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No. 71855-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TRACI TURNER,

Appellant,

v.

VULCAN INC., PAUL ALLEN, JODY ALLEN, RAY COLLIVER, and LAURA MACDONALD,

Respondents and Cross-Appellant.

REPLY BRIEF OF CROSS-APPELLANT VULCAN INC.

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I. INTRODUCTION

In her Responsive Brief, Appellant Traci Turner completely ignores the well-established legal test that governs Vulcan's cross-appeal. Instead, Turner asks this Court to affirm the expansive application of the public policy doctrine employed by the Superior Court when it vacated the Arbitrator's original award of attorneys' fees to Vulcan for successfully compelling arbitration (for a second time). Proper application of the narrow public policy exception, however, along with an appropriate regard for the strong public policy *favoring* arbitration, requires reversal of the Superior Court's order vacating that original fee award.

Under the correct and exacting standard, a court may only vacate an arbitration award on public policy grounds if an explicit, well-defined, and dominant public policy exists, and only then if the policy is one that specifically militates against the relief ordered in the arbitration award. Here, the Arbitrator properly applied a bilateral attorneys' fee provision to award Vulcan its reasonable attorneys' fees for successfully compelling arbitration of Turner's employment-related claims.

The Superior Court vacated that fee award even though no authority bars such an award. In fact, the *only* Washington case addressing the issue presented in Vulcan's cross-appeal upheld the enforceability of a contractual provision permitting a fee award to an

employer for successfully compelling arbitration of statutory claims. The Superior Court improperly distinguished this binding precedent, relying instead upon authority addressing a fundamentally different issue. In doing so, the court committed reversible error.

II. ARGUMENT

A. Turner Completely Ignores the Applicable Legal Test for Vacating an Arbitration Award on Public Policy Grounds

Turner's response to Vulcan's cross-appeal is remarkable for a glaring omission: she entirely ignores the relevant legal test that governs the issue (i.e., the standard that Vulcan respectfully maintains was misapplied by the Superior Court when it vacated the Arbitrator's original fee award as contrary to public policy). Nowhere in her Responsive Brief does Turner identify or discuss that test.[1]

The applicable legal test is well established. "To vacate an arbitration award on public policy grounds, [a court] must '(1) find that an explicit, well defined and dominant public policy exists . . . and (2) [find] that the policy is one that specifically militates against the relief ordered by the arbitrator.'" *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1111 (9th Cir. 2012) (quoting *United Food & Commercial*

[1] Turner's response on the cross-appeal is also remarkable for the number of legal errors and factual mischaracterizations packed into six pages of discussion. *See* discussion *infra* Part II.B; Turner Resp. Br. at 42–47. Indeed, the portion of Turner's Reply Brief directed to issues raised in her appeal also contains numerous misstatements of the law and the record. Consistent with RAP 10.1(c), however, Vulcan limits the scope of this brief to the issues raised in its cross-appeal.

Workers Int'l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 174 (9th Cir. 1995), as amended); *see also E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 67 (2000). Whether the public policy at issue is sufficiently well defined, explicit, and dominant "is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (internal quotation marks omitted). Further, "violation of such a policy must be clearly shown if an award is not to be enforced." *Id.*[2]

The public policy exception is a "rarely-used ground for reversal," *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 825 (2d Cir. 1997), and reflects the narrow judicial review of arbitration awards. *See ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)

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[2] The Federal Arbitration Act ("FAA") applies to this case, as Turner concedes. Turner Opening Br. at 29, 41; *see also Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 (2004) ("The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, applies to all employment contracts except employment contracts of certain transportation workers.") (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001)). The FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)). Although Turner correctly observes that Washington courts applying the state's Uniform Arbitration Act or Revised Uniform Arbitration Act often look to cases interpreting the FAA, that does not mean—as Turner appears to suggest—that this Court is bound by Washington cases misapplying or ignoring United States Supreme Court precedent. *See* Turner Resp. Br. at 3 n.3; *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 62 (2014) ("On matters of federal law, we are bound by the decisions of the United States Supreme Court."). With respect to the public policy exception at issue in Vulcan's cross-appeal, Washington courts have adopted the same legal test as applied by federal courts discussed in this Reply. *See, e.g., Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty.*, 167 Wn.2d 428, 435 (2009).

("[M]aximum deference is owed to the arbitrator's decision. In fact, the standard of review of arbitral awards is among the narrowest known to the law.") (citation and internal quotation marks omitted). The Eleventh Circuit has described the doctrine as follows:

> [E]xamples of arbitration results that so offend public policy that they should be set aside by a court are not readily to be found. This is not surprising. An arbitrator's result may be wrong; it may appear unsupported; it may appear poorly reasoned; it may appear foolish. Yet, it may not be subject to court interference. The offending arbitrator's award which properly results in our setting it aside must be so offensive that one is to be seen only rarely.

Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 670–71 (11th Cir. 1988).[3]

B. No Explicit, Well-Defined, and Dominant Public Policy Bars an Award of Attorneys' Fees to an Employer for Successfully Compelling Arbitration

There is no explicit, well-defined, and dominant public policy that bars a fee award to an employer for successfully compelling arbitration of a dispute that includes statutory employment claims. For that reason, the Superior Court erred in vacating the Arbitrator's original fee award.

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[3] The court held that the case before it presented one of those extremely rare instances justifying vacatur of an award: the panel had ordered reinstatement of a pilot who had been terminated because he had operated a commercial aircraft while drunk. *Delta Air*, 861 F.2d at 666–69. Another court has concluded that even those egregious circumstances are insufficient to satisfy the public policy exception. *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173,* 886 F.2d 1200, 1214 (9th Cir. 1989) (disagreeing with the holding in *Delta Air Lines*).

1. The Original Fee Award Is Fully Consistent with Binding Authority and Cannot Properly Be Deemed Contrary to Public Policy

In this case, the Arbitrator's original fee award compensated Vulcan for a portion of attorneys' fees incurred in connection with its efforts to compel arbitration a *second* time. CP 3103-14, 3117-20 (App. G).[4] The fee award was unrelated to the merits of the claims in arbitration. Indeed, the Arbitrator expressly stated that she was *not* awarding any attorneys' fees to Vulcan for prevailing on the merits of Turner's statutory claims; nor did Vulcan request such an award. CP 3109-12; CP 3118-20; CP 3994–96.

Thus, the question presented to the court below was whether an arbitrator's award of attorneys' fees to an employer that successfully *compels arbitration* of statutory and nonstatutory claims (which are also present in this case), pursuant to a bilateral contractual fee provision, violates public policy. The fee award could only properly be set aside if it violates an explicit, well-defined, and dominant public policy.

