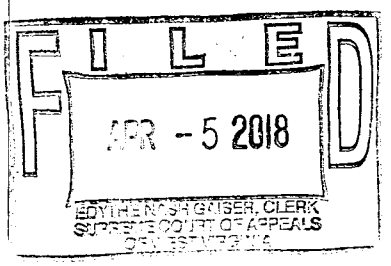
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON

EMPLOYEE RESOURCE GROUP, LLC,
DAVID CURRY and JAMES MOLLETTE,

Petitioners

Appeal No.: 18-0007

v.

ANITA COLLINS,

Respondent.

APPEAL FROM AN ORDER FROM
THE CIRCUIT COURT OF MINGO COUNTY,
WEST VIRGINIA

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PETITION FOR APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I.

ASSIGNMENT OF ERROR

The Circuit Court of Mingo County, West Virginia erred in refusing to enforce the arbitration program.

II.

STATEMENT OF THE CASE

This appeal comes to the Court as a result of the Mingo Circuit Court's December 5, 2017 Order finding that there is no valid agreement to arbitrate between the parties. The trial court made this ruling in spite of being presented with documentation outlining the terms and conditions of the arbitration agreement, deposition testimony as to the formation of the agreement, and testimony and documentation showing the agreement was digitally signed by the Respondent.

On or about April 24, 2016 Respondent was presented with the Dispute Resolution Program Booklet. A copy of the booklet can be found in the Appendix pages 56-62. Respondent electronically signed the Agreement & Receipt for Dispute Resolution Program and agreed that she would be subject to the arbitration program. A copy of that signed agreement can be found in the Appendix pages 63-64. These documents show the existence of a contract between Respondent and Petitioner Employee Resource Group to resolve their legal claims or disputes covered by the Dispute Resolution Program through binding arbitration. Further, it is expressly stated that the binding arbitration is to be "the mandatory and exclusive means" for resolving a workplace dispute. *Appendix, p. 56.* In other words, the parties have contracted to resolve their disputes by way of arbitration and not by filing a lawsuit with this or any other court. The parties have contractually agreed this Court does not have jurisdiction to hear this matter nor is it the proper venue.

Respondent filed her Complaint alleging theories of sexual harassment and retaliation in violation of the Kentucky Civil Rights Act along with Kentucky common law claims for violation of public policy, negligent supervision, and tort of outrage all based upon the

foregoing claims of sexual harassment and retaliatory discharge. All of these claims are covered in the Arbitration Agreement. On page four of the booklet claims for wrongful termination, sexual harassment, tort claims, and claims for retaliation are specifically identified as claims covered by the agreement to arbitrate. *Appendix, p. 59.* Further, claims against both the company as well as its "officers, directors, shareholders, employees or agents" are covered by the agreement to arbitrate. *Appendix, p. 59.*

In her deposition, Collins testified that she applied for the job at Wendy's online using her iPhone 4. *Appendix, p. 275, lines 17-24.* Collins no longer has the phone and thus, it cannot be accessed to show the communications and transactions that took place between Collins and Wendy's. *Appendix p. 276, lines 1-3.*

At first, Collins testified she could not recall whether or not she had to give an email address when applying online for the Wendy's job. *Appendix p. 276, lines 4-6.* She was shown what was marked as "Exhibit 1" in her deposition (*Appendix p. 346-349*), her employment application with Wendy's. It reported that she gave a yahoo email address when she applied. Collins confirmed that this was in fact her email address at the time she applied. *Appendix p. 276, lines 9-18.* But, Collins no longer has access to this email account. She testified that she forgot her password and the account is now locked. *Appendix p. 276-277, lines 19-1.* Collins was locked out of her email account about eight months prior to her deposition, which would be approximately December 2016. She testified she has tried to get back into her email account but is unable to do so. *Appendix p. 277, lines 2-6.* Accordingly, Petitioners are unable to review Respondent's email records which would have recorded the communications and transactions that took place in regards to her being hired and receiving and reviewing the arbitration policy.

Petiutioners issued a subpoena to Yahoo in an attempt to gain access this evidence. *Appendix, p. 426-427.* Yahoo responded that it is unable to comply with the subpoena due to the Stored Communications Act. *Appendix, p.428.* In the hopes of satisfying Yahoo's concerns, Petitioners issued a letter to Respondent's counsel enclosing a written authorization directed to Yahoo for Respondent to sign granting it permission to disclose her emails. *Appendix 429-430.*

It is difficult to understand how it is that Respondent is unable to access her Yahoo email account. Yahoo has procedures which a user can use when he has forgotten his password. *Appendix, p. 433.* Accordingly, it should be easy for Respondent to have restored her access, but she has not.

At this point, it is likely the evidence has been lost. Yahoo has a policy where it deletes email accounts that are inactive for 12 months. *Appendix, p. 434.* Thus, even though Respondent has recently provided the written authorization, it is likely Yahoo will respond that the account has been deactivated and the evