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No. 78356-4-I
King County Superior Court No. 17-2-25978-1 SEA

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

STEVEN BURNETT, individually and on behalf of all others similarly
situated,

Plaintiff/Respondent,

v.

PAGLIACCI PIZZA, INC.,

Defendant/Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Steven Burnett (the Employee) worked for Pagliacci Pizza Inc. (the Employer) as a pizza delivery driver. The Employee alleges that the Employer failed to pay him and his fellow drivers all wages owed and failed to provide rest and meal breaks as required by law. The issue in this appeal is whether the Employee entered into an enforceable agreement to arbitrate his wage-and-hour claims with the Employer. The trial court correctly ruled that the Employee did not agree to the purported arbitration agreement because it was not incorporated by reference into his written employment agreement with Employer. The trial court also said that if it reached the question of whether the arbitration agreement was enforceable, the court would find the Employer's Mandatory Arbitration Policy both procedurally and substantively unconscionable.

The Employer gives this Court no reason to reverse the trial court. On appeal the Employer relies primarily on its inclusion of the arbitration provision in a handbook to establish the existence of an agreement. This argument was raised for the first time in a motion for reconsideration and is waived. It is also wrong as a matter of law because promises to resolve future disputes in a specific forum are necessarily bilateral and do not become binding based on unilateral contract formation principals.

The trial court's ruling that the Employer's Little Book of Answers, which includes the Employer's Mandatory Arbitration Policy, is not incorporated by reference into the written contract the Employee signed is also correct. As the trial court found, the language of the signed Employee Relationship Agreement does not clearly and unequivocally incorporate the Mandatory Arbitration Policy. In fact, the signed Employee Relationship Agreement contains terms inconsistent with Mandatory Arbitration and "FAIR" policies found in the Little Book of Answers.

The Employer fails to address unconscionability in its opening brief. It also fails to cite either of the Washington Supreme Court's two leading cases on the enforceability of arbitration provisions in employment contracts. Instead, the Employer falsely asserts that the trial court rejected the Employee's unconscionability arguments. Four pages of the transcript of the trial court's oral ruling are devoted to explaining that if the court were to reach unconscionability, the court would find the Employer's Mandatory Arbitration Policy unconscionable. CP 286-289. The Employer's failure to address this alternative ground for affirmance in its opening brief signals the weakness of its arguments on appeal and should be deemed a waiver of its ability to make any arguments regarding unconscionability.

The terms of the Employer's Mandatory Arbitration Policy are unconscionable and unenforceable. Even if this Court finds the Employee agreed to the Mandatory Arbitration Policy, it should affirm the denial of the motion to compel arbitration on unconscionability grounds.

II. ASSIGNMENTS OF ERROR

The issue before this Court is whether the trial court erred in denying the Employer's motion to compel arbitration. This Court should affirm because there is no enforceable agreement to arbitrate between the Employee and the Employer. The Employer's statement of issues improperly attempts to limit this Court's review to the question of whether an agreement exists and to foreclose consideration of whether the purported agreement is enforceable. If the Employer intends to argue that the Employee was required to file a cross-appeal to preserve arguments based on alternative grounds for affirmance, such an argument is meritless. *See Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011) (this Court "may affirm on any ground supported by the record").

III. STATEMENT OF THE CASE

A. The Employee Relationship Agreement the Employee signed does not contain an arbitration provision.

During the Employee's orientation, the Employer presented the Employee with multiple forms and told the Employee to sign the forms so

that he could start working. CP 142–143 at ¶¶ 3–7. One of those forms was the Employee Relationship Agreement, which he was told to sign. CP 58 (“Employee Relationship Agreement”); CP 124 at ¶ 7. The Employee was also given a copy of the Little Book of Answers and told to read it at home. CP 142 at ¶ 8.

The Employee Relationship Agreement that the Employee signed does not contain an arbitration clause. CP 58. Indeed, the agreement does not even use the word “arbitration” or any variant of it. *Id.* Rather, the Employee Relationship Agreement contains a section on “INCONSISTENCIES IN HOURS/PAY/BREAKS” that instructs employees to “promptly inform Human Resources” if they have concerns about hours, pay, or breaks. *Id.* It says nothing about arbitration. *Id.*

The Employee Relationship Agreement also contains a section entitled “RULES AND POLICIES,” which provides: “On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy.” CP 58. In other words, the Employee Relationship Agreement directs employees *not* to spend time reading the Little Book of Answers before signing the Employee Relationship Agreement. *Id.*

B. The Mandatory Arbitration Policy is hidden in the Little Book of Answers.

The Employee Relationship Agreement's "RULES AND POLICIES" reference a "FAIR Policy" in the Little Book of Answers. CP 58. The Little Book of Answers is a 23-page handbook that the Employer provides to employees. CP 60–73. The FAIR Policy is on page 17. CP at 70.

The Mandatory Arbitration Policy appears on page 18 of the Little Book of Answers. CP 71. The Mandatory Arbitration Policy is a single paragraph that provides in full:

The company has a mandatory arbitration policy with which you must comply for the binding resolution of disputes without lawsuits. If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration before a neutral arbitrator pursuant the Washington Arbitration Act.

Id.

The "INCONSISTENCIES IN HOURS/PAY/BREAKS" section of the Employee Relationship Agreement that the Employee signed contains terms different from the terms of both the FAIR Policy and the

Mandatory Arbitration Policy. *Compare* CP 58 *with* CP 70–71. The Employee Relationship Agreement also permits the Employer to unilaterally change the terms of the Little Book of Answers, including the FAIR Policy and Mandatory Arbitration Policy, at any time. CP 58.

C. The trial court correctly denied the Employer’s motion to compel arbitration and motion for reconsideration.

Shortly after the Employee filed his class action complaint, the Employer moved to compel arbitration. CP 39–47. The Employer’s motion argued that the Employee Relationship Agreement the Employee signed incorporates by reference the Little Book of Answers and its Mandatory Arbitration Policy. CP 42. The Employer also argued that the presentation of the Mandatory Arbitration policy was neither procedurally nor substantively unconscionable. CP 44–47. Neither the Employer’s motion nor its reply made any argument that the Little Book of Answers is a separate and binding unilateral contract. CP 39–47, 213–220.

After a hearing, the trial court issued a detailed oral ruling from the bench. CP 279–290; *see also* CP 225. The trial court first explained that the court’s focus was on the basic question of whether the Employee’s employment contract contains an agreement to arbitrate. CP 279 (RP 17:5–8). The court discussed the terms of the Employee Relationship Agreement and found it did not incorporate the Mandatory Arbitration Policy in the Little Book of Answers:

I don't see anything in this agreement that includes an arbitration provision either on its face or by saying we're incorporating our Little Book of Answers that is an employee handbook, and, by the way, also includes additional terms to this agreement. I mean, it would be easy to say that, but it doesn't say that.

CP 282. The court explained that a "second big problem" with the Employer's argument is that the dispute resolution terms in the Little Book of Answers are "directly contradicted" by the Employee Relationship Agreement. CP 283 (RP 21:16–22). The court concluded that as a reasonable person reading the Employee Relationship Agreement, there is no way to find the Mandatory Arbitration Policy is incorporated by reference. CP 285 (RP 23:12–24).

The trial court then addressed unconscionability because that is where the parties had focused their arguments. CP 286. With respect to procedural unconscionability, the court explained that "the terms in the *Little Book of Answers* were not provided to be read before [the Employee Relationship Agreement] was signed. You can't add additional terms or impose additional terms that are only provided to a party to the contract later." CP 287 (RP 25:10–16).

Next the court addressed substantive unconscionability. The court explained that the Mandatory Arbitration Policy is "very, very one-sided." CP 288 (RP 26:6–10). Adding: "it's one-sided in a way that always

offends courts, which is it only binds one side.” CP 288 (RP 26:11–12). The court continued: “it’s very unfair and wrong for one party to a contract to require that only the other side has to arbitrate, and that’s what this does.” CP 288 (RP 26:15–17). The court characterized this as “hugely concerning.” CP 288–89 (RP 26:25–27:2). The court also said that the FAIR Policy’s limitation on actions, which purports to preclude arbitration unless an employee complies with the informal reporting requirements of FAIR, “looks to me to be substantively unconscionable.” CP 289 (RP 27:3–19).

The Employer filed a motion for reconsideration, CP 228–237, in which it argued for the first time that the Employee became bound by the arbitration policy in the Little Book of Answers simply by working for the Employer. The Employee pointed out in response that this was a new argument improperly raised for the first time in a motion for reconsideration and that the motion failed to address unconscionability, the alternative grounds for the court’s denial of the motion to compel arbitration. CP 297. The trial court promptly denied the Employer’s motion for reconsideration. CP 321–22.

IV. ARGUMENT AND AUTHORITY

This Court reviews the trial court’s decision to deny a motion to compel arbitration de novo. *Gandee v. LDL Freedom Enters., Inc.*, 176

Wn.2d 598, 602, 293 P.3d 1197 (2013). This Court “may affirm on any ground supported by the record.” *Wash. Fed. Sav. & Loan Ass’n*, 165 Wn. App. at 14, 266 P.3d 905. As the party opposing arbitration, the Employee bears the burden of establishing that the purported agreement to arbitrate is not enforceable. *Zuver v. Airtouch Communc’ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). The trial court correctly denied the Employer’s motion to compel arbitration because the Employee carried his burden.

A. Washington’s public policy favoring arbitration does not override black letter law governing contract formation and enforceability.

The Washington Arbitration Act (“WAA”) requires the court determine whether there is an agreement to arbitrate, and if so whether it is enforceable. *See Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (Courts “determine the threshold matter of whether an arbitration clause is valid and enforceable.”). “If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.” RCW 7.04A.070(2).

“While a strong public policy favoring arbitration is recognized under both federal and Washington law, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Satomi Owners Ass’n v. Satomi, LLC*, 167

Wn.2d 781, 810, 225 P.3d 213 (2009) (internal citations and quotation marks omitted). Arbitration agreements stand on equal footing with other contracts and may be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability.” *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 467, 45 P.3d 594 (2002); *see also Gandee*, 176 Wn.2d at 609–10, 239 P.3d 1197 (denying enforcement of unconscionable arbitration clause).

B. Employers may not unilaterally impose mandatory arbitration provisions on employees via handbooks.

The Employer maintains the Employee is bound by the arbitration provision simply because that provision was included in the Employer’s handbook and the Employee worked for the Employer after receiving the handbook. This argument was waived below because it is based on decades-old authority yet appeared for the first time in the Employer’s motion for reconsideration. CP 228–237. A motion for reconsideration is not an opportunity to present new theories that could have been raised before entry of an adverse ruling. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (finding new legal theories raised for the first time in a motion for reconsideration are waived on appeal)); *see also JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (same).

Further, a trial court's denial of a motion for reconsideration will not be reversed absent a showing of manifest abuse of discretion. *See Wilcox*, 130 Wn. App. at 241, 122 P.3d 729 (citing *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988)). The trial court's rejection of the Employer's new legal theories raised for the first time on reconsideration was no abuse of discretion—it was entirely correct as a matter of law.

The Employer cites no Washington state-court decision holding that an employer may bind an employee to arbitration simply by putting an arbitration clause in an employee handbook. Instead, Washington courts have said that when *employers* make promises to employees in employee handbooks, those promises may be enforced *against the employer*. *See Gagliardi v. Denny's Rests., Inc.*, 117 Wn.2d 426, 432–33, 815 P.2d 1362 (1991) (discussing the “leading case in Washington on when employee handbooks give rise to contractual obligations *on the part of the employer*”) (emphasis added); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 233, 685 P.2d 1081 (1984) (summarizing holdings relating to when an employer's ability to terminate an employee at will is limited by the terms of an employee manual or handbook); *Grovier v. N. Sound Bank*, 91 Wn. App. 493, 499, 957 P.2d 811 (1998) (“The rationale for allowing *an employee* to enforce a written personnel policy is that the

employer has derived a benefit in the nature of workplace harmony and productivity from its policy's existence.”) (emphasis added).

The argument that an employer may bind employees to arbitration by simply putting an arbitration clause in a handbook is fundamentally flawed. This flaw is exposed by the Employer's assertion that “bilateral contract analysis, *i.e.*, the exchange of reciprocal promises does not apply to employee handbooks.” Opening Br. at 16 (quoting *Grovier*, 91 Wn. App. at 399, 957 P.2d 811) (internal quotation marks omitted). An agreement to arbitrate is by its nature a bilateral exchange of promises.

A unilateral contract is one in which the offeror makes promises and the offeree accepts by performance. *See* 25 Wash. Practice, Contract Law & Practice § 1:4 (2017) (A “unilateral contract” is one where “only one party has made a promise, and therefore, only that party is subject to a legal obligation.”) The offeree makes no promises in return—a unilateral contract “is given in exchange for an act or forbearance.” *Id.* That is why the legal obligations created by handbooks are enforceable *only against an employer*. *See Gagliardi*, 117 Wn.2d at 432–33, 815 P.2d 1362; *Thompson*, 102 Wn.2d at 233, 685 P.2d 1081; *Grovier*, 91 Wn. App. at 499, 957 P.2d 811. If an employee's performance does not meet the standards set forth in a handbook, the employer's remedy is to terminate the employee, not sue the employee for breach of contract. These basic

rules also explain why an employer can modify the obligations to which it may have bound itself in a handbook unilaterally.

An arbitration agreement is a promise to resolve any future disputes using a specific method of dispute resolution. The Employer argues that it offered the Employee a unilateral contract, which the Employee accepted by working, but that the terms of the contract included the *Employee's* promise to resolve future disputes by arbitration. The Employer's argument seeks to invent a hybrid contract that is imposed unilaterally but creates bilateral obligations. The Court should forcefully reject this argument.

Gagliardi does not support the Employer's arguments. The Employer characterizes the issue in *Gagliardi* as whether the employee was bound by the provisions in two handbooks, but that is incorrect. In *Gagliardi*, the issue was whether the *employer* breached its contractual obligations to the employee when it terminated her employment. 117 Wn.2d at 431, 815 P.2d 1362. The court found the employer was bound by the terms of its handbooks, but could unilaterally modify those terms in subsequent handbooks. *Id.* at 436, 815 P.2d 1362. The employer in *Gagliardi* was not trying to bind the *employee* to any obligation; it was defending a breach of contract action by saying that it met its own obligations under the contract.

The only contract-by-handbook case involving an arbitration agreement that the Employer cites is *Browning v. 24 Hour Fitness, Inc.*, No. C05-5732RBL, 2006 WL 151933 (W.D. Wash. Jan. 19, 2006). *Browning* is an unpublished federal district court decision that is not binding on this Court. See *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 823–24, 881 P2d 986 (1994) (“a federal district court [opinion] . . . is not controlling on this court when state substantive law is interpreted”). To the extent *Browning* interprets *Gagliardi* as supporting the employer’s argument here, see *Browning*, 2006 WL 151933 at *1–2, it is wrong for the reasons set forth above.

Browning is also distinguishable because there the employee signed the employee handbook containing the arbitration clause. *Id.* at *1. Here, the Employee never signed the Little Book of Answers. Indeed, the Employer’s motion to compel arbitration in the trial court focused on the Employee having signed a separate document, the Employee Relationship Agreement. CP 43–44. The Employee Relationship Agreement that the Employee signed makes no mention of arbitration and sets forth procedures for addressing wage disputes—like the ones in this case—that are inconsistent with the arbitration provision contained in the Little Book of Answers. CP 58.

The Employer’s proposed rule ignores the bedrock principle that “[a]s an important policy of contract, one who has not agreed to arbitrate generally cannot be required to do so.” *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 934–35, 231 P.3d 1252 (2010). It also runs headlong into the Washington Supreme Court’s holding in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773 (2004). There the Court ruled that employers may not enforce arbitration agreements against employees when those agreements are obtained in a manner that deprives the employees of a meaningful choice regarding arbitration. *Id.* at 348–50, 103 P.3d 773. Indeed, the Employer acknowledges that if its argument regarding unilateral formation of arbitration agreements were accepted, there would have to be an exception for unconscionable agreements. Opening Br. at 18. But the Employer nonetheless fails to address unconscionability based on its false assertion that the Employee’s unconscionability arguments were “rejected” below. *See* § IV.D.1 *infra*.

C. The trial court correctly ruled that the Employer’s Mandatory Arbitration Policy is not incorporated by reference into the Employee Relationship Agreement.

