No. 75472

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

VALERIE JOHNSON,

Respondent,

v.

VATTEROTT EDUCATIONAL CENTERS, INC., REBECCA MATTNEY, DAVE INLOW, AND CHERYL TILLEY,

Appellants.

Appeal from Jackson County Circuit Court

Sixteenth Judicial Circuit

The Honorable David Michael Byrn, Judge

RESPONDENT'S BRIEF

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ARGUMENT

Point I

The trial court did not err in denying Vatterott's motion to compel arbitration because Vatterott did not prove that its arbitration agreement met the elements of a contract. Specifically, Vatterott has not established that its arbitration agreement met the elements of a contract because Vatterott's employee handbook states that the arbitration agreement is not a contract and declares that Vatterott has the power to rescind or modify the agreement.

a) The court's standard of review and legal standard

The appellate court uses its *de novo* review to determine whether or not the parties agreed to arbitrate their dispute. *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 736 (Mo. App. 2011). That review requires the court to consider whether or not: (1) the parties have executed a valid arbitration agreement; (2) whether the specific dispute falls within the arbitration agreement's scope; and (3) applicable contract principles invalidate the agreement.

The court uses normal state law contract principles in deciding those issues. *Id.* Under Missouri law, a court can compel arbitration only when one party firmly establishes that the parties agreed to arbitrate their claims. The court will enforce an arbitration agreement only if the agreement meets the essential contract elements of offer, acceptance, and consideration. *Id.* The party seeking to enforce an arbitration agreement has the burden to prove the existence of those elements. *Id.*

b) Vatterott has not proven that it offered an arbitration agreement to Johnson

In this case, Vatterott placed its arbitration provisions in its employee handbook. (LF. 104-117). The court has generally held that an employee handbook is not a contract because the handbook normally lacks the contract elements of offer, acceptance, and consideration. *See e.g. Enyeart v. Shelter Mut. Ins. Co.*, 784 S.W.2d 205, 207 (Mo. App. 1989).

And, in fact, in this case, Vatterott's employee handbook's acknowledgment form clearly says that the handbook is not a contract:

> I understand the Employee Handbook is not a contract of employment and that no employment relationship other than 'at will' has been expressed or implied. I also understand that I am an 'at will' employee and my employment may be terminated at any time, with or without prior notice, and with or without cause or reason by Vatterott regardless of my length of employment or the granting of benefits[.]

(L.F. page 108).

This court has already held that similar language in an employee handbook that included arbitration provisions showed the parties did not intend to create a binding arbitration contract. In *Whitworth,* the employer included arbitration provisions in its employee handbook. The employer's acknowledgment form also included language

explaining that the employee handbook did not create a binding contract between the employer and employee:

> None of the guidelines, policies or benefits in this manual are intended, by reason of their publication, to confer any contractual rights or privileges upon you. This is not a contract of employment.

Whitworth, 344 S.W.3d at 739. Because of this language, the *Whitworth* court held that the arbitration agreement was not a valid contract. Based on this court's holding in *Whitworth*, this court should conclude that Vatterott and Johnson did not have a valid arbitration agreement.

Vatterott concedes that it included that language in its employee handbook. Vatterott, however, claims that the arbitration agreement and the employee handbook were separate documents and that the employee handbook's acknowledgement form, which included the non-contractual language, does not apply to the arbitration agreement. In its brief, Vatterott relies primarily on *McIntosh v. Tenet Health Systems Hospitals, Inc.*, 48 S.W.3d 85 (Mo. App. 2001) and *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th 1997) for the proposition that a court should consider an arbitration agreement separate and distinct from the employee handbook even when the handbook contains the arbitration agreement.

Vatterott is correct that both the *McIntosh* court and the *Patterson* court enforced an arbitration agreement contained in the employee handbook. Neither case, however, created a *per se* rule that the court must enforce every arbitration agreement found in an employee handbook. And, neither of those cases held that the court cannot examine the

rest of the employee handbook to determine whether or not the arbitration agreement is enforceable. To the extent that those cases did hold that the court could not examine the rest of the employee handbook, the court should not follow those cases because the cases clearly conflict with this court's *Whitworth* opinion. Hence, the court's only issue is whether or not the employee handbook contains any language showing that the parties intended to exempt the arbitration agreement from the employee handbook's acknowledgment form's non-contractual language. If not, then the court should follow *Whitworth* by upholding the circuit court's order.

