

FILED
Court of Appeals
Division I
State of Washington
9/26/2018 3:11 PM

No. 97429-2

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STEVEN BURNETT,

Respondent,

vs.

PAGLIACCI PIZZA, INC.,

Appellant.

NO.: 78356-4-I

**REPLY BRIEF OF
APPELLANT**

TABLE OF CONTENTS

	Page
I. ARGUMENT	1
A. Employee Bears the Burden of Proof, Including the Burden to Prove that the Arbitration Policy is Unconscionable	1
B. The Strong Public Policy Favoring Arbitration Supports an Employee Handbook-Imposed Arbitration Duty	1
C. Employee Handbooks Can Create Binding Obligations for Employers and Employees	2
D. Employer Was Not Required to Include the Mandatory Arbitration Policy in the Employee Relationship Agreement	4
E. The Legal Standard for Unconscionability	5
F. The Mandatory Arbitration Policy is Not Procedurally Unconscionable	6
1. Contracts of Adhesion Are Not <i>Per Se</i> Unconscionable	6
2. An Employer Can Unilaterally Impose New Rules and Policies Even <i>After</i> an Employee Begins Working for the Company	8
3. Ignorance of Contract Terms Is Not a Defense	9
4. The Mandatory Arbitration Policy is Not “Hidden in a Maze of Fine Print”	10
5. It is Not Necessary for the Arbitration Clause to Appear in the Employee Relationship Agreement	11

G.	The Mandatory Arbitration Policy Is Not Substantively Unconscionable.....	12
1.	Mutuality Does Not Require “Mirror” Obligations.....	13
2.	The Mandatory Arbitration Policy is Not Shocking to the Conscience, Monstrously Harsh, or Exceedingly Calloused.....	15
3.	The F.A.I.R. Policy Is Not Substantively Unconscionable.....	17
4.	The F.A.I.R. Policy Can Be Severed From the Agreement	18
H.	The Mandatory Arbitration Policy is Incorporated by Reference into the Employee Relationship Agreement.....	19
I.	The Other Cases Cited by Employee Are Distinguishable	21
J.	Employer did Not Waive Any Arguments.....	24
II.	CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004).....	<i>passim</i>
<i>Baptist Health Sys. v. Mack</i> , 860 So.2d 1265 (Ala. 2003).....	2
<i>Chanchani v. Salomon/Smith Barney, Inc.</i> , No. 99-9219, 2001 U.S. Dist. LEXIS 2036 (S.D.N.Y. Mar. 1, 2001).....	2
<i>Daniels v. Raymours Furniture Co., Inc.</i> , No. 13-11551-MLW, 2014 U.S. Dist. LEXIS 44409 (D. Mass. Mar. 31, 2014)	2
<i>Forest Mktg. Enters. v. Dep’t of Natural Res.</i> , 125 Wn. App. 126, 104 P.3d 40 (2005).....	17
<i>Gaglidari v. Denny’s Rests.</i> , 117 Wn.2d 426, 815 P.2d 1362 (1991).....	<i>passim</i>
<i>Gandee v. LDL Freedom Enters., Inc.</i> , 176 Wn.2d 598, 293 P.3d 1197 (2013).....	<i>passim</i>
<i>Govier v. N. Sound Bank</i> , 91 Wn. App. 493, 957 P.2d 811 (1998).....	<i>passim</i>
<i>Hill v. Garda CL Northwest, Inc.</i> , 179 Wn.2d 47, 308 P.3d 635 (2013).....	12
<i>Johnson v. Trugreen Ltd. P’ship</i> , No. A-12-CV-166-LY, 2012 U.S. Dist. LEXIS 188280 (W.D. Tex. Oct. 25, 2012)	2
<i>Keith Adams & Assocs. v. Edwards</i> , 3 Wn. App. 623, 477 P.2d 36 (1970).....	5

<i>Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc., 192 Wn. App. 465, 369 P.3d 503 (2016)</i>	4
<i>Mattingly v. Palmer Ridge Homes LLC, 157 Wn. App. 376, 238 P.3d 505 (2010)</i>	21, 22
<i>Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 45 P.3d 594 (2002)</i>	23
<i>Moreno v. Prologistics Distrib., No. 18-1833, 2018 U.S. Dist. LEXIS 129386 (N.D. Ill. Aug. 2, 2018)</i>	2
<i>Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042 (9th Cir. 2009)</i>	23
<i>Romney v. Franciscan Med. Grp., 186 Wn. App. 728, 349 P.3d 32 (2015)</i>	<i>passim</i>
<i>Santos v. Sinclair, 76 Wn. App. 320, 884 P.2d 941 (1994)</i>	20
<i>Satomi Owners Ass’n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009)</i>	22, 23
<i>Swanson v. Liquid Air Corp., 118 Wn.2d 512, 826 P.2d 664 (1992)</i>	3, 4, 5
<i>Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984)</i>	3, 5, 8, 12
<i>Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 28 P.3d 823 (2001)</i>	<i>passim</i>
<i>W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 7 P.3d 861 (2000)</i>	20, 21
<i>Walters v. A.A.A. Waterproofing, Inc., 120 Wn. App. 354, 85 P.3d 389 (2004)</i>	6, 14
<i>Wilcox v. Lexington Eye Inst., 128 Wn. App. 234, 122 P.3d 729 (2005)</i>	25