The Employer’s motion to compel arbitration argued that the Employee is bound by the arbitration agreement in the Little Book of Answers because it is incorporated by reference into the Employee Relationship Agreement the Employee signed. The motion presented the

trial court with a question of contract interpretation: is there language in the Employee Relationship Agreement that clearly and unequivocally incorporates by reference the arbitration provision?

The trial court read the Employee Relationship Agreement and concluded that it does not incorporate by reference the arbitration provision. CP 281–286. The employment agreement the Employee signed is a one-page document entitled “Employee Relationship Agreement.” CP 58. The trial court carefully analyzed the Employee Relationship Agreement and explained that “it just never says there’s an arbitration provision. I mean, it doesn’t even say it indirectly. And that’s pretty important to me because this agreement looks complete on its face.” CP 281 (RP 19:20–23). The court went on to explain there is no language in Employee Relationship Agreement expressly incorporating the terms of the Little Book of Answers, including the arbitration provision. The court also explained that because the terms of the Employee Relationship Agreement signed by the Employee are inconsistent with the dispute resolution procedures—including the arbitration provision—in the Little Book of Answers, there is no agreement to arbitrate. CP 285.

A person who has not signed an arbitration agreement may nevertheless be bound by that agreement if it is incorporated by reference into a contract they have signed. *See Raven Offshore Yacht, Shipping, LLP*

v. F.T. Holdings, LLC, 199 Wn. App. 534, 541, 400 P.3d 347 (2017) (listing incorporation by reference as rule that may bind a person who has not signed an arbitration agreement). But incorporation by reference “must be clear and unequivocal.” *See W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000) (citing *Santos v. Sinclair*, 76 Wn. App. 320, 325, 884 P.2d 861 (1994)).

To establish incorporation by reference, the Employer relies on the following statement in the Employee Relationship Agreement: “On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers.” Opening Br. at 19; CP 58. Whether that language is sufficient to accomplish incorporation by reference is a pure legal question. *See Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, 194 P.3d 221 (2008) (“Contract construction involves the application of legal principles to determine the legal effect of contract terms.”); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 521, 826 P.3d 664 (1992) (explaining “there are cases where the question whether the employment at will relationship has been modified may be decided as a matter of law by the court” based on the “familiar principle that interpretation of contracts is a question of law for the courts”). The trial court correctly ruled that language in an employment contract telling an employee to read “on your own time” a separate employment handbook is

not “clear and unequivocal” incorporation by reference that binds the employee to terms inconsistent with those in the contract he signed.

Rather than confront the correctness of the trial court’s legal conclusion, the Employer maintains the Employee waived any argument that the Little Book of Answers is not incorporated by reference into the Employee Relationship Agreement. The basis for this assertion is that counsel for the Employee said during oral argument there is language in the Employee Relationship Agreement that is “probably sufficient for incorporation by reference.” CP 267 (RP 5:6–8). That is an equivocal statement of a legal conclusion, not a statement of fact. This Court is free to disregard counsel’s remark, as the trial court did. Even if the Court concludes the Employee is bound by the position that the Employee Relationship Agreement incorporates by reference the Little Book of Answers, the Court should find the arbitration agreement unconscionable for all the reasons discussed below.

D. The Employer’s Mandatory Arbitration Policy is unconscionable.

An unconscionable arbitration clause is unenforceable. *See Zuver*, 153 Wn.2d at 302–03, 103 P.3d 753; *Adler*, 153 Wn.2d at 344–45, 103 P.3d 773. “In Washington, either substantive *or* procedural unconscionability is sufficient to void a contract.” *Gandee*, 176 Wn.2d at 603, 293 P.3d 1197 (emphasis in original) (holding arbitration clause in

debt adjusting contract substantively unconscionable and unenforceable).

The Employer's Mandatory Arbitration Policy is unenforceable because it is presented in a procedurally unconscionable manner and contains substantively unconscionable terms.

1. The trial court adopted the Employee's unconscionability arguments on the record.

In his briefing to the trial court, the Employee argued that the Mandatory Arbitration Policy is unconscionable, both procedurally and substantively. The Employer maintains that the court "rejected" this argument, Opening Br. at 18, but the Employer's assertion is belied by the record. The trial court addressed unconscionability at length in its oral ruling, explaining that if it were to reach unconscionability, the court would find the arbitration provision unconscionable. CP 286–89. The Employer cites to the second page of the trial court's written order denying the motion to compel arbitration. Opening Br. at 18 (CP 227). If the Employer is suggesting the trial court rejected language regarding unconscionability in the proposed order prepared by the Employee's counsel in advance of the hearing, that is false. Counsel for the Employee crossed out the provisions—at the request of counsel for the Employer—before submitting the proposed order to the court.