The *only* Washington authority addressing the enforceability of a contractual fee provision permitting attorneys' fees to be awarded to a prevailing employer for successfully compelling arbitration is *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293 (2004). There, the

[4] "App." refers to Appendices included with the Answering Brief of Respondents Vulcan, Paul Allen, and Jody Allen, filed on October 15, 2014.

Washington Supreme Court evaluated an attorneys' fee provision in an employment arbitration agreement that required an award of fees to either party for successfully compelling arbitration. *Id.* at 319 & n.19. Noting the bilateral nature of the provision, the Court rejected the employee's argument that the fee provision was substantively unconscionable. *Id.* at 319. Thus, the Court let stand a contractual provision that would require a fee award to an employer in precisely the posture of this case, including the plaintiff's assertion of the same statutory discrimination (WLAD) claims advanced by Turner in this action.

There were only two aspects of *Zuver* that distinguish it from this case: (1) *Zuver* addressed substantive unconscionability rather than the narrow public policy exception, and (2) *Zuver* did not involve the tactical maneuver employed by Turner here, a voluntary nonsuit in an effort to avoid an existing order compelling arbitration and get a second bite at the arbitrability question. If anything, those two differences *favor* the Arbitrator's original fee award. First, the public policy exception to enforcement of arbitration awards likely has a narrower application than substantive unconscionability, as the latter can reach harsh terms without the requirement that those terms be clearly and specifically identified ("well-defined" and "explicit") in state law. Thus, a provision that (per *Zuver*) is *not* substantively unconscionable cannot violate public policy

unless there is an explicit, unambiguous statement to that effect in statute or case law. Second, the protracted, costly, and unjustified effort by Turner—across two different lawsuits—to avoid the effect of her agreement to arbitrate should not be encouraged, as it undermines one of the central purposes of arbitration, which is to "reduc[e] the cost and increas[e] the speed of dispute resolution." *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1749 (2011).

Turner addresses *Zuver* by advancing several spurious arguments. First, Turner contends that the portion of *Zuver* relied upon by Vulcan is dicta. Turner Resp. Br. at 43, 45. She makes no attempt to justify this characterization, which even a cursory review of *Zuver* demonstrates is false. In *Zuver*, the Court evaluated several unconscionability challenges to an arbitration agreement between an employer and employee, including an "attorney fees provision requiring that a party who files a judicial action must pay attorney fees and costs to the opposing party who successfully stays such action and/or compels arbitration." 153 Wn.2d at 319. The Court's conclusion that the provision was not substantively unconscionable determined a question of law necessary to decide the employee's challenge, and thus constitutes a holding, *not* dicta. *See id.*; *see also State v. Potter*, 68 Wn. App. 134, 150 (1992) ("Statements in a

case that do not relate to an issue before the court and are unnecessary to decide the case constitute *obiter dictum,* and need not be followed.").

Second, Turner contends that *Zuver* is not on point because it "dealt with the *speculative* possibility that the provision might be unconscionable if the arbitrator failed to award [attorneys'] fee[s] to Plaintiff." Turner Resp. Br. at 45 (capitalization altered and underlining omitted for readability) (emphasis in original). She continues: "the fee provision in *Zuver* was permissive, using the word 'may', while the clause at issue here is mandatory, using the word 'shall.'" *Id.* (citing *Walters v. A.A.A. Waterproofing, Inc.*, 151 Wn. App. 316, 322-25 (2009)). But Turner has confused two distinct fee provisions that were at issue in *Zuver*. *Compare* 153 Wn.2d at 310-12 (involving a permissive fee provision for success on the merits of the claims), *with id.* at 319 (a mandatory fee provision for successfully compelling arbitration). Thus, the *Zuver* fee provision and holding relevant to this case was *not* permissive; rather, it was an entirely distinct and *mandatory* fee provision for a party successfully compelling arbitration. *Id.* at 319 & n.19. Accordingly, Turner's attempt to distinguish *Zuver* on this basis focuses on the wrong part of the opinion and is therefore completely meritless.

Third, Turner argues that *Zuver* should be disregarded because it "did not even address . . . the chilling effect of a fee provision on an

employee's efforts to vindicate her statutory rights." Turner Resp. Br. at 44. Here again, Turner has grossly mischaracterized *Zuver*. In its analysis of the issue, the Court summarized the plaintiff-employee's argument: "She asserts that this provision is substantively unconscionable because it 'discourage[s] an employee from bringing a discrimination claim,' and in her case, she 'is faced with the prospect of having to pay Respondents' attorney's fees . . . .'" *Zuver*, 153 Wn.2d at 319 (quoting from employee's brief) (alteration in original). Thus, contrary to Turner's characterization, the Court plainly considered—and rejected—the argument that the fee provision should not be enforced based on its purported "chilling effect."

Fourth, Turner repeatedly characterizes Vulcan's argument as relying on "two sentences" of *Zuver*, presumably suggesting that this Court should therefore ignore the opinion. Turner Resp. Br. at 43, 45, 46. But a concise Supreme Court holding is no less binding than a lengthier analysis. If anything, a court's quick rejection of a party's legal position underscores the weakness of the party's argument.

Fifth, and finally, Turner insists that this Court should disregard *Zuver* because it "did not even address public policy" but instead assessed "whether a reciprocal loser-pays provision was substantively unconscionable." Turner's Resp. Br. at 44. Leaving aside Turner's

mischaracterizations and inconsistencies on this issue,[5] the argument is meritless. While substantive unconscionability and the public policy exception are separate legal doctrines, they are, as the Superior Court noted, "closely related." CP 3596. Thus, as noted above, if a provision permitting a fee award to an employer for successfully compelling arbitration of statutory claims is enforceable and *not* substantively unconscionable—as *Zuver* held—that forecloses any reasonable argument that an arbitrator's fee award pursuant to such a provision could violate public policy, at least in the absence of an explicit, unambiguous statement of such a policy in statute or case law. No Washington Supreme Court cases have overruled or even addressed *Zuver*'s holding, and thus it remains binding precedent. *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 379 (2013) ("[U]ntil our precedents are specifically overruled

[5] Turner is hopelessly inconsistent on whether substantive unconscionability and the public policy exception are distinct legal concepts. For example, in response to Vulcan's observation that Judge Heller raised the public policy issue *sua sponte*, Turner claims that she "argued the public policy issue in [a] reply" brief before Judge Heller. Turner Resp. Br. at 42 n.50 (citing CP 3183–84). In fact, Turner had argued that the fee provision was substantively unconscionable. CP 3183–84 (citing *Walters*, 151 Wn. App. at 321–25 (involving substantive unconscionability)). Thus, Turner initially equates substantive unconscionability and the public policy exception for enforcement of arbitration awards. Two pages later, however, she contends that *Zuver* is not relevant because it addressed substantive unconscionability, not the public policy doctrine. *See* Turner Resp. Br. at 44. On the next page, Turner reverts to her original position, claiming that *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 605–06 (2013), held that a fee-shifting provision violated public policy. Turner Resp. Br. at 45. In fact, *Gandee* held that the fee provision was substantively unconscionable. 176 Wn.2d at 605–06.

they remain good law."). As a result, *Zuver* is dispositive of the issue presented in Vulcan's cross-appeal.