I. ARGUMENT

A. Employee Bears the Burden of Proof, Including the Burden to Prove that the Arbitration Policy is Unconscionable

Because Employer presented evidence of an agreement to arbitrate, Employee must prove that the agreement is not enforceable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d, 773, 780 (2004); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753, 759 (2004). This includes the burden to prove that the arbitration policy is unconscionable. *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.3d 823 (2001).

B. The Strong Public Policy Favoring Arbitration Supports an Employee Handbook-Imposed Arbitration Duty

Employee argues that employers cannot unilaterally impose mandatory arbitration policies via handbooks. *See* Resp. Br. at 10. There is no support for that proposition. No reported Washington decision specifically addresses arbitration policies in the context of employee handbooks. But many Washington decisions hold that arbitration clauses contained in non-negotiated, form employment agreements are enforceable. *See Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32, 38 (2015); *Tjart*, 107 Wn. App. at 898, 28 P.3d at 830.

Given the strong public policy favoring arbitration, employers should be encouraged to use handbooks to require arbitration. Numerous

state and federal courts have found binding agreements to arbitrate based on employee handbooks.¹

C. Employee Handbooks Can Create Binding Obligations for Employers and Employees

Lacking any direct support for his argument that employee handbooks cannot require arbitration, Employee relies on the broader proposition that employee handbooks create obligations that are binding on employers *only*, but not on employees. *See* Resp. Br. at 11-13. This is incorrect. The handbook in *Gaglidari* imposed a “contractual” obligation on the employee not to fight on company premises as a condition of her employment. *Gaglidari v. Denny’s Rests.*, 117 Wn.2d 426, 433, 815 P.2d 1362, 1366 (1991). As explained by this Court: “The plaintiff in *Gaglidari*, a bartender, had signed a form saying she read and understood provisions about fighting on company premises. Thus, those provisions **were binding upon her.**” *Govier v. N. Sound Bank*, 91 Wn. App. 493, 502, 957 P.2d 811, 817 (1998) (Div. II) (emphasis added).

Throughout *Gaglidari*, the Court makes it clear that a handbook can create obligations binding upon an employee, as long as the employee has

¹ *See Chanchani v. Salomon/Smith Barney, Inc.*, No. 99-9219, 2001 U.S. Dist. LEXIS 2036 (S.D.N.Y. Mar. 1, 2001); *Moreno v. Prologistics Distrib.*, No. 18-1833, 2018 U.S. Dist. LEXIS 129386 (N.D. Ill. Aug. 2, 2018); *Baptist Health Sys. v. Mack*, 860 So.2d 1265, 1274 (Ala. 2003); *Johnson v. Trugreen Ltd. P’ship*, No. A-12-CV-166-LY, 2012 U.S. Dist. LEXIS 188280 (W.D. Tex. Oct. 25, 2012); *Daniels v. Raymours Furniture Co., Inc.*, No. 13-11551-MLW, 2014 U.S. Dist. LEXIS 44409 (D. Mass. Mar. 31, 2014).

reasonable notice of the handbook. “While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to inform employees of its actions.” *Gaglidari*, 117 Wn.2d at 435; 815 P.2d at 1367.

The relevant facts here are almost identical to those in *Gaglidari*. Employer made an offer by presenting Employee with the Employee Relationship Agreement (CP 58) and a copy of the employee Handbook (CP 60-73). Employee accepted the offered terms of employment by signing the Employee Relationship Agreement, which states: “you will learn and comply with the policies outlined in our Little Book of Answers” (the Handbook) and “you agree to all the foregoing.” CP 58. In addition, and “independent of this contract analysis,” Employee accepted the rules and policies set out in the Handbook by commencing—and continuing—his employment after receiving notice of the Handbook. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 228-29, 685 P.2d 1081, 1087 (1984); *see Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 520, 826 P.2d 664, 668 (1992).

Respondent misrepresents *Thompson*, *Gaglidari* and *Govier* as holding that employers—and *only* employers—are bound by the policies contained in their handbooks. *See* Resp. Br. at 11. All three courts held that employers can unilaterally impose binding obligations on employees through employee handbooks. *Thompson*, 102 Wn.2d at 228-29, 685 P.2d

at 1087 (“unilateral acts of the employer are binding on his employees ...”); *Gaglidari*, 117 Wn.2d at 435; 815 P.2d at 1367 (“the employee is bound by unilateral acts of the employer ...”); *Govier*, 91 Wn. App. at 502-503, 957 P.2d at 817 (“Thus, those provisions [of the handbooks] were binding upon [employee Ronda Gaglidari]. But she was not bound by unilateral revisions of company policies contained in an earlier version of an employee handbook that she never received.”) *See Swanson*, 118 Wn.2d at 547, 826 P.2d at 682 (“Moreover, in *Gaglidari*, at 434-35, we held that ‘employee[s] [are] bound by unilateral acts of the employer’ as long as the employees are given reasonable notice of those actions”) (brackets in original).

D. Employer Was Not Required to Include the Mandatory Arbitration Policy in the Employee Relationship Agreement

Employee argues that the Mandatory Arbitration Policy is not binding because it does not appear in the one-page Employee Relationship Agreement. CP 58. “Under Washington law, an express agreement to arbitrate is not required.” *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 473, 369 P.3d 503, 507 (2016); *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 747, 349 P.3d 32, 42 (2015). “A party may consent to arbitration without signing an arbitration clause, just as a party may consent to the formation of a contract without signing a written document.” *Romney*, 186

Wn. App. at 747, 349 P.3d at 42 (citation omitted); *see Keith Adams & Assocs. v. Edwards*, 3 Wn. App. 623, 477 P.2d 36 (1970).

Although the standard of review is *de novo*, this legal principle is important to understanding the trial court's error. The trial court believed that Employee could not be required to arbitrate unless there was either: (1) a document bearing his signature that expressly included the arbitration clause, or (2) the words "incorporated by reference" linking the Handbook to the signed agreement. RP 19-20. Neither proposition is true.

Employee is bound by the arbitration clause because he signed the Employee Relationship Agreement stating: "you will learn and comply with the policies outlined in our Little Book of Answers" and "you agree to all the foregoing." CP 58. In addition, and "independent of this contract analysis," Employee is bound by the arbitration clause because he received notice of the Handbook and thereafter commenced and continued his employment with Employer. *Thompson*, 102 Wn.2d at 228-29; 685 P.2d at 1087. Either method will bind Employee, as shown by *Thompson*, *Swanson*, *Gaglidari*, *Govier* and other cases.

E. The Legal Standard for Unconscionability

The legal standard for unconscionability was described by the Supreme Court in *Adler*:

In Washington, we have recognized two categories of unconscionability, substantive and procedural. Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh. **Shocking to the conscience, monstrosly harsh, and exceedingly calloused are terms sometimes used to define substantive unconscionability.** Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in a maze of fine print. We have cautioned that these three factors should not be applied mechanically without regard to whether in truth a meaningful choice existed.

Adler, 153 Wn.2d at 344-45, 103 P.3d at 781 (2004) (citations and internal punctuation omitted) (emphasis added).

F. The Mandatory Arbitration Policy is Not Procedurally Unconscionable

1. Contracts of Adhesion Are Not *Per Se* Unconscionable

It is not the case in Washington that each employee has a right to negotiate all of the terms of his or her employment. It is well settled that non-negotiable, form employment agreements—“contracts of adhesion”—are not *per se* unconscionable. *Zuver*, 153 Wn.2d at 304 103 P.3d at 760 (“[T]he fact that an agreement is an adhesion contract does not necessarily render it procedurally unconscionable.”); *accord Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 362, 85 P.3d 389, 393-394 (2004). As held by this Court: “Most courts have rejected plaintiffs’ arguments that predispute mandatory arbitration clauses are unconscionable contracts of

adhesion because of mere inequality of bargaining power between employer and employee.” *Tjart, supra*, 107 Wn. App. at 830, 28 P.3d at 898 (citations omitted).

The Supreme Court found that the arbitration agreement in *Zuver* was “an adhesion contract,” but that did **not** render it unconscionable. *Zuver*, 153 Wn.2d at 305-306, 103 P.3d at 760-761. The “key inquiry” is whether the party challenging an arbitration clause lacked a meaningful choice in assenting to the agreement. *Id.* at 305, 103 P.3d at 761; *Romney*, 186 Wn. App. at 739, 349 P.3d at 38; *Tjart*, 107 Wn. App. at 898-99, 28 P.3d at 830. The Court found that “Zuver had a meaningful choice” whether to accept the offered terms of employment. *Zuver*, 153 Wn.2d at 306, 103 P.3d at 761. The Court found the arbitration provision to be unconscionable because it unlawfully limited the employee’s **substantive remedies**. *Id.* at 318, 103 P.3d at 767. The arbitration policy here does not limit the substantive remedies available to Employee.