The Employer's attempt to sandbag by failing to address an obvious alternative ground for affirmance in its opening brief should be

deemed a waiver of the ability to address those arguments in reply. The failure to address unconscionability here is inexcusable because the Employee argued for denial of the Employer's motion for reconsideration based on its failure to address the unconscionability grounds discussed by the trial court on the record. CP 299–300. The notion that the Employee was required to file a cross-appeal to preserve arguments on which it prevailed below is meritless. The Employer seeks reversal of the trial court's denial of its motion to compel arbitration. But to obtain a reversal, the Employer must address each of the reasons given by the trial court for its decision. This the Employer fails to do.

2. The Employer's Mandatory Arbitration Policy is procedurally unconscionable.

An arbitration agreement is procedurally unconscionable when the circumstances surrounding the parties' transaction show that the weaker party lacked meaningful choice. *Zuver*, 153 Wn.2d at 304, 103 P.3d 753. When a prospective employer presents new employees with a standard form contract to be signed as a condition of employment, it is self-evident that the employee cannot negotiate the terms with the employer, and the contract is an adhesion contract. *Id.*

Courts consider the following factors to determine whether an adhesion contract exists:

(1) whether the contract is a standard form printed contract, (2) whether it was prepared by one party and submitted to the other on a take it or leave basis, and (3) whether there was no true equality of bargaining power between the parties.

Adler, 153 Wn.2d at 347, 103 P.3d 773 (internal quotation marks omitted).

As the Employer admitted, the Employee Relationship Agreement is a form contract that new employees were “required” to sign to work for the Employer. CP 41; CP 55 at ¶ 6 (“Upon hire, [Employee] was *required* to attend new employee orientation and sign various [Employer] documents to begin employment”) (emphasis added). And there is nothing in the record to suggest the Employee and the Employer had true equality of bargaining power. Thus, the Employee Relationship Agreement is an adhesion contract.

To determine whether an employee lacked meaningful choice when presented with an arbitration agreement in an adhesion contract, courts consider whether the arbitration term was hidden and whether the employee had a reasonable opportunity to understand the terms of the agreement. *Adler*, 153 Wn.2d at 350, 103 P.3d 773.

The Employer went to great lengths to hide its purported arbitration agreement from new employees. Indeed, the Employee Relationship Agreement that the Employee signed does not use the term “arbitration” or say anything about the employee giving up his right to sue

the Employer in court. Rather, the Employee Relationship Agreement contains a section entitled “INCONSISTENCIES IN HOURS/PAY/BREAKS” that directs employees to promptly inform Human Resources if an employee does not receive pay or breaks to which he is entitled. CP 58. It says nothing about arbitration or the FAIR policy.

The Employee Relationship Agreement contains a section entitled “RULES AND POLICIES” that refers to the Little Book of Answers. *Id.* That section directs employees: “On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy.” *Id.* Consistent with the terms of the Employer’s form contract, the Employee was given a copy of the Little Book of Answers but was not given time to review the document before the Employer required him to sign to the Employee Relationship Agreement. CP 142 (Burnett Decl. ¶¶ 7–8).

The Little Book of Answers further hides the arbitration policy the Employer seeks to enforce by burying it on page 18 of a 23-page handbook. Indeed, if an employee were to turn to page 17 of the Little Book of Answers, containing the FAIR Policy referenced in the Employee Relationship Agreement, the employee still would not find the Mandatory Arbitration Policy because it appears on the next page.

The circumstances here are similar to those in *Mattingly v. Palmer Ridge Homes LLC*, 157 Wn. App. 376, 238 P.3d 305 (2010) (addressing arguments based on both procedural unconscionability and improper incorporation by reference and resolving case on the basis of unconscionability). In *Mattingly*, the court found procedurally unconscionable and refused to enforce an arbitration agreement buried in a 32-page booklet, even though the contract signed by the Mattinglys (the party opposing arbitration) expressly referred to an arbitration policy in capital letters. *Id.* at 387–88, 391, 238 P.3d 505. The Mattinglys had no opportunity to review and understand the arbitration clause because they did not receive the referenced booklet until after they signed the contract.

