outside the complaint. However, as he acknowledged in section three of his argument, if on a motion to dismiss "matters outside the pleading are

Pursuant to CR 12(b), when a court considers matters outside the pleadings in connection with a motion to dismiss, the motion will be treated as a motion for summary judgment under CR 56. CR 12(b); Inlandboatmens, 279 F.3d at 1083; Bailey v. State, 147 Wn. App. 251, 191 P.3d 1285, 1289 (2008).

On appeal of an order granting summary judgment, the standard of review is de novo, with the appellate court performing the same inquiry as the trial court. Shields v. Morgan Fin., Inc., 130 Wn. App. 750, 755, 125 P.3d 164 (2005). Summary judgment is appropriate "if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." Sheehan v. Cent. Puget Sound Reg'l Transit Auth., 155 Wn.2d 790, 797, 123 P.3d 88 (2005).

B. THERE IS A STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION

As Davis concedes in his opening brief, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, establishes a strong national policy favoring

presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." Brief of Appellant 23 (quoting CR 12(b)). Both Respondents' initial and renewed motions to dismiss were noted in accordance with the 28-day schedule required by CR 12 and 56. Through his CR 56(f) motion for continuance, Davis received additional time to conduct discovery before responding. Indeed, he submitted evidence outside his complaint in opposition to the motion. [CITE]. In short, he had ample "opportunity to present all material made pertinent to [Respondents'] motion by rule 56." CR 12(b). Accordingly, the facts and arguments in Respondents' motion to dismiss were properly before the court below and are properly before the Court here.

arbitration. Preston v. Ferrer, ___ U.S. ___, 128 S. Ct. 978, 981, 169 L. Ed. 2d 917 (2008); Brief of Appellant 25-27. In Preston, the U.S. Supreme Court explained that the FAA represents a congressional mandate and "calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." 128 S. Ct. at 981. The public policy in favor of arbitration is largely grounded in the desire to achieve "streamlined proceedings and expeditious results," thereby reducing the costs (time and dollars) of dispute resolution for all parties. Id. at 986 (internal quotation marks and citation omitted). See also Rodriguez v. Windermere Real Estate/Wall St., Inc., 142 Wn. App. 833, 841, 175 P.3d 604 ("Arbitration serves as a beneficial alternative to litigation that can provide a more expeditious and less expensive resolution of disputes."), review denied, 164 Wn.2d 1017 (2008).³ The FAA reflects Congress's intent "to move the parties to an arbitrable dispute out of court and into arbitration *as quickly and easily as possible.*" Preston, 128 S. Ct. at 980 (emphasis added) (internal quotation marks and citation omitted). Here, the parties have expressly agreed that the

³ Although saving a significant amount of time and money, the parties agreeing to arbitration retain all their substantive rights. Preston, 128 S. Ct. at 987 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum.") (internal quotation marks and citation omitted).

arbitration process "*shall be governed* by the Federal Arbitration Act, 9 U.S.C. §1 et. seq." CP 58 (§ 4.8.4) (emphasis added).

By its terms, the FAA "leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (internal quotation marks and citation omitted).

The national public policy in favor of arbitration has been expressly embraced by Washington courts. Zuver v. Airtouch Commcn's, Inc., 153 Wn.2d 293, 301 n.2, 103 P.3d 753 (2004) ("Washington State also has a strong public policy favoring arbitration of disputes."). See also Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004); Rodriguez, 142 Wn. App. at 836, 841 ("Strong public policy favors arbitration" and Washington law favors arbitration." In discharging its duties under the FAA, a Washington court "*must indulge every presumption 'in favor of arbitration.'*" Adler, 153 Wn.2d at 342 (emphasis added) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983))). The FAA's presumption in favor of arbitrability applies with equal force to arbitration agreements entered into as a condition of employment. See id. at 364-65

(Madsen, J., concurring) (citing EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003)).

C. DAVIS ADMITS THAT THE ARBITRATION AGREEMENT IN THE DISPUTE RESOLUTION PROCESS IS VALID

Washington courts enforce arbitration agreements, subject only to well-recognized contract defenses such as fraud, duress, and unconscionability. Zuver, 153 Wn.2d at 301. None of these defenses are present here. Far from contesting the validity of the arbitration agreement, Davis concedes that "[t]he [a]rbitration [c]lause [h]ere [i]s [v]alid." Brief of Appellant 29. Rightly so, as the agreement between Davis and GDLS consists of only evenhanded bilateral terms and mutual obligations, with GDLS going so far as agreeing to pay all of the arbitrator's expenses and compensation.⁴ CP 55-56 (§ 4.4).