2. The Court Below Erred in Distinguishing *Zuver*

In vacating the original fee award, the court below speculated about the current views of the Washington Supreme Court and relied upon cases addressing a fundamentally different issue. The Superior Court did *not* rely on any cases addressing an award of attorneys' fees for successfully compelling arbitration and did *not* contend that *Zuver*'s holding has been overruled. Instead, the Superior Court expressed the view that "[t]here is a *serious question* whether the *Zuver* court's exclusive focus on the bilateral nature of the fee provision [in upholding the provision against an unconscionability challenge] continues to represent the current view of the court." CP 3596 (emphasis added).

Even if the court's speculation were accurate—it is not, as discussed below—an open legal question cannot possibly support the conclusion that the narrow public policy exception should be applied. That is, an *explicit*, *well-defined*, and *dominant* public policy cannot properly be derived from an unsettled question of law.

Moreover, the Superior Court's conclusion that *Zuver*'s holding has been called into question is wrong and stems from its mistaken conflation of two fundamentally different fee scenarios. Turner makes the

same mistake, failing to distinguish between a fee award for prevailing on the *merits* of a statutory employment claim and a fee award for successfully *compelling arbitration* of such claims. Both *Zuver* and its companion case, *Adler v. Fred Lind Manor*, 153 Wn.2d 331 (2005), distinguish between these two and indicate that the nonreciprocal fee policy reflected in the WLAD relates only to the former, not the latter.[6]

The Superior Court's erroneous conflation of these different situations is evident when it mischaracterizes the effort to enforce the arbitration agreement as a "procedural defense." CP 3596 (likening arbitration to a statute of limitations defense). Although an attempt to enforce an arbitration clause presents a procedural *issue*, it is an issue presented in a separate proceeding. *See* Vulcan's Opening Br. at 23–27 (addressing the *res judicata* effect of an order compelling arbitration). It is not a procedural *defense* to the merits, in contrast to the statute of limitations defense identified by the Superior Court. Prevailing on a statute of limitations defense precludes further adjudication of a given claim; it ends that piece of the litigation. In contrast, prevailing on a

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[6] In *Adler*, which involved review of a trial court's order compelling arbitration, the Washington Supreme Court rejected the employee's request for an award of attorneys' fees despite his success on a number of unconscionability arguments, observing that "the applicable law here, RCW 49.60.030(2) [WLAD], permits an attorney fees award only when a plaintiff prevails on his discrimination claim. It does not, as Adler contends, authorize attorney fees in connection with opposing a motion to compel arbitration." 153 Wn.2d at 363–64.

motion to compel arbitration does not preclude further consideration of the merits. Indeed, a party who wins a motion to compel arbitration may lose *in arbitration* on the merits of the claim. Thus, arbitration cannot be deemed a "defense."

The Superior Court's mischaracterization obscures the fact that it has improperly extended a public policy (involving nonreciprocal fee recovery on certain statutory claims) into a new area (involving fee recovery for enforcing an agreement regarding the *forum* for resolution of the claims). In this respect, the court failed to adhere to the important legal principle it recognized in its Memorandum Opinion: "[t]he need to identify with precision the public policy at issue[, which] stems from the fact that the public policy exception is a 'narrow' one . . . ." CP 3594 (citing *Kitsap Cty. Deputy Sheriff's Guild*, 167 Wn.2d at 436).

3. The Cases Relied Upon By Turner and the Court Below Do Not Address the Issue in Vulcan's Cross-Appeal

a. The Superior Court Misapplied *Gandee*

The Superior Court and Turner rely principally on *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598 (2013), to try to call *Zuver* into question. But *Gandee* addresses whether an employer that prevails on the *merits* of a statutory claim can be awarded attorneys' fees pursuant to a contractual fee provision. *Gandee* does not address the issue relevant to this cross-appeal: whether an employer that successfully *compels*

arbitration of statutory employment claims may be awarded attorneys' fees pursuant to a bilateral, contractual fee-shifting provision.

Gandee struck down a "loser-pays" fee provision because it would have permitted an award of attorneys' fees to an employer that prevailed on the merits of a Consumer Protection Act claim. 176 Wn.2d at 605-06. The Court concluded that the term was substantively unconscionable because it was contrary to the legislature's intent as expressed in the CPA's one-way fee-shifting statute, which allows prevailing plaintiffs—not defendants—to recover reasonable attorneys' fees. *Id.*; RCW 19.86.090. *Gandee* neither cited nor addressed the portion of the *Zuver* opinion relevant to this cross-appeal—which is unsurprising since the issue was not presented in *Gandee*—and thus *Gandee* did not overrule or call into question the *Zuver* holding. As a result, there is no explicit, well-defined, and dominant public policy barring the Arbitrator's original award of fees to Vulcan. In concluding otherwise, the Superior Court improperly extended *Gandee* to displace the holding of *Zuver*.

In justifying its extension of *Gandee*, the Superior Court identified "two rationales" underlying that decision and erroneously concluded that they "apply equally here." CP 3597. The first of these rationales was that the "loser-pays" provision benefitted only one party. 176 Wn.2d at 605–06. Again, in *Gandee*, that benefit related to the costs of litigating the

merits of the plaintiff's Consumer Protection Act claim: "if [plaintiff] prevails she is already entitled to costs and fees under the CPA but [with the challenged fee provision] is forced to bear the risk of a negative outcome." *Id.* But in *Zuver*, the Washington Supreme Court rejected that argument with respect to fees for compelling arbitration, as the bilateral nature of the fee provision for that purpose was deemed potentially beneficial to *both* parties in that case, an employer and an employee. The U. S. Supreme Court agrees, noting that "for parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 122-23. Thus, the Superior Court's conclusion that "the party benefitting from a fee provision like the one in *Zuver* will almost invariably be the employer, not the employee" (CP 3597), not only contradicts the Washington Supreme Court's position in *Zuver* on that issue (where the Court concluded that the bilateral fee provision was not "one-sided and harsh," 153 Wn.2d at 619), it disregards U.S. Supreme Court precedent as well, all while relying on a case (*Gandee*) involving a *different* type of fee provision in a debt adjustment contract (i.e., not an employment context).