Like the Mattinglys, the Employee had no “reasonable opportunity to understand the terms” of the Mandatory Arbitration Policy before the Employer required him to sign the Employee Relationship Agreement. *Id.* at 390–91, 238 P.3d 505. The document the Employee signed says nothing about arbitration, while the one presented to the Mattinglys did. *Id.* In addition, the agreement the Employee was required to sign to get a job directs the employee that “you will” (in the future tense) learn and comply with the Little Book of Answers “[o]n your own initiative.” The Employee Relationship Agreement directs prospective employee *not* to spend time reading the Little Book of Answers before signing. As the trial court put it,

“That’s sort of procedural unconscionability on its face.” CP 287 (RP 25:23–24).

In the trial court, the Employer cited *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.2d 823 (2001), for the well-worn proposition that ignorance of the terms of a contract is not a defense to enforcement. *Tjart* is not relevant here. First, *Tjart* was decided three years before *Zuver* and *Adler*, the Washington Supreme Court’s leading decisions on unconscionable arbitration provisions in employment contracts. Second, the arbitration provision the court enforced in *Tjart* was “obvious in the fairly short contract” that the employee signed. *Id.* at 899, 28 P.3d 823. *Tjart* has no relevance to determining whether an arbitration clause that was not included or expressly referenced in the employment contract presented to the employee is procedurally unconscionable.

The Employee signed an Employee Relationship Agreement that does not contain an arbitration clause and that conflicts with the Employer’s FAIR and Mandatory Arbitration policies. Further, the Employee Relationship Agreement directs employees not to read the Little Book of Answers containing the Mandatory Arbitration Policy before signing. Thus, the arbitration clause the Employer seeks to enforce is procedurally unconscionable and unenforceable.

3. The Employer's Mandatory Arbitration Policy is substantively unconscionable.

An arbitration clause is substantively unconscionable “where it is overly or monstrously harsh, is one-sided, shocks the conscience, or is exceedingly calloused.” *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 55, 308 P.3d 635 (2013) (affirming refusal to enforce arbitration provision in employment contract in a case involving wage and hour violations). Arbitration provisions that require an employee to arbitrate her claims, but do not require her employer to do so, are unfairly one-sided and unconscionable. *See Zuver*, 153 Wn.2d at 316–17 & n.16, 103 P.3d 753 (explaining that unilateral arbitration agreements imposed on the employee by the employer reflect the very mistrust of arbitration that the FAA is supposed to remedy (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 120–21, 6 P.3d 669 (2000)); *see also Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 724, 13 Cal. Rptr. 3d 88 (2004) (finding a contract “may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are more likely to be brought by the stronger party”).

In *Zuver*, the Court found a provision that limited the remedies the employee could recover in arbitration was unfairly one-sided. *Id.* at 315–19, 103 P.3d 753; *see also Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d

1254, 1261 (9th Cir. 2005) (applying Washington law and holding that an arbitration clause requiring the employee to arbitrate his claims but not requiring Circuit City to arbitrate claims it might have is substantively unconscionable and unenforceable). Similarly, in *Adler*, the Court agreed that a one-sided arbitration clause in an employment contract is unconscionable. 153 Wn.2d at 351–52, 103 P.3d 773. The Court found the clause before it, however, required both parties to submit their claims to arbitration. *Id.*

As the trial court explained, the Employer’s Mandatory Arbitration Policy is substantively unconscionable because it is one-sided—it applies only to claims the employee may have against the Employer. The trial court emphasized the one-sided nature of the clause in its oral ruling denying the motion to compel arbitration. CP 287 (describing the Mandatory Arbitration Policy as “very, very one-sided” in “a way that always offends courts, which is it only binds one side”).

The Mandatory Arbitration Policy expressly provides that “you” must comply with the company’s mandatory arbitration policy. CP 71. It goes on:

If you believe you have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of your employment was wrongful, you submit the

dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, you then submit the dispute to binding arbitration.