D. DAVIS'S CLAIMS ARE COVERED BY THE DISPUTE RESOLUTION PROCESS

Davis is an employee of GDLS. CP 37-38. Upon becoming an employee in April 2006, he signed an agreement whereby he promised to resolve all claims against GDLS and its employees – including claims for "*discrimination, retaliation, violation of public policy, tort claims,*

⁴ Nevertheless, in an attempt to discredit GDLS, Davis cites Adler for the proposition that "if GDLS did not agree to pay the arbitrator's expenses and compensation, the arbitration provision would most likely be unconscionable." Brief of Appellant 29, n.7. Adler does not stand for that proposition. Rather, Adler holds only that fee-splitting provisions *may* be unconscionable where the party seeking to avoid arbitration provides *evidence* that the fees would *effectively prohibit* him from bringing his claims. 153 Wn.2d at 353-54.

contract claims, and specifically any claims that could be made under any State or Federal Civil Rights Laws" – via GDLS's Dispute Resolution Process. CP 38. The claims alleged in Davis's lawsuit are expressly covered by this language.

Davis attempts to avoid this conclusion by arguing that the Dispute Resolution Process does not apply because the claims in his lawsuit are limited to the time he worked as a contractor, before he became a regular GDLS employee and before he signed the arbitration agreement. That timing, however, is irrelevant. Once he became a GDLS employee and agreed to utilize the Dispute Resolution Process, all claims that he had against the Company and its employees were covered, including those that arose before he signed the agreement.

GDLS Human Resources Manager Susan Williams confirmed that the Dispute Resolution Process applies to *all employees* who believe they have been treated unfairly or in an unlawful manner, and it extends to *all claims* that an employee may have against GDLS and its employees, regardless of when the claims arose. CP 38, 306 ("[The Dispute Resolution Process] would also include any pending claims . . . if he had directly against General Dynamics. So any pending claims prior to becoming an employee, once he becomes an employee, General Dynamics inherits those complaints . . . through our DRP process"). Because Davis

is an employee of GDLS and he alleges that GDLS and its employees unlawfully harassed him and discriminated against him during the time he worked as a contractor at GDLS's Auburn facility, his claims are expressly included in the claims "covered" by the Dispute Resolution Process.

Davis further argues that his claims do not arise out of "the employment relationship" referenced in § 4.1.1 of the Dispute Resolution Process. Section 4.1.1 states in pertinent part:

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, including the arbitrability of any controversy, dispute or claim, between an employee not represented by a labor union and the Company which arises out of or relates to the employment relationship and which is based on a legally protected right.

CP 53. Davis relies on this language to argue that his claims are not subject to the Dispute Resolution Process because they arose before he became a regular GDLS employee. This argument is simply insufficient to overcome the strong presumption in favor of arbitrability. In Peninsula School District No. 401 v. Public School Employees of Peninsula, the Washington Supreme Court held that arbitration can be denied only when

it may be said with positive assurance the arbitration clause is not susceptible of *an* interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. . . . There is a strong presumption in favor of arbitrability; all questions upon which the parties disagree are presumed to be within the arbitration

provisions unless negated expressly or by clear implication.

130 Wn.2d 401, 413-14, 924 P.2d 13 (1996) (internal quotation marks and citation omitted). Similarly, in Zuver, the court reaffirmed that Washington courts "*must indulge every presumption in favor of arbitration*, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." 153 Wn.2d at 301 (emphasis added) (internal quotation marks and citation omitted).

When read in light of this strong presumption of arbitrability, Davis's claims *are* encompassed within the language of Section 4.1.1 because they are clearly based on legally protected rights and because they arise out of or relate to the employment relationship. Although "employment relationship" is not expressly defined in the dispute resolution handbook, it is undisputed that Davis is now an employee of GDLS and that he was working for GDLS as a contractor when his claims arose, which relationship is a type of employment relationship. Moreover, the Dispute Resolution Process expressly extends to "all employment related legal claims or theories . . . including, but not limited to discrimination, retaliation, violation of public policy, tort claims, contract claims, and specifically any claims that could be made under any State or

Federal Civil Rights Laws[.]” CP 53 (§ 4.1.3). At the very least, Davis's claims easily come within the category of covered "employment-related" legal claims or theories. CP 8-13.