Moreover, there is no evidentiary basis for the Superior Court's conclusory assertion that the sole beneficiary of arbitration "will almost invariably be the employer." In fact, in the context of this case, where the employee (Turner) is a member of a relatively small executive protection industry, there is ample reason to believe that she (or others similarly positioned) would have a significant interest in resolving disputes with her employer in confidential arbitration.[7]

The second rationale from *Gandee* that the Superior Court relied upon was equally misapplied in this case. That is the contention that the fee award for compelling arbitration would "have a chilling effect on an employee contemplating a court action to challenge the conscionability of an arbitration agreement and/or to vindicate her statutory rights." CP 3597. There are multiple problems with that conclusion. First, there is no well-defined, explicit, and dominant public policy that a party to an arbitration agreement should be immunized from the financial consequences of contesting the enforceability of that agreement. On the contrary, "both state and federal law strongly favor arbitration and require all presumptions to be made in favor of arbitration." *Gandee*, 176 Wn.2d

[7] In addition, as noted above, the WLAD's one-way fee-shifting provision applies to an employee prevailing on the *merits*; it does *not* authorize a fee award to an employee who prevails in connection with a motion to compel arbitration. *See Adler*, 153 Wn.2d at 363–64; *see also supra* note 6. Thus, unlike the situation in *Gandee*, the fee provision in this case is not one-sided, as it provided a potential benefit to her that was not already provided by statute (i.e., had she prevailed in a dispute over arbitrability).

at 603. In this case, Turner's repeated court challenges on conscionability only served to frustrate one of the primary goals of the FAA, which is "to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748. Thus, if anything, the public policy considerations counsel in favor of confirming the Arbitrator's initial fee award, not the opposite.

Second, the *Zuver* Court rejected the argument that a fee award for compelling arbitration would have a chilling effect on employee claims. 153 Wn.2d at 319 (rejecting plaintiff's argument that the provision would "discourage an employee from bringing a discrimination claim"). Here again, in focusing on *Gandee*, the Superior Court appears to disregard the Supreme Court's actual discussion of the issue in *Zuver*. Moreover, the concern about a "chilling effect" is particularly inapt in the unique circumstances of this case, where the fee award stems from Turner's decision to defy Judge Oishi's order and initiate a second action in court.[8]

Finally, contrary to the Superior Court's suggestion (and Turner's repeated assertions), there is absolutely no basis for maintaining that an employee's statutory rights cannot be vindicated in arbitration. Arbitrators obviously protect employee's statutory rights, as was evident in this case, where the Arbitrator expressly stated that no recovery of fees would be available to Vulcan for its successful defense of the WLAD and MWA

[8] *See* discussion *infra* Part II.C.2.

claims. CP 3994-96; *see also Circuit City*, 532 U.S. at 123 ("[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statutes; it only submits their resolution in an arbitral, rather than a judicial forum.") (internal quotation marks and citations omitted). Likewise, Washington courts have repeatedly rejected arguments that public policy guarantees an employee the right to pursue discrimination or other statutory claims in a judicial forum. *See, e.g., Adler*, 153 Wn.2d at 343–44 ("The United States Supreme Court . . . has held that in instances where a valid individual employee-employer arbitration agreement exists, the FAA requires that employees arbitrate federal and state law discrimination claims. . . . Thus, we reject Adler's claim that the WLAD entitles him to a judicial forum").[9]

In short, the Superior Court's reliance on *Gandee* was misplaced, as that case neither overrules *Zuver* nor reflects an explicit, well-defined, and dominant public policy against attorney fee awards for compelling arbitration in the employment context.

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[9] *See also Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 901 (2001) (rejecting argument in a discrimination case that arbitration clauses violated public policy: "by signing the arbitration agreements, [the employee] did not give up her right to be free from workplace discrimination, only the ability to raise the issue in court"); *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 364 (2004), *cause remanded on other grounds*, 153 Wn.2d 1023 (2005) (enforcing arbitration provision against public policy challenge because clause "did not force [employee] to give up his ability to challenge the alleged overtime pay violation, only his ability to raise the issue in court").

b. The Other Cases Relied on By Turner Are Not On Point

The additional cases cited by Turner in her Responsive Brief are also inapposite. None addresses the issue presented in this cross-appeal (i.e., a fee award for successfully compelling arbitration). Oddly, Turner cites *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47 (2013), which does not even involve a "loser-pays" fee-shifting provision. Instead, the term at issue was a *fee-splitting* provision, which required the parties to share responsibility for the arbitrator's fees and other arbitration-related costs. *Id.* at 56-57.[10] In *LaCoursiere v. CamWest Development, Inc.*, __ P.3d __, 2014 WL 5393866, *6 (Wash. Oct. 23, 2014), the Court addressed a bilateral fee-shifting provision and held that an employer that prevailed on the *merits* was "not entitled to attorney fees because under the WRA [Wage Rebate Act], attorney fees may be awarded only to prevailing employees, not employers." The case did not involve a motion to compel arbitration, and therefore does not at all undermine *Zuver*. To the extent *LaCoursiere* has any relevance at all, it supports Vulcan's position, because the Court held that "[t]he mandatory attorney fees provision in the

[10] The same is true for the following cases cited by Turner, all of which involved a provision to split arbitration-related fees, an issue Turner does not challenge on appeal (i.e., none involves a "loser-pays" provision that was contrary to a one-way statutory fee-shifting provision): *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233 (10th Cir. 1999); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1485 (D.C. Cir.1997); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 687 (Cal. 2000).

employment agreement does not apply when an employee makes claims *exclusively* under the WRA." *Id.* (emphasis added). Here, the dispute involves both statutory and nonstatutory claims, and Vulcan's original fee award was unrelated to the merits.[11]

Finally, in addition to lacking any precedential value, neither *Nesbitt v. FCNH, Inc.*, No. 14-CV-00990-RBJ, 2014 WL 6477636, at *4–*5 (D. Colo. Nov. 19, 2014), nor *Trivedi v. Curexo Technology Corp.*, 116 Cal. Rptr. 3d 804, 810 (Cal. Ct. App. 2010), addresses the enforceability of a contractual provision that would permit an award of attorneys' fees to an employer for successfully compelling arbitration. Instead, both cases concern the enforceability of fee-shifting provisions as applied to a party prevailing on the *merits* of a statutory claim.