The *Zuver* Court adopted the reasoning of a Federal Court of Appeals that “if a court found procedural unconscionability based solely on an employee’s unequal bargaining power, that holding could potentially apply to invalidate every contract of employment in our contemporary economy.” *Id.* at 307, 103 P.3d at 761 (*quoting Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002) (internal punctuation omitted)).

This Court held in *Romney* that a non-negotiable, form employment agreement containing an arbitration clause was not unconscionable. *Romney*, 186 Wn. App. 740, 735, 349 P.3d at 38. “In *Zuver*, our Supreme Court found that an adhesion contract of employment was not procedurally unconscionable when the employee’s argument rested solely on a lack of bargaining power.” *Romney*, 186 Wn. App. at 737, 349 P.3d at 37. “The key inquiry under Washington law is whether the employees lacked a meaningful choice. Here, as in other cases of employment, the employees could choose employment elsewhere. The arbitration clause is understandable and is printed in the same size font as the rest of the agreement under a bolded heading.” *Id.* at 740, 349 P.3d at 38.

These same legal principles also apply to employee handbooks. The Supreme Court held in *Thompson* that “unilateral acts of the employer are binding on his employees,” and “[o]nce an employer takes action, for whatever reasons, an employee must either accept those changes, quit, or be discharged.” *Thompson*, 102 Wn.2d at 228-29; 685 P.2d 1087.

2. An Employer Can Unilaterally Impose New Rules and Policies Even *After* an Employee Begins Working for the Company

The trial court thought it was important that Employee did not read the Handbook *before* commencing his employment. RP 19. But the case law shows that an employer can impose new terms of employment on

existing employees at any time, simply by amending a handbook and giving employees notice that the conditions of their employment have changed. That is exactly what happened in *Gaglidari*. The employee had been employed for six years before Denny’s Restaurants issued the new handbook which “contained the provision that fighting on company premises was grounds for immediate dismissal.” *Gaglidari*, 117 Wn.2d at 429, 815 P.2d at 1364.

The same thing happened in *Govier*. Two years after Deborah Govier began working for North Sound Bank, “the bank presented her with a new employment agreement that *substantially* changed the terms of her previous employment.” *Govier*, 91 Wn. App. at 494, 957 P.2d at 813 (emphasis added). This Court rejected Govier’s argument that the Bank was required to give her advance notice of the changes, before they became effective. *Id.* at 502, 957 P.2d at 816. This Court reached the same conclusion in *Tjart*, holding that the employee was bound by an arbitration clause contained in a form “application” that she was “told to sign” after her employment began. *Tjart*, 107 Wn. App. at 896-97, 28 P.3d at 829.

3. Ignorance of Contract Terms Is Not a Defense

Tjart argued that she should not be bound by arbitration clauses contained in “form” agreements that she did not read or understand. *Id.* This Court rejected that argument, holding:

... whether or not Tjart read or understood the terms of the Shearson Application to constitute an agreement to arbitrate, she assented to its terms. ... One who accepts a written contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation, or other wrongful act by another contracting party. Thus, ignorance of the contents of a contract expressed in a written instrument does not ordinarily affect the liability of one who signs it **or who accepts it otherwise than by signing it.**

Tjart, 107 Wn. App. at 896-97, 28 P.3d at 829 (emphasis added).

4. The Mandatory Arbitration Policy is Not “Hidden in a Maze of Fine Print”

Employee argues that *Tjart* is inapposite because it was decided before *Zuver* and because the arbitration clause enforced in *Tjart* was “obvious in the fairly short contract” signed by the employee. *See* Resp. Br. at 24, *quoting Tjart*, 107 Wn. App. at 899, 28 P.3d at 830. But *Zuver* did not change the legal standard for determining whether a provision is “hidden” in a contract. The legal standard is “whether the important terms were hidden in a maze of fine print.” *Zuver*, 153 Wn.2d at 303, 103 P.3d at 759 (citations and internal punctuation omitted); *Tjart*, 107 Wn. App. at 898, 28 P.3d at 830.