That the Dispute Resolution Process encompass Davis's claims is reinforced by the complete absence of any language even suggesting that claims that arose before Davis became a direct GDLS employee are excluded. Indeed, the language of the Dispute Resolution Process makes it clear that the process is *not* limited to claims that arise after Davis signed the agreement. CP 44-65. For example, in the Introduction to the Dispute Resolution Process, the term "employee" is defined to include applicants and, therefore, to expressly include claims that arise before formal employment starts. CP 48. Moreover, there are no temporal limitations in the Dispute Resolution Process restricting covered claims to those arising only after an individual signs the arbitration agreement. To the contrary, much of the key language applies to *all* claims brought by an employee against the Company, regardless of when they arose. See, e.g., CP 48 ("this process applies to those employees who believe they have been treated unfairly or in an unlawful manner" – no temporal limitation), 49 ("Arbitration is the exclusive external remedy for employees and the Company to resolve their disputes based on certain legally protected rights" – no temporal limitation).

Furthermore, as Davis repeatedly points out in his opening brief, the Dispute Resolution Process clearly states that it applies to *employees* and it is the *only* appropriate process for employees to resolve legal disputes with the Company.⁵ *Davis is a GDLS employee.* If Davis were still a contractor who had not signed the dispute resolution agreement, the matter would be different. But the simple fact is that he is *not* a contractor and he *did* sign the arbitration agreement. When he signed the arbitration agreement, Davis agreed to submit all claims he may have against GDLS and its employees to the Dispute Resolution Process, and arbitration is the exclusive external remedy for them. That agreement must be enforced.

E. DAVIS EXPRESSLY AGREED THAT QUESTIONS OF ARBITRABILITY MUST ALSO BE ARBITRATED

As explained above, Respondents maintain Davis has agreed that arbitration is the exclusive external remedy for his claims against GDLS and its employees. Davis contends that the agreement applies only to claims that arose after he became an employee, not when he was a contractor. This dispute raises a question of "arbitrability," i.e., a question

⁵ See, e.g., Brief of Appellant 6-7 (quoting GDLS dispute resolution handbook – GDLS "has always encouraged the resolution of *employee* disputes and legal claims . . . Employees have had the option to redress major employment and termination issues," the dispute resolution handbook is "an essential element of *your employment relationship* and compliance with it is *a condition of your employment*," "This process applies to those *employees* who believe they have been treated unfairly or in an unlawful manner," "Arbitration is the exclusive external remedy for *employees* and the Company to resolve their disputes based on certain legally protected rights," "The employee and the Company agree and hereby waive the [sic] any right to [a] jury trial and any claim otherwise covered by the Arbitration Process.").

of whether his claims are ones that must be submitted to the Dispute Resolution Process and ultimately to arbitration. Although questions of arbitrability are normally for the courts to decide, the normal rule does not apply "*where the parties 'clearly and unmistakably provide otherwise.'*" The parties . . . may agree that an arbitrator shall decide the question of whether they agreed to arbitrate a dispute." Mount Adams Sch. Dist. v. Cook, 150 Wn.2d 716, 724, 81 P.3d 111 (2003) (emphasis added) (quoting AT&T Techs., Inc. v. Commcn's Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986)). In such a situation, "the proper judicial inquiry is whether the parties have agreed that an arbitrator should decide that question. When the parties agree by contract to vest an arbitrator with authority to interpret the parties' original intent, the parties are bound by their consent to have the arbitrator fashion an appropriate remedy." Id. (citation omitted).

For example, in Cook, a school district sought a declaratory judgment that the plaintiff's grievance was not arbitrable. Id. at 723. According to the district, the contract at issue applied to only "bargaining unit members" (regular full-time and part-time certified personnel who held valid contracts) and plaintiff was not a member of the unit when he was terminated. Id. at 720-23. Thus, the district argued, plaintiff could not compel arbitration under the contract. Id. at 723. Whether plaintiff

was a bargaining unit member at the time of his termination was a disputed issue. Id. at 726. However, the contract provided in pertinent part: "Upon the Request of either party, the merits of a grievance and the *substantive and procedural arbitrability* issues arising in connection with that grievance may be consolidated for hearing before an arbitrator" Id. at 720. This language constituted "clear and unmistakable" evidence of the parties' agreement that "the question of arbitrability" was for the arbitrator to decide. Id. at 725.

The same conclusion is inescapable here. The agreement between Davis and GDLS likewise contains a "clear and unmistakable" statement of the parties' intent to have the arbitrator decide questions of arbitrability.⁶ The Dispute Resolution Process unequivocally states:

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, *including the arbitrability of any controversy, dispute or claim*

CP 53 (§ 4.1.1) (emphasis added). Just as in Cook, the Dispute Resolution Process *explicitly* states that "arbitrability" is among the issues to be conclusively decided by the arbitrator. And, as in Cook, when Davis and

⁶ In his opening brief, Davis argues for the first time that there are outstanding issues of fact. Brief of Appellant 40, 50. At the trial court level, Davis did not raise or argue this issue and he is, therefore, precluded from raising this argument on appeal. CP 76-95; RAP 2.5(a) (court may refuse to review issues raised for the first time on appeal); RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

GDLS agreed "by contract to vest an arbitrator with *authority to interpret the parties' original intent*, the parties are *bound by their consent* to have the arbitrator fashion an appropriate remedy." 150 Wn.2d at 724 (emphasis added).

Davis attempts to distinguish Cook by stating:

Mount Adams School Dist. v. Cook is simply a case that falls under the narrow exception carved out in AT&T Techs., Inc. v. Communications Workers of Am. Where the parties had "clearly and unmistakably" agreed the issue of arbitrability would be decided by the arbitrator. In AT&T Techs., Inc., v. Communications Workers of Am., the United States Supreme Court simply carried out that narrow exception, applied by the Washington State Supreme Court in Mount Adams School Dist. v. Cook, to the general rule that courts determine the issue of arbitrability.

Brief of Appellant 33-34. Respondents agree that Cook fell within the narrow exception carved out by the U.S. Supreme Court. *So does the present case.* Cook fell within the exception based on contractual language that read, "the substantive and procedural arbitrability issues arising in connection with that grievance *may* be consolidated for hearing before an arbitrator." 150 Wn.2d at 720 (emphasis omitted and added).

The agreement in the present case is even *more* clear and unmistakable:

The Arbitration Process *applies to, and is intended to completely and finally resolve*, any controversy, dispute or claim, *including the arbitrability of any* controversy, dispute or claim

CP 53 (§ 4.1.1) (emphasis added).

Davis's statement that "courts should not assume that the parties agreed to arbitrate arbitrability," Brief of Appellant 36, misses the point. No assumption is required here. The parties clearly and unmistakably agreed that arbitrability is for the arbitrator to decide. CP 53.⁷

Thus, even if the Court were to determine that Davis has raised a question as to the scope of the Dispute Resolution Process, that question itself is a question of arbitrability that must also be submitted to arbitration.

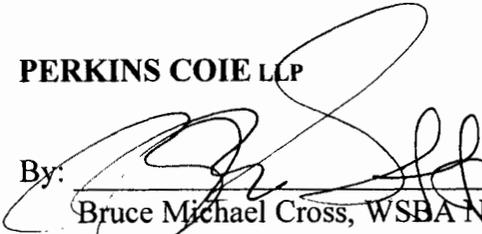
V. CONCLUSION

For the foregoing reasons, the trial court was correct in ruling that arbitration is the sole and exclusive forum for the resolution of Davis's claims. Accordingly, Respondents respectfully request that the Court affirm the Superior Court's dismissal of Davis's claims for failure to exhaust his administrative remedies.

⁷ Davis inexplicably argues that the trial court's order must be reversed because the court did not issue detailed written findings of fact specifically stating that the parties "clearly and unmistakably" agreed that arbitrability was to be decided by the arbitrator. Brief of Appellant 3, 32, 49-50. There are three reasons why this argument has no merit. First, this is a question of law, not a finding of fact. Second, the court was not required to issue detailed written findings of fact and conclusions of law. Third, review on appeal is de novo. Whether or not the trial court determined that the parties clearly and unmistakably agreed, the Court will need to make its own independent determination and that determination will control.

DATED: February 4, 2009

PERKINS COIE LLP

By: 

Bruce Michael Cross, WSBA No. 356

BCross@perkinscoie.com

Maralee M. Downey, WSBA No. 38239

MDowney@perkinscoie.com

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

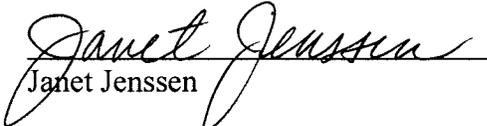
Facsimile: 206.359.9000

Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she caused a copy of the foregoing BRIEF OF RESPONDENTS to be served upon the following counsel of record via messenger, on February 4th, 2009:

Mr. Thaddeus P. Martin
Law Office of Thaddeus P. Martin
Suite 102
4002 Tacoma Mall Blvd.
Tacoma, WA 98409


Janet Jenssen

FILED
COURT OF APPEALS
DIVISION II
09 FEB -4 PM 12:29
STATE OF WASHINGTON
BY 
DEPUTY