By contrast, *Perez v. Qwest Corp.*, 883 F. Supp. 2d 1095, 1127 (D.N.M. 2012), previously cited by Vulcan, enforced a contractual fee-

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[11] Turner has also distorted the holdings of cases addressing segregation of attorneys' fees where a party is entitled to fees for some, but not all, claims. The rule is *not*, as Turner contends, that a "court may not segregate fees on related claims." Resp. Br. at 39–40. To the contrary, the court *must* segregate fees—even if claims or facts are interrelated—*unless* segregation is not reasonably possible. *See Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690 (2004), *as amended on denial of reconsideration* (Segregation of fees is required "even if the claims overlap or are interrelated. An exception exists, however, if 'no reasonable segregation . . . can be made.'") (quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673 (1994)); *see also Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411 (1988) (remanding to trial court for segregation of fees, while acknowledging factual overlap among claims). Here, the exception does not apply, as segregation of recoverable fees is straightforward (i.e., those related to efforts to compel arbitration in *Turner II*, which did not relate to the merits of Turner's statutory claims). The same is true for the amended fee award to Vulcan, which related to nonstatutory claims. *See* Vulcan's Opening Br. at 39–45.

shifting provision and awarded attorneys' fees to an employer for successfully compelling arbitration. Thus, the *only* two cases cited by the parties that address the issue presented here (*Zuver* and *Perez*) support Vulcan's position. In sum, because no explicit, well-defined, and dominant public policy bars a fee award to an employer for successfully compelling arbitration of statutory claims, the Superior Court's order vacating the Arbitrator's original fee award should be reversed.

C. Upholding the Original Fee Award Would Not Undermine the Public Policy at Issue

Even if this Court were to conclude that the Arbitrator's original fee award was contrary to an explicit, well-defined, and dominant public policy, the Superior Court's vacatur of the award would still constitute reversible error because upholding the original award does not undermine the public policy at issue. First, the speculative deterrent effects identified by the court below are too attenuated to support application of the narrow public policy exception. Second, the unique circumstances of this case are not likely to be repeated—and should not be encouraged—and thus any concerns about a "chilling effect" are misplaced.

1. Speculative, Indirect Effects Are Insufficient to Justify Application of the Public Policy Exception

In addition to the existence of an explicit, well-defined, and dominant public policy, application of the public policy exception requires

"that the policy is one that specifically militates against the relief ordered by the arbitrator." *Matthews*, 688 F.3d at 1111. "Typically, the public policy exception is implicated when enforcement of the award compels one of the parties to take action which directly conflicts with public policy." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 782 (11th Cir. 1993), *abrog. on other grounds recog. by Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313 (11th Cir. 2010); *Isenhower v. Morgan Keegan & Co., Inc.*, 311 F. Supp. 2d 1319, 1328 (M.D. Ala. 2004) (same); *see also Revere Copper & Brass Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir. 1980) (The public policy exception "is not available for every party who manages to find some generally accepted principle which is transgressed by the award. Rather, the award must be so misconceived that it compels the violation of law or conduct contrary to accepted public policy.") (citation and internal quotation marks omitted).

Here, enforcement of the original fee award does not compel Turner to take action that directly conflicts with a public policy. Rather, the asserted policy concern is the potential deterrence effect on the future actions of *third parties* (other employees who believe they may have claims). Such concerns about speculative, indirect effects on third parties are too attenuated to justify application of the public policy exception. *See Brown*, 994 F.2d at 778, 782 (holding that failure to award statutorily

required damages for violation of securities law was not contrary to public policy because the arbitration award "does not compel either party to take action which conflicts with public policy"); *Isenhower*, 311 F. Supp. 2d at 1328 (rejecting public policy challenge because arbitration award that failed to include statutorily required attorneys' fees did not compel either party to take action in violation of public policy). Like *Brown* and *Isenhower*, this case stands in stark contrast to those rare cases vacating an arbitration award on public policy grounds, as it does not require Turner to take action in direct conflict with an explicit, well-defined, and dominant public policy.[12]

2. The Original Fee Award Is Limited to Efforts to Secure a *Second* Order Compelling Arbitration—Unique Circumstances That Do Not Implicate the Public Policy

Finally, application of the public policy exception is particularly unwarranted in the unique circumstances of this case. In *Turner I*, Judge Oishi rejected Turner's challenge to the arbitration agreement and ordered

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[12] *See, e.g.*, *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (vacating arbitration award ordering reinstatement of employee because "there is a well defined and dominant policy that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty[; a]n intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury."); *Delta Air Lines*, 861 F.2d at 671 (holding that arbitration award ordering reinstatement of pilot "would violate clearly established public policy which condemns the operation of passenger airliners by pilots who are under the influence of alcohol"); *Iowa Elec. Light & Power v. Local Union 204, Int'l Bhd. of Elec. Workers,* 834 F.2d 1424, 1427-29 (8th Cir.1987) (concluding that there is "a well defined and dominant national policy requiring strict adherence to nuclear safety rules," and thus vacating arbitrator's award ordering reinstatement of an employee who had compromised a nuclear reactor safety system in order to leave early for lunch).

Turner to pursue her claims in arbitration. CP 95–96 (App. C). In defiance of that order, Turner initiated a new lawsuit (*Turner II*), in which she reasserted five claims from *Turner I* and added five new employment-related claims. CP 1-20. As a result, Vulcan was forced to incur substantial attorneys' fees to relitigate issues previously resolved by Judge Oishi, and it was exclusively for these efforts that the Arbitrator's original attorneys' fee award compensated Vulcan (and even then, Vulcan only requested and was awarded a small portion of fees incurred in *Turner II*).[13]

Thus, no fees were awarded in connection with Turner's initial attempt to assert her claims in court (i.e., in *Turner I*). To the extent there is any valid public policy interest in providing an employee opportunity for a risk-free challenge to an arbitration agreement—a highly dubious position[14]—such a policy would not be implicated in the unusual circumstances of this case, where fees were awarded to Vulcan for successfully compelling arbitration a *second* time. Those circumstances will rarely be repeated, and should not be encouraged. Application of the public policy exception here would encourage employees to make repeated challenges to arbitration agreements, in defiance of a court order compelling arbitration.

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[13] Turner could have asserted her principal procedural unconscionability challenge in the arbitration, which was a question for the arbitrator, but she opted not to do so. *See* Vulcan's Opening Br. at 15–27.

[14] *See* discussion *supra* Part II.B.2, II.B.3.

III. CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's order vacating the original attorneys' fee award to Vulcan and award Vulcan its reasonable attorneys' fees and costs incurred on appeal, pursuant to the contractual fee provision in the EIPA. *See* CP 2362. The Court should remand to the Superior Court with instructions to enter an order confirming the initial Final Arbitration Award and entry of an amended judgment that restores the original $113,235 fee award to Vulcan, and includes the attorneys' fee award to Vulcan for this appeal.