The Mandatory Arbitration Policy is short, written in plain English—not “legalese”—and printed in the same size font as the rest of the Handbook. CP 71. The policy is captioned in bold, capital letters that state: **“MANDATORY ARBITRATION POLICY.”** *Id.* The Handbook itself is well organized with bold captions for each section and topic. It contains

a table of contents at the beginning. CP 62. Employee admits that he was “told to read” the Handbook. CP 142. He agreed in writing he would “learn and comply with” its provisions. CP 58.

Employee was a delivery driver for almost two years after receiving a copy of the Handbook. As in *Tjart*, he “had a reasonable opportunity to understand that [he] was agreeing to arbitrate [his] future claims.” *Tjart*, 107 Wn. App. at 898-99; 28 P.3d at 830. He also had “meaningful choice” whether to continue his “at will” employment with Employer or to “choose employment elsewhere.” *Romney*, 186 Wn. App. 740, 735, 349 P.3d at 38. Employee chose to accept the conditions of his employment.

5. It is Not Necessary for the Arbitration Clause to Appear in the Employee Relationship Agreement

Employee argues that the Mandatory Arbitration Provision is not enforceable because it appears in the Handbook, but not the one-page employment agreement he signed. But the same facts appear in *Gaglidari* and *Govier*. Ronda Gaglidari received a copy of the Denny’s Restaurants handbook upon employment, and she “signed a form acknowledging receipt of the manual and agreeing to abide by the rules.” *Gaglidari*, 117 Wn.2d at 428, 815 P.2d at 1364. Six years later, she received a copy of the “alcoholic beverage handbook,” and she “signed for this book in the same manner as the 1979 employee handbook” *Id.* at 428, 815 P.2d at 1364.

The same facts appear in *Govier*, where the Bank “gave Govier a copy of its personnel handbook on her first day of work” and “she signed an acknowledgement of its receipt” *Govier*, 91 Wn. App. at 495, 957 P.2d at 813. The Court found the terms of the handbook to be binding on Govier once she received notice, even though “she did not expressly agree to be bound by its terms.” *Id.* at 499, 957 P.2d at 815.

It is clear from *Thompson*, *Gaglidari*, *Govier* and other cases that employers can unilaterally impose binding conditions through employee handbooks, and those conditions need not appear within the four corners of a document signed by the employee.

G. The Mandatory Arbitration Policy Is Not Substantively Unconscionable

Employee relies on the Supreme Court’s decisions in *Adler, Zuver, Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013) and *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 293 P.3d 1197 (2013) for his argument that the Mandatory Arbitration Policy is substantively unconscionable. In those four cases, the Court found arbitration provisions to be unconscionable because they *significantly* limited the employee’s *substantive* rights and remedies, and unfairly shifted costs to the plaintiffs. Importantly, however, the Supreme Court held that substantively unconscionable provisions should normally be severed by the

court, unless doing so would “significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause.” *Gandee*, 176 Wn.2d at 607; 293 P.3d at 1202 (quoted by *Hill*, 179 Wn.2d at 58, 308 P.3d at 640).

1. Mutuality Does Not Require “Mirror” Obligations

Employee’s main argument is that the Mandatory Arbitration Policy is “one sided” and therefore substantively unconscionable. The term “one-sided,” as used in the case law, does not mean that the parties are required to have “identical” or “mirror” obligations. The Supreme Court and this Court have expressly rejected that position. *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-767; *Romney*, 186 Wn. App. at 742, 349 P.3d at 39. “Washington courts have long held that mutuality of obligation means both parties are bound to perform the contract’s terms—not that both parties have identical requirements.” *Zuver*, 153 Wn.2d at 317, 103 P.3d at 766-767 (citations omitted). Here, the Handbook obligated Employer to provide numerous benefits and protections to Employee, including paid time off, available medical insurance, employee discounts, and a 401k retirement plan with Employer matching. CP 66-69; *see also, infra p. 23*.

The *Zuver* Court rejected the “mutuality” argument made by Employee. “[W]e are not concerned here with whether the parties have

mirror obligations under the agreement, but rather whether the effect of the provision is so “one-sided” as to render it patently “overly harsh” in this case.” *Zuver*, 153 Wn.2d at 317 n.16, 103 P.3d at 767 n.16 (citations omitted); *see Romney*, 186 Wn. App. at 742, 349 P.3d at 39.²

This Court addressed the same issue in *Walters, supra*. Walters argued that an arbitration clause lacked mutuality and was unconscionable because it required him to arbitrate all employment disputes, but permitted his employer the option of bringing certain types of claims in court. This Court rejected that argument, holding:

Next, Walters argues that the arbitration clause is invalid because the arbitration provision suffers from a lack of mutuality. But where the contract as a whole is otherwise supported by consideration on both sides, most courts have not ruled the arbitration clause invalid for lack of mutuality, even when the clause compelled one party to submit all disputes to arbitration but allowed the other party the choice of pursuing arbitration or litigation in the courts.