Id. (emphasis added). The one-sided nature of the arbitration is plain from its repeated statement that “you”—the employee—must arbitrate with no concurrent duty placed on the Employer. In addition, the only claims subject to arbitration are claims the employee can bring against the Employer. Any claim by the Employer against an employee, for example a claim that an employee took money from the company, does not fall within the scope of the arbitration clause.

The Mandatory Arbitration Policy is also unconscionable because the FAIR Policy contains a “LIMITATIONS ON ACTIONS” that is shockingly harsh. The Limitations Provision precludes an employee from commencing arbitration or a lawsuit if the employee fails to comply with “the steps and procedures in the FAIR Policy.” CP 70. Under the Limitations Provision: “If you do not comply with a step, rule or procedure in the FAIR Policy with respect to a claim, you waive the right to raise the claim in any court or other forum, including arbitration.” *Id.* The FAIR Policy calls for a two-step process. *Id.* First, the employee must “informally report the matter to the employee’s supervisor.” Second, the employee must “initiate non-binding Conciliation.” *Id.*

The Limitations Provision is overly harsh. First, it effectively shortens the statute of limitations for any claim by an employee who no longer works for the Employer. *See Hill*, 179 Wn.2d at 55–56, 308 P.3d 635 (holding that a limitations provision that shortens the statute of limitations is unconscionable). How is a terminated employee to “informally report the matter and all details to your supervisor”? A former employee no longer has a supervisor and certainly does not have informal access to a supervisor. Second, the provision contains no exception to the first step in the FAIR Policy when the employee’s supervisor is the person subjecting the employee to unfair conduct or harassment.

Moreover, the FAIR Policy is inconsistent with the Employee Relationship Agreement’s requirement that the employee promptly report issues related to hours, pay, or breaks to Human Resources. *Compare* CP 70 with CP 58. An employee who follows the “INCONSISTENCIES” section of the Employee Relationship Agreement, could be deemed to have violated the FAIR Policy and thereby be deprived of the ability to bring any action related to unpaid wages.

Finally, the Mandatory Arbitration Policy is unconscionable because the Employer reserves for itself the ability to modify the terms of the Little Book of Answers at any time. CP 58 (“We will on occasion change the policies and procedures contained in this employee handbook.

The newest handbook supersedes any prior handbook or policy notices issued by Pagliacci Pizza.”). An arbitration provision that grants the employer a unilateral right to terminate or modify it is unenforceable under Washington law. *Al-Safin*, 394 F.3d at 1261.

As the trial court correctly ruled, the Mandatory Arbitration Policy is unconscionable because the documents presented to employees contain conflicting and inconsistent instructions and a one-sided arbitration provision that the Employer may unilaterally modify at any time.

E. The unconscionable provisions cannot be severed from the Mandatory Arbitration Policy.

Washington courts strive to enforce the terms of an agreement if the agreement can be saved by severing unconscionable terms. *Gandee*, 176 Wn.2d at 607, 293 P.3d 1197. But where “the unconscionable terms pervade the entire clause,” and severing the unconscionable terms would essentially require rewriting the clause, the court should instead deny enforcement. *Id.* In *Gandee*, the Washington Supreme Court found that the “short four-sentence arbitration clause containing three unconscionable provisions” could not be saved by severing provisions. *Id.*

Severance is even less appropriate here than in *Gandee*. First, the procedural unconscionability created by the way the Mandatory Arbitration Policy is presented cannot be cured by severance. Second, the Mandatory Arbitration Policy is just two sentences long and both

sentences impose a unilateral obligation on the employee to resolve disputes through arbitration. Severing the two unconscionable provisions would leave nothing to enforce. *Id.* For these reasons, if the Court finds the Mandatory Arbitration Agreement unconscionable, it must affirm the trial court's denial of the Employer's motion to compel arbitration.

V. CONCLUSION

For all of the foregoing reasons, the Employee respectfully requests that this Court affirm the trial court's denial of the Employer's motion to compel arbitration.

RESPECTFULLY SUBMITTED AND DATED this 27th day of August, 2018.

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I certify that on August 27, 2018, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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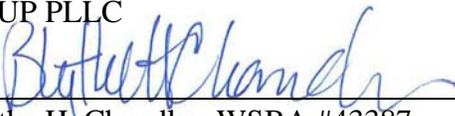
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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