1) **The court should conclude that the arbitration agreement's placement in the employee handbook establishes that the parties did not intend to separate the arbitration provisions from the employee handbook**

The employee handbook is 68 pages. (LF page 104-171). Vatterott included the arbitration provisions in these 68 pages. *Id.* at 112. Vatterott's employee handbook's table of contents lists the arbitration provisions as part of the employee handbook. *Id.* at 105. And, each page of the handbook including the arbitration provisions pages has the term "employee handbook" at the top of the page. These facts are sufficient for the court to conclude that Vatterott intended for the arbitration agreement to be part of the employee handbook.

In its brief, Vatterott also claims that the acknowledgment form's language does not apply to the arbitration provisions because the general acknowledgment form is on page 8 of the employee handbook while the arbitration agreement is on pages 9-14 of the

handbook. Of course, Vatterott is correct that the acknowledgement form is on page 8 while the arbitration agreement is on page 9 through 14. Vatterott does not explain why the acknowledgement form's placement on page 8 means that it does not apply to pages 9 through 14. Since Vatterott placed the acknowledgment form on page 8 *before* the arbitration agreement and before the rest of Vatterott's policies, it would make sense that the acknowledgment form applies to every policy on every page after page 8.

For example, Vatterott would undoubtedly agree that the acknowledgment form applies to other pages in the employee handbook like Vatterott's holiday and vacation policy, which it outlines on pages 28 and 29 of the handbook. If the acknowledgment form applies to the pages after the arbitration agreement then it must also apply to the arbitration agreement pages.

2) The court should conclude that the acknowledgment form's language establishes that Vatterott did not intend to exempt the arbitration agreement from the acknowledgment's non-contractual language

In its brief, Vatterott suggests that the acknowledgment form deals only with the employer's policies and that the employment arbitration agreement is an employment contract that falls outside the employer's policies. See Vatterott's brief, page 14. Vatterott points to no language in the acknowledgment form that supports this distinction. The employer made this exact argument in *Whitworth* and the court rejected it by noting that an employer's arbitration procedures are no less an employment policy than the employer's provisions addressing sick days or vacations days. *Id.*

Vatterrott points to no language in the acknowledgment form to show that the acknowledgment form's non-contractual language does not apply to the arbitration provisions. As the trial court concluded in this case and the court concluded in *Whitworth*, Vatterott could have included language exempting the arbitration provisions from the acknowledgment form's non-contractual language. LF, page 186; *Whitworth*, 344 S.W.3d at 739. Vatterott did not do so. Since Vatterott drafted the document, this court should construe the document against Vatterott. *Mays v. Hodges*, 271 S.W.3d 607, 612 (Mo. App. 2008). The court should also conclude that nothing about Vatterott's acknowledgment form suggests that the parties intended to exempt the arbitration provisions from the acknowledgment form's non-contractual language.

Vatterott also points out that (1) the arbitration agreement is clearly labeled "an agreement," (2) the arbitration agreement clearly says the contract is binding, and (3) the arbitration agreement was signed by the employee and a Vatterott representative while the employee acknowledgment form was signed by only the employee. See Vatterott's brief, page 13-15. Vatterott is also correct that Vatterott labeled arbitration agreement as an agreement and required the employer and the CEO to sign it. Vatterott does not explain why these differences modify Vatterott's general acknowledgment form or explain why those differences distinguish this case from *Whitworth*.

Vatterott's employee handbook says that the handbook is not a contract. Vatterott points to nothing to suggest that it intended to exempt the arbitration agreement from this language. Thus, the court should conclude that Vatterott's handbook was not an offer to contract to which Johnson could respond by accepting the contract.

c) Vatterot has not proven that it executed the document

In its brief, Vatterott points that its arbitration agreement required signatures from the employee and Vatterott. See L.F. 46. Arijana Baskot signed the arbitration agreement on behalf of Vatterott. (L.F. 46). Although a person may have his or her agent sign a document on his or her behalf, Vatterott's employee handbook modifies this contract principle by requiring Vatterott's CEO or President to sign all agreements:

> No officer, employee, or representative of the company is authorized to enter into an agreement, expressed or implied with any employees for employment other than at will unless those agreements are in a written contract signed by the CEO and President of Vatterott Educational Centers, Inc.