Walters, 120 Wn. App. at 359, 85 P.3d at 392 (citations omitted).

² The Court held: “While the concurrence/dissent asserts that our conclusion here ‘opens the door’ to claims of substantive unconscionability ‘whenever only one party to an employment arbitration agreement is constrained under one term of the agreement,’ see concurrence/dissent at [770,] that is simply not the case. Rather, future litigants must show, as was done in this circumstance, that the disputed provision is so ‘one-sided’ and ‘overly harsh’ as to render it unconscionable.” *Zuver*, 153 Wn.2d at 319 n.18, 103 P.3d at 767 n.18.

2. The Mandatory Arbitration Policy is Not Shocking to the Conscience, Monstrously Harsh, or Exceedingly Calloused

The Handbook does not contain the any of provisions that the Supreme Court has found to be substantively unconscionable. In *Zuver*, certain provisions of an arbitration clause were unconscionable because they denied the employee substantive legal remedies while allowing the employer to pursue those same remedies. The Court held:

[Zuver] contends that the effect of this provision is so one-sided and harsh that it is substantively unconscionable. We agree. Indeed, this provision appears to heavily favor Airtouch. It bars Zuver from collecting any punitive or exemplary damages for her common law claims but permits Airtouch to claim these damages for the only type of suit it would likely ever bring against Zuver, that is, for breach of her duty of nondisclosure of Airtouch's confidential information. The remedies limitation provision blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse. Consequently, we conclude that this provision is substantively unconscionable in these circumstances.

Zuver, 153 Wn.2d at 318-319, 103 P.3d at 767 (footnote omitted).

In *Hill*, the Supreme Court found an arbitration clause to be substantively unconscionable because of provisions that: (1) reduced the statute of limitations on the employees' claims from three years to 14 days; (2) imposed a two- and four-month limit on their ability to recover back pay; and (3) imposed arbitration cost-sharing requirements that effectively eliminated the employees' ability to litigate their claims. *Hill*, 179 Wn.2d at 55-58, 308 P.3d at 638-40.

In *Adler*, the arbitration agreement contained a “fee-splitting” provision that was found to be “substantively unconscionable because [it] would effectively bar [Adler] from bringing his claims.” *Adler*, 153 Wn.2d at 352-353, 103 P.3d at 785 (footnote omitted). The agreement in *Adler* also reduced the limitations period for the employee’s claims from three years to 180 days. *Adler*, 153 Wn.2d at 355-358, 103 P.3d at 786-788.

The arbitration agreement in *Gandee* required the arbitration to take place in Orange, County California, which made commencing an arbitration prohibitively expensive for the plaintiff. *Gandee*, 176 Wn.2d at 604-605; 293 P.3d at 1200. The agreement also required the losing party to pay the winning party’s attorney fees and expenses, which “effectively chill[ed] Gandee’s ability to bring suit” *Id.* at 606, 293 P.3d at 1201. The arbitration clause also reduced the statute of limitations to 30 days. *Id.*

Unlike the agreements considered by the Supreme Court, the Handbook does not purport to limit the substantive rights or remedies available to Employee. The Mandatory Arbitration Policy does not shorten the statute of limitations, reduce the amount or type of damages that Employee can recover, nor shift any costs to Employee. Employee has not satisfied his burden to prove that the Mandatory Arbitration Policy is “shocking to the conscience,” “monstrously harsh” or “exceedingly calloused.”

3. The F.A.I.R. Policy Is Not Substantively Unconscionable

Employee argues that the F.A.I.R. policy renders the Mandatory Arbitration Policy unconscionable. As explained in the Handbook, F.A.I.R. stands for Fair and Amicable Internal Resolution of disputes. CP 70. The policy requires existing employees to first report a dispute to their supervisor. *Id.* If that does not lead to a resolution, the second step is to engage in “non-binding Conciliation” with “a responsible person at Pagliacci Pizza (who may be the owner)” *Id.* An existing employee is required to follow these two steps before resorting to arbitration. *Id.*

Employee asks this Court to interpret the F.A.I.R. policy as applying to him as a former employee. He argues that because he no longer has a supervisor at Pagliacci Pizza, a literal reading of the F.A.I.R. Policy would effectively prevent him from seeking arbitration of his current claims.