DATED: January 5, 2015

PERKINS COIE LLP

By: _____

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CERTIFICATE OF SERVICE

On the 5th day of January, 2015, I caused to be served upon the following, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Rebecca J. Roe, WSBA #7560 Kathryn Goater, WSBA #9648 Schroeter Goldmark & Bender 810 Third Ave., Suite 500 Seattle, Washington 98104 roe@sgb-law.com goater@ sgb-law.com	☑ Via Hand Delivery ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via Overnight Delivery ☐ Via Facsimile ☐ Via E-filing ☑ Via E-mail
Jeffrey I. Tilden, WSBA #12219 Gordon Tilden Thomas & Cordell, LLP 1001 Fourth Ave., Suite 4000 Seattle, WA 98154 jtilden@gordontilden.com jthomas@gordontilden.com	☑ Via Hand Delivery ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via Overnight Delivery ☐ Via Facsimile ☐ Via E-filing ☑ Via E-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington, this 5th day of January, 2015.

Roxann Ditlevson

Roxann Ditlevson

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TRACI TURNER,

Appellant,

v.

VULCAN INC., PAUL ALLEN, JODY ALLEN, RAY COLLIVER, and LAURA MACDONALD,

Respondents and Cross-Appellant.

No. 71855-0-I

CROSS-APPELLANT VULCAN INC.'S GR 14.1 AUTHORITY

1. *Nesbitt v. FCNH, Inc.*,

No. 14-CV-00990-RBJ, 2014 WL 6477636 (D. Colo. Nov. 19, 2014)

DATED: January 5, 2015

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 5th day of January, 2015.

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Tab 1

Tab 1

2014 WL 6477636
Only the Westlaw citation is currently available.
United States District Court, D. Colorado.

Rhonda Nesbitt, individually, and on behalf of all others similarly situated, Plaintiff,

v.

FCNH, Inc., Virginia Massage Therapy, Inc., Mid–Atlantic Massage Therapy, Inc., Steiner Education Group, Inc., Steiner Leisure Ltd., SEG Cort LLC, d/b/a as the "Steiner Education Group", Defendants.

Civil Action No 14–cv–00990–RBJ | Filed November 19, 2014

Attorneys and Law Firms

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ORDER

R. Brooke Jackson, United States District Judge

***1** This matter is before the Court on the defendants' Motion to Compel Arbitration of Individual Claims and to Stay Proceedings [ECF No. 10]. For the following reasons, the motion is denied.

BACKGROUND

The plaintiff, Ms. Nesbitt, filed this action with the Court on April 7, 2014. In her Complaint she alleges violations of the Fair Labor Standards Act ("FLSA") and numerous state wage and hour laws. According to the Complaint, the defendants are each involved in the management or operation of, or have an ownership interest in, the Steiner Education Group; and the Steiner Education Group runs schools of massage therapy and esthetics in Arizona, Colorado, Connecticut, Florida, Maryland, Massachusetts, Illinois, Nevada, New Jersey, Pennsylvania, Texas, Utah, Virginia, and Washington. Ms. Nesbitt claims that while enrolled as students of massage therapy at one of these schools, she and the putative class members were required to perform massages for paying members of the general public without compensation. She alleges that the labor provided by herself and the putative class members established an employment relationship for purposes of the FLSA and state labor laws.

In the Complaint, Ms. Nesbitt admits that she entered into an arbitration agreement at the time of enrollment. The Arbitration Agreement provides that

> [y]ou, the student, and Steiner Education Group ("SEG") agree that any dispute or claim between you and SEG (or any company affiliated with SEG or any of its or SEG's officers, directors, employees or agents) arising out of or relating to (1) this Enrollment Agreement, or the Student's recruitment, enrollment or attendance at SEG, (2) the education provided by SEG, (3) SEG's billing, financial aid, financing options, disbursement of funds or career service assistance, (4) the enforceability, existence, scope or validity of this Arbitration Agreement, or (5) any claim relating in any manner, to any act or omission regarding Student's relationship with SEG or SEG's employees, whether such dispute arises before, during or after Student's attendance at SEG, and whether the dispute is based on contract, statute, tort, or otherwise, shall be resolved through binding arbitration pursuant to this Section (the "Arbitration Agreement").

[ECF No. 1–1].

It continues,

> Arbitration shall be conducted in accordance with the Commercial Rules of the American Arbitration Association applying federal law to the fullest extent possible, and the substantive and procedural provisions

> of the Federal Arbitration Act (9 U.S.C. §§ 1–16) shall govern this Arbitration Agreement and any and all issues relating to the enforcement of the Arbitration Agreement and the arbitrability of claims between the parties. Judgment upon the award rendered by the Arbitrator may be entered in any court having competent jurisdiction.

Id.

As to costs, the Arbitration Agreement provides that "[e]ach party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs." *Id.*

***2** The agreement then issues the following warning, in capital letters:

> THIS ARBITRATION AGREEMENT LIMITS CERTAIN RIGHTS, INCLUDING THE RIGHT TO MAINTAIN A COURT ACTION, THE RIGHT TO A JURY TRIAL, THE RIGHT TO PARTICIPATE IN ANY FORM OF CLASS OR JOINT CLAIM, THE RIGHT TO ENGAGE IN DISCOVERY (EXCEPT AS PROVIDED IN THE APPLICABLE ARBITRATION RULES), AND THE RIGHT TO CERTAIN REMEDIES AND FORMS OF RELIEF. OTHER RIGHTS THAT YOU OR SEG WOULD HAVE IN COURT ALSO MAY NOT BE AVAILABLE IN ARBTRATION.

Id.

Finally, it ends with a "right to reject" provision, which states that the student

> may reject this Arbitration Agreement by mailing a signed rejection notice to: Attention: Steiner Education Group Corporate Office, Compliance Department, 2001 W Sample Road, Ste. 318, Pompano Beach, FL 33064 within 30 days after the date I sign this Enrollment Agreement. Any rejection notice must include my name, address, [and] telephone number.

Id.

The question for purposes of this motion is whether the Arbitration Agreement is enforceable against Ms. Nesbitt such that this Court must compel arbitration of her claims.

LEGAL ANALYSIS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16, "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006). Section 2 provides,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). This provision reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), as well as "the fundamental principle that arbitration is a matter of contract,"*Rent–A–Ctr., W., Inc. v. Jackson,* 561 U.S. 63, 67 (2010). "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3, 4) (emphasis in original). However, "[u]nlike the general presumption that a particular issue is arbitrable when the existence of an arbitration agreement is not in dispute, when the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away." *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (internal citations omitted).

A. *Is the Arbitration Agreement unconscionable?*

Section 2 of the FAA includes a saving clause that allows for arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1746 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)). Colorado's test for unconscionability does not explicitly favor or disfavor arbitration. *SeeBernal v. Burnett,* 793 F.Supp.2d 1280, 1287 (D. Colo. 2011).