(L.F. page 5).

Since Vatterott did not follow its own self-imposed rules by having its CEO or president did not sign the arbitration agreement then the arbitration agreement is not a binding contract. *Whitworth*, 344 S.W.3d at 740. Furthermore, even if handbook allowed Vatterott's CEO or president to have someone sign on his or her behalf, Vatterott has not established or presented any facts showing that Baskot had the CEO's or president's authority to sign the document. Vatterott had the burden to prove the enforceability of the arbitration agreement. *Whitworth*, 344 S.W.3d at 736. Vatterott, however, has failed to show that it properly executed the arbitration agreement.

d) Vatterott has not proven that it gave consideration for the arbitration agreement

Consideration for a contract generally consists of one party's promise to do something or give something of value to the other party. *Id.* In this case, Vatterott claims that the parties gave mutual consideration to each other because both parties agreed to arbitrate their claims against each other. As a general matter, the parties give adequate consideration for a bilateral contract if the contract contains mutual promises or if the contract imposes liability on each party. If, however, one party retains the unilateral right to modify or alter the contract then that party's promise is illusory and does not constitute consideration. *Id.*

In this case, Vatterott's promise to arbitrate its claims against Johnson was illusory. Vatterott retained the right to revise, rescind, or supplement the handbook's terms at its discretion:

> Vatterott reserves the right to revise, supplement, or rescind any polices or portions of the Handbook as it deems appropriate at its sole discretion.
>
> . . . .
>
> I have received a copy of the Employee Handbook. I understand that the policies, rules, and benefits described in it are subject to change at any time and at the sole discretion of Vatterott.

(L.F. 108).

Vatterott's handbook's terms show that Vatterott possessed the unilateral right to modify any terms of the handbook without notice to Johnson. Thus, Vatterott's promise to follow the arbitration procedure was illusory and does not constitute consideration for an enforceable arbitration contract. *Whitworth*, 344 S.W.3d at 742.

Conclusion

The court should deny Vatterott's first point. Vatterott has not established that the parties intended to exempt its arbitration agreement from its handbook's acknowledgment form. The handbook's acknowledgment form proves that the parties did not intend to create a contract and shows that Vatterott did not offer any consideration for its promise to arbitrate.

Point II

The trial court did not err in denying Vatterott's motion because its arbitration agreement is unconscionable. Specifically, Vatterott's arbitration agreement is unconscionable because Ms. Johnson had no bargaining power when she signed the agreement and the agreement prohibits her from recovering sufficient damages.

a) Standard of review and legal standard

The court's unconscionability doctrine guards against one-sided contracts, oppression and unfair surprise. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493 (Mo. 2012). Missouri courts traditionally have discussed unconscionability under the concepts of *procedural* unconscionability and *substantive* unconscionability. *Brewer*, 364 S.W.3d at 493. In *Brewer*, the Missouri Supreme Court held that the United States Supreme Court now requires that the court review the case to determine whether or not state law defenses such as unconscionability impact the *formation* of a contract. *Id.* But the Missouri Supreme Court also noted that oppression and unfair surprise can occur during the bargaining process or may become evident later, when a party invokes the objectively unreasonable arbitration terms. *Id.* The Missouri Supreme Court noted that, in either case, the unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms. *Id.*

b) The court should conclude that the bargaining process was unconscionable

In *Brewer*, the court held that factors supporting a determination that an arbitration agreement is unconscionable include: (1) one party having superior bargaining position; (2) the arbitration agreement was difficult to read or understand; (3) the arbitration agreement was non-negotiable; and (4) the arbitration agreement's terms prevented one party from vindicating his or her rights. *Id.* Other Missouri courts have held that factors supporting a determination that an arbitration agreement is unconscionable include the fact that: (1) the contract was on a pre-printed form, and (2) the agreement contained fine print. *Shaffer*, 300 S.W.3d at 558.