One basic rule of contract construction is that Courts must give a contract a practical and reasonable interpretation, while avoiding a literal interpretation that would lead to absurd results. “[W]hen a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.” *Forest Mktg.*

Enters. v. Dep't of Natural Res., 125 Wn. App. 126, 132, 104 P.3d 40, 43 (2005) (citations and internal quotation marks omitted).

The only reasonable interpretation of the F.A.I.R. policy is that it is intended to apply to current employees. By definition, the policy is designed for “internal” resolution of employee disputes, and does not apply to former employees. But even if the F.A.I.R. policy were found to be unconscionable – which it is not – it can easily be severed in whole or part from the Handbook without altering “the tone of the arbitration clause [or] the nature of the arbitration contemplated by the clause.” *Gandee*, 176 Wn.2d at 607; 293 P.3d at 1202.

4. The F.A.I.R. Policy Can Be Severed From the Agreement

The Supreme Court’s analysis in *Zuver* and *Gandee* shows that the F.A.I.R. policy can easily be severed. In *Zuver*, the Court held: “Although some courts have declined to sever unconscionable provisions where those provisions pervade an agreement, here we are faced with only two unconscionable provisions. . . . We can easily excise the confidentiality and remedies provisions but enforce the remainder.” *Zuver*, 153 Wn.2d at 320, 103 P.3d at 768-69 (citations omitted).

By contrast, the *Gandee* Court found that severing the unconscionable provisions would essentially “rewrite” the arbitration

agreement:

Here, we are confronted with a short, four-sentence arbitration clause containing three unconscionable provisions. Severing all three provisions would significantly alter both the tone of the arbitration clause and the nature of the arbitration contemplated by the clause. The location, fee structure, and timing of the arbitration would be changed. Little would be left of the arbitration “agreed” to by the parties. On these facts, the unconscionable terms pervade the entire clause and severing three out of four provisions would require essentially a rewriting of the arbitration agreement. Thus, the arbitration clause cannot be severed from the overall contract.

Gandee, 176 Wn.2d 607; 293 P.3d 1201-1202.

With regard to severance, this case is like *Zuver* and unlike *Gandee*.

The F.A.I.R. policy concerns events that occur before an arbitration, not the arbitration itself. Severing the F.A.I.R. policy (CP 70) would have no effect on the separate Mandatory Arbitration Policy (CP 71). Severing the policy would have no effect on the nature, location, fee structure or timing of the arbitration. Severance would be the appropriate remedy if the F.A.I.R. policy were unconscionable.

H. The Mandatory Arbitration Policy is Incorporated by Reference into the Employee Relationship Agreement

There is no magic language required to incorporate a separate document into a written agreement. The Handbook is incorporated by reference through the following language: “you will learn and comply with the policies outlined in our Little Book of Answers” and “you agree to all

the foregoing.” CP 58. Counsel for Respondent admitted in open court that the Handbook is incorporated by reference. RP 4-5.

The trial court asked the wrong question regarding incorporation by reference, and therefore got the wrong answer. The question is not whether the Employee Relationship Agreement mentions “arbitration.” *See* Resp. Br. at 16. The question is whether the agreement clearly and unequivocally reflects an intent by the parties to incorporate the terms of the Handbook into their signed agreement. *Santos v. Sinclair*, 76 Wn. App. 320, 325-326, 884 P.2d 941, 943-944 (1994); *W. Wash. Corp. of Seventh Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494-495, 7 P.3d 861, 865 (2000).

The issue in *Santos*, a case cited by Employee, was whether a policy of title insurance covered an easement described in a separate document called “Short Plat No. 702.” The insurance company argued that the scope of the title insurance was limited to the real property expressly described in Exhibit A to the policy. The insured argued that the title policy also covered an easement described in Short Plat No. 702, a separate document referenced in Exhibit A. This Court agreed that by referencing Short Plat No. 702 in Exhibit A, the title policy covered the easement described in that separate document. *Santos*, 76 Wn. App. at 325-326, 884 P.2d at 943-944.

As held by the Supreme Court: “It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.”

W. Wash. Corp. of Seventh Day Adventists, 102 Wn. App. at 494-495, 7 P.3d at 865. It is clear that Employee had knowledge of the Handbook as referenced in the agreement, and expressly agreed to “comply with” its rules and policies when he began and continued his employment. CP 58.

I. The Other Cases Cited by Employee Are Distinguishable

Employee relies on *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010) for his arguments that: (1) Employee had “no reasonable opportunity to understand the terms” of the Mandatory Arbitration Policy before he signed the Employee Relationship Agreement, and (2) the Handbook was not incorporated by reference into the Employee Relationship Agreement. *See* Resp. Br. at 23. *Mattingly* is distinguishable in many significant respects.