***3** The first question at issue in this case is whether the Arbitration Agreement is unenforceable because it is unconscionable. A federal court must apply state contract law principles when determining whether an arbitration agreement is valid and enforceable. *SeeFirst Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). Under Colorado law, one of the legal grounds for revoking a contract is unconscionability. *See, e.g.,Davis v. M.L.G. Corp.,* 712 P.3d 985, 991 (Colo. 1986); *Univ. Hills Beauty Acad., Inc. v. Mountain States Tel. & Tel. Co.,* 554 P.2d 723, 726 (Colo. App. 1976). Colorado courts consider a number of factors in deciding whether a contractual provision is unconscionable, including:

> (1) the use of a standardized agreement executed by parties of unequal bargaining power; (2) the lack of an opportunity for the customer to read or become familiar with the document before signing it; (3) the use of fine print in the portion of the contract containing the provision in question; (4) the absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive fairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) the circumstances surrounding the formation of the contract, including setting, purpose, and effect.

Bernal, 793 F.Supp.2d at 1286 (citing *Davis,* 712 P.3d at 991) [hereinafter "the *Davis* factors"]. The *Davis* factors encompass both procedural and substantive unconscionability, both of which must be shown in Colorado. *SeeVernon v. Qwest Commc'ns Intern., Inc.,* 925 F.Supp.2d 1185, 1194–95 (D. Colo. 2013); *Davis,* 712 P.2d at 991. The burden of proof is on the party opposing arbitration. *SeeWeller v. HSBC Mortg. Servs., Inc.,* 971 F.Supp.2d 1072, 1080 (D. Colo. 2013).

The plaintiff argues that most of the *Davis* factors weigh in her favor, and that taken together they show that the Arbitration Agreement is both substantively and procedurally unconscionable. The Court begins with an analysis of the alleged procedural unfairness of the agreement. The first, second, third, sixth, and seventh *Davis* factors relate to procedural unconscionability. Looking to the first factor, the Arbitration Agreement is a standardized agreement between parties with unequal bargaining power. However, this factor by itself is not enough for a finding of unconscionability. *SeeConcepcion,* 131 S.Ct. at 1750 ("[T]he times in which consumer contracts were anything other than adhesive are long past."). The second factor looks to whether there was an opportunity to read and become familiar with the document before signing it. Ms. Nesbitt contends that she was not given an opportunity to become familiar with the document before signing it, alleging that she was presented with it at the time of enrollment and was required to sign all of her enrollment forms before being able to speak to a financial aid representative. She does not claim, however, that she was denied the opportunity to read the provision or that she was rushed through the process of enrolling. Moving along to the third factor, Ms. Nesbitt argues that the defendants used "fine print" in the portion of the enrollment forms containing the Arbitration Agreement. The Court notes that while the typeface does appear small, it is no smaller than the other enrollment provisions. *See* [ECF No. 1–1]. [1] Ms. Nesbitt signed her initials next to these provisions, which were written in the same size font, and she has not claimed that she was unable to read them before signing them. Furthermore, the section of the Arbitration Agreement summarizing numerous waivers is written in capital letters, whereas none of the other enrollment provisions include capitalized sections.

***4** The sixth factor requires analysis of the relationship between the parties, including issues of assent, notice, and unfair surprise. The biggest question at issue here is

assent. The agreement provided a "right-to-reject" provision wherein Ms. Nesbitt could have opted out of the Arbitration Agreement within thirty days of enrolling. However, the assent factor also weighs in Ms. Nesbitt's favor, as the other sections of the enrollment form required her initials (showing affirmative assent), whereas only the Arbitration Agreement did not. Finally, the seventh factor is a catchall that allows for consideration of all of the factors surrounding formation of the contract. The plaintiff has presented no additional factors for consideration.

Taking into account all of the factors surrounding formation of the Arbitration Agreement, the Court finds that the agreement is not procedurally unconscionable. While the contract was certainly one of adhesion, Ms. Nesbitt was provided an opportunity to read the provision before signing it; notice of a variety of waivers was included in capitalized letters and in the same font size and typeface as the rest of the enrollment form sections; and Ms. Nesbitt was given the opportunity to opt out of the provision if she so chose. Furthermore, while she may not have had an opportunity to become familiar with the document on the date she signed it, she had thirty days to familiarize herself with its terms and opt out after enrolling. For these reasons, the Court finds that the provision is procedurally conscionable.

As discussed earlier, a contract provision is unenforceable only if both procedural and substantive unconscionability can be shown. Since the contract is procedurally conscionable, the Court need not address the substantive factors.

B. *Do provisions of the Arbitration Agreement undermine federal statutory policy?*

The Supreme Court has recognized that arbitration is generally a sufficient medium for resolving federal statutory claims. *SeeGreen Tree Fin. Corp.–Alabama v. Randolph,* 531 U.S. 79, 89 (2000). In fact, "even claims arising under a statute designed to further important social policies may be arbitrated." *Id.* However, the presumption in favor of arbitration is not without its limits. *SeeShankle v. B–G Maint. Mgmt. of Colorado, Inc.,* 163 F.3d 1230, 1234 (10th Cir. 1999). Only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, [will] the statute ... continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 637 (1985). The presumption in favor of arbitration "falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights."*Shankle,* 163 F.3d at 1234 (collecting cases). "Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum." *Id.* (emphasis added). Furthermore, an arbitration provision may not operate " 'as a prospective waiver of a party's right to pursue statutory remedies.' " *Am. Express Co. v. Italian Rest.,* 133 S.Ct. 2304, 2310 (2013) (quoting *Mitsubishi Motors,* 473 U.S. at 637 n.19) (emphasis omitted).

The second question at issue in this motion is whether the Arbitration Agreement is unenforceable because it would prevent Ms. Nesbitt and the putative class members from effectively vindicating their statutory rights under the FLSA.[2] Ms. Nesbitt argues that there are two provisions that undermine her statutory rights: the section directing that arbitration be conducted in accordance with the Commercial Rules of the American Arbitration Association and the provision providing that each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs. Notably, all that the plaintiff discusses with regard to the Commercial Rules appears to be the fees, costs, and expenses associated with arbitration under those rules as compared to the Employment Rules. Taking these two criticisms together, her argument is that the high cost of arbitration and the duty that each side bear its own expenses (particularly of counsel) render the Arbitration Agreement unenforceable. Furthermore, because the agreement does not contain a savings clause, it cannot be enforced in any capacity. The Court agrees.

***5** In *Shankle,* the Tenth Circuit found an arbitration agreement unenforceable in the employment context because it placed the plaintiff "between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." 163 F.3d at 1235. The court reasoned that the employer required the plaintiff "to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." *Id.* The defendants argue that this case does not concern an employment relationship, and that therefore the reservations in *Shankle* are not applicable here. That is a merits argument that the Court does not here address. *See supra* note 2. Assuming without deciding the existence

of an employment relationship, and assuming for present purposes only that the defendants required the plaintiff to perform services on its behalf without compensation, the case implicates federal labor laws.

Shankle stands for the position that "an arbitration agreement requiring a plaintiff to share in the costs of arbitration is unenforceable when the agreement effectively deprives the plaintiff of an accessible forum to resolve his statutory claim and vindicate his statutory rights." *Daugherty v. Encana Oil & Gas (USA), Inc.*, No. 10–CV–02272–WJM–KLM, 2011 WL 2791338, at *10 (D. Colo. July 15, 2011) (citing *Perez v. Hospitality Ventures–Denver LLC*, 245 F.Supp.2d 1172, 1173–74 (D. Colo. 2003); *Gourley v. Yellow Transp.*, 178 F.Supp.2d 1196, 1204 (D. Colo. 2001)). The plaintiff argues that under the Commercial Rules she will likely incur between $2,320.50 and $12,487.50 in costs simply paying for the arbitrator's time, let alone the expenses associated with discovery, producing witnesses, the room rental, and other arbitration-related necessities. *See* Plaintiff's Response [ECF No. 19] at 15. The Employment Rules, on the other hand, place virtually all of the arbitration costs on the employer (except for the $200 filing fee) where the dispute arises out of an employer-promulgated plan (as opposed to an individually-negotiated employment contract). *See* American Arbitration Association, *Employment Arbitration Rules & Mediation Procedures* 32–34 (Rules Amended and Effective Nov. 1, 2009, Fee Schedule Amended and Effective Nov. 1, 2014), *available at* http://www.adr.org/employment.

Ms. Nesbitt has filed an affidavit establishing that she cannot afford the costs of proceeding under the Commercial Rules. [ECF No. 19–1]. The defendants' only argument in response is that she might be eligible for a discounted rate based on a showing of financial hardship. Notably, application of the Employment Rules would save Ms. Nesbitt from the risk of bearing these costs should she be found not eligible for fee waivers. The Employment Rules do not require a showing of financial hardship, presumably to ensure that employees are not discouraged from vindicating their statutory rights. Since this is an (alleged) employment dispute, arguably the Employment Rules should apply. At a minimum, an arbitrator should be free to decide which rules apply based on his or her interpretation of the nature of the case. The Arbitration Agreement as written, however, would not permit such flexibility.

Ms. Nesbitt also points out that under the terms of the Arbitration Agreement she will be required to bear the costs of her own counsel. The FLSA, however, provides that where judgment is awarded to the plaintiff, the court shall "allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). This term therefore amounts to a prospective waiver of Ms. Nesbitt's right to pursue a statutory remedy, specifically attorney's fees. The defendants have made no argument in response.

The Court finds that these two provisions are unenforceable. First, the application of the Commercial Rules and their fee splitting provisions, along with the condition that Ms. Nesbitt bear the costs of producing experts, witnesses, and preparation and presentation of proofs, would effectively preclude Ms. Nesbitt from pursuing her claims. [3] *SeeDaugherty*, 2011 WL 2791338 at *11 (citing *Shankle*, 163 F.3d at 1235). Second, requiring the plaintiff to bear the costs of her own counsel even should she prevail amounts to a prospective waiver of a statutory remedy while simultaneously undermining the enforcement scheme erected by the FLSA. The FLSA relies on individuals to bring claims as private attorneys general with the promise that should they prevail they will be awarded their reasonable attorney's fees in addition to damages. *Seeid.*; *Gourley*, 178 F.Supp.2d at 1204. Eliminating this assurance may significantly chill individuals and attorneys from bringing these claims. As such, arbitration agreements denying a prevailing civil rights plaintiff the right to attorney's fees are presumptively void as a matter of public policy. *SeeGourley*, 178 F.Supp.2d at 1204.

***6** The next question is whether the unenforceable provisions are severable such that the Arbitration Agreement can be saved. "A court is without authority to alter or amend contract terms and provisions absent an ambiguity in the contract." *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 930 (10th Cir. 1992). "[W]here a contract contains a void arbitration provision, it must either be deemed unenforceable where there is no savings clause to the contract or, in keeping with the presumption in favor of arbitrability in the case of a contract with a savings clause, the void language may be stricken and the arbitration agreement otherwise enforced." *Daugherty*, 2011 WL 2791338 at *12. Because there is no savings clause and because the agreement itself is unambiguous its provisions cannot be stricken, rendering the entire Arbitration Agreement unenforceable. *CompareFuller v. Pep Boys—Manny, Moe & Jack of Delaware, Inc.*, 88 F.Supp.2d 1158, 1162 (D. Colo. 2000) (striking fee-splitting provision and enforcing remainder of arbitration agreement where savings clause could be found) *withGourley*, 178 F.Supp.2d at 1204 (refusing to enforce arbitration agreement

with an unenforceable fee-splitting provision because the agreement did not contain severability or savings clause). The Court is without authority to alter or amend the agreement under these circumstances.

C. *Does the Arbitration Agreement violate the NLRA?*

The plaintiff's third and final argument is that the arbitration provision violates the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, in two distinct ways. The plaintiff voluntarily dismissed one of her arguments in support of this claim, *see* Plaintiff's Notice of Supplemental Authorities [ECF No. 20], while maintaining the contention that the Arbitration Agreement is so broad that it would lead a reasonable person to believe that he or she was prevented from filing a charge before the National Labor Relations Board ("NLRB"). Because the Court has found the Arbitration Agreement unenforceable on other grounds, the question of whether it violates the NLRA is moot.

ORDER

For the foregoing reasons, the defendants' Motion to Compel Arbitration of Individual Claims and to Stay Proceedings [ECF No. 10] is DENIED. The Court requests that counsel jointly contact Chambers within 14 days to reset the initial scheduling conference.

Footnotes

1 Though the parties reference a nine-page Enrollment Agreement, the Court has only been provided with the one page that contains the Arbitration Agreement. [ECF No. 1–1]. That said, it contains other provisions, specifically those entitled Crime Statistics, Photo Release, Field Trip Release, and Confidential Information. All of these provisions appear in the same typeface and font size.

2 To be clear, this Court is not deciding that the plaintiff had an employment relationship with SEG. That goes to the merits of the claim and is not a matter that the Court resolves at this stage. Similarly, the Court expresses no opinion at this stage as to whether, even if the Court were later to determine as a matter of law that an employment relationship existed, this case is appropriate for collective or class treatment.

3 In response to the defendant's argument that Ms. Nesbitt hasn't shown whether she would be eligible for reduced or waived arbitration fees, the Court still finds that the requirement that she bear these other arbitration-related costs would preclude her from being able to pursue her claim. Furthermore, should Ms. Nesbitt be able to afford the costs of arbitration, the attorney's fee provision would still remain unenforceable.

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