These factors are present in this case. Vatterott, the party with all of the power, caught Johnson off guard when Johnson's superior demanded that she sign a pre-printed arbitration agreement on the day that it was given to her. (L.F. 102 ¶¶ 6-7). Johnson had been employed at Vatterott for nine months and did not understand why she was being asked to sign the document. (L.F. 102 ¶ 6). Johnson did not fully comprehend what the significance of the document and her supervisors explained that it was a way to "fix things internally before things went externally." (L.F. 103 ¶ 8). Johnson felt pressured and powerless to propose a change in the document's terms and feared that a refusal to sign the document might jeopardize her employment with Vatterott. (L.F. 103 ¶¶ 15-16). The agreement also contained fine print because the arbitration rules were not included. (L.F. 44).

c) The court should conclude that the agreement prevents Johnson from vindicating her rights

This court has held that parties may litigate statutory claims in arbitration. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 311 (Mo. App. 2005). The court has noted, however, that the arbitration forum must provide the claimant with the ability to vindicate his or her statutory rights. This court has held that it will invalidate an arbitration agreement that effectively prohibits a party from vindicating his or her rights. *Id.*

For example, in *Whitney*, the plaintiff filed suit against a corporation for violating the Missouri's Merchandising Practices Act by improperly including a line item charge of $0.88 per month for a "Regulatory Cost Recovery Fee" on his billing statement. The corporation filed a motion to compel. The appellate court refused to enforce an arbitration agreement because the agreement limited his relief to his actual damages and prohibited him from receiving attorneys' fees, incidental damages, consequential damages, and punitive damages. *Id*. The court held that this limitation effectively prohibited the claimant from bringing his claim because the plaintiff's potential award could not possibly approach the costs of arbitrating the claim. The court concluded that the arbitration agreement's limitation on damages effectively prohibited the plaintiff from seeking relief. *Id.*

The court's holding applies in this case. The Missouri legislature has provided that employees may recover actual damages, punitive damages, attorney's fees, and costs. Section 213.111(2). The statute authorizes these other damages and fees because the

actual monetary harm to the employee is often very minimal. *Holmes v. Kansas City Missouri Bd. of Police Com'rs*, 364 S.W.3d 615, 628 (Mo. App. 2012). This court has noted that the statute allows a claimant to recover attorney's fees to fully make the plaintiff "whole" by compensating him or her for the lawsuit's costs and to make sure that plaintiffs prosecute discrimination suits that have small or nominal monetary damages. *Id.* at 630.

And, the United States Supreme Court has observed that a rule restricting an attorney's fees award in civil rights cases would seriously undermine the legislature's purpose in enacting civil rights legislation. *City of Riverside v. Rivera*, 477 U.S. 561, 576-77 (1986). These victims cannot afford to pay their attorneys and the attorneys cannot accept the case on a contingent fee arrangement because the cases usually involve substantial expenditures while producing small monetary recoveries. The statute, therefore, recognizes that, without the court's ability to award attorney's fees in discrimination cases, most claimants would not pursue their claims.

Vatterott's arbitration agreement, however, limits Johnson's damages to her actual economic loss and prohibits an arbitrator from awarding non-economic damages, consequential damages, treble damages, punitive damages, attorney's fees, and costs. (L.F. 45). The amount of money that Johnson will spend on attorney's fees and costs will most likely exceed her actual damages. The agreement, therefore, makes it economically impractical for her to pursue a claim and vindicate her rights. Based on this court's holding in *Whitney*, the court should conclude that the arbitration agreement's damages restrictions effectively prevents a claimant from vindicating his or her rights.

Conclusion to Point II

The court should conclude that the trial court did not err in denying Vatterott's motion because its arbitration agreement is procedurally and substantively unconscionable.

Conclusion

The trial court did not err in denying Vatterott's motion to compel arbitration. Based on this court's holding in *Whitworth*, Vatterott's arbitration agreement lacks the essential elements of a contract: offer, acceptance, and consideration. Furthermore, assuming that a valid arbitration agreement existed between Vatterott and Johnson, the court should conclude that the agreement is unconscionable.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

I, Tom Hershewe, certify that:

1. This brief includes the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. There are 3,635 words contained in this brief.

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CERTIFICATE OF SERVICE

I certify that, on November 16, 2012, I electronically filed and served via e-mail this brief to:

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