Mattingly does not concern an employment relationship, much less an “at will” employment relationship. The plaintiffs in *Mattingly* signed a land purchase and construction agreement, where they agreed to pay the defendant \$563,750 to construct a new home. They could not simply walk away from that contract, as Employee was free to do in this case. CP 58. One reason employers can “unilaterally” impose rules and policies on “at will” employees, and even change those policies long after the employment begins, is because at will employees are free to terminate the relationship.

See Gaglihari, 117 Wn.2d at 433, 815 P.2d at 1366.

A second important distinction is that Employee received a copy of the Handbook when his employment began. The Mattinglys did not receive the “booklet” limiting their warranties until after the land purchase and construction agreement “closed,” and they were obligated to pay \$563,750 to the defendant. *Mattingly*, 157 Wn. App. at 382-383, 238 P.3d at 507-508.

The *Mattingly* Court held that “documents incorporated by reference usually must be reasonably available, at the least, so that the essentials of a contract can be discerned by the signer.” *Mattingly*, 157 Wn. App. at 392, 238 P.3d at 512. Here, the Handbook was not just “reasonably available,” it was in Employee’s possession throughout his employment. CP 142.

Employee cites *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 225 P.3d 213 (2009) for the proposition that “a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *See* Resp. Br. at 9-10. *Satomi* is not an employee handbook case. It concerns a dispute between a condominium owners association and a construction company. Here, Employee agreed to arbitrate under contract principles (signing the Employment Relationship Agreement) and through his actions (commencing and continuing his employment after being notified of the Handbook).

The Supreme Court recognized in *Satomi* that there are exceptions to the “general rule” that a signed arbitration agreement is required. *Id.* at 810-11, n.22, 225 P.3d at 230, n.22. The Court cited with approval a federal court decision holding that “a nonsignatory may be held to an arbitration clause where the nonsignatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement.” *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (cited by *Satomi*, 167 Wn.2d at 810-11, n.22, 225 P.2d at 230, n.22).

Here, Employee benefitted from the policies and protections contained in the Handbook during his two years of employment with Employer. Those benefits include: free food during work shifts (CP 67 and CP 142 at ¶6); a 50% discount on Employer products (CP 66 and 67); paid time off (CP 66 and 67); and many other policies designed to benefit and protect employees. CP 66-71.

Employee cites *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002), where a motion to compel arbitration was denied because the plaintiff proved that filing an arbitration would be cost-prohibitive. *Mendez*, 111 Wn. App. at 450, 45 P.3d at 597. No such claim has been made here.

J. Employer did Not Waive Any Arguments

Employee argues that unconscionability “was one of the reasons given by the trial court for its decision,” and therefore Employer should have assigned error to that purported finding and addressed the issue in its opening brief. *See* Resp. Br. at 20. In fact, the trial court’s order contains only one finding: “The court finds there is no agreement to arbitrate.” CP 227. All of the *proposed* findings regarding unconscionability were crossed out in the order, because the trial court did not actually find the arbitration clause to be unconscionable. *Id.*

The judge prefaced her oral remarks about unconscionability with the statements: “if I were to reach the issue about unconscionability” and “I’ll give you the benefit of my thinking, for what it’s worth” RP 286. Because the trial court did not actually make a finding regarding unconscionability, there was no reason for Employer to assign error to the court’s comments or to address the issue in its opening brief.

Employee also argues that Employer waived the legal argument that Employee agreed to arbitration by working for Employer after receiving notice of the Handbook. *See* Resp. Br. at 10. Employee misconstrues the cited caselaw. This Court held that a motion for reconsideration was improper where it was based on “new legal theories with new and different citations to the record,” but confirmed that “a new theory based on the

evidence presented in a nonjury bench trial could be raised for the first time in a motion for reconsideration.” *Wilcox v. Lexington Eye Inst.*, 128 Wn. App. 234, 241, 122 P.3d 729, 732 (2005). Employer’s motion for reconsideration was based on all of the same evidence that was in the record and discussed during the underlying motion to compel arbitration. Employer merely added additional legal authority for its argument that Employee had agreed to arbitration.

II. CONCLUSION

For the foregoing reasons, Employer respectfully requests that the Court reverse the Order Denying Defendant’s Motion to Compel Arbitration (CP 226-27), and remand with instructions to stay the Superior Court action in favor of arbitration.

Respectfully submitted this 26th day of September, 2018.

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CERTIFICATE OF SERVICE

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September 26, 2018 - 3:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78356-4
Appellate Court Case Title: Steven Burnett, Respondent v. Pagliacci Pizza, Appellant
Superior Court Case Number: 17-2-25978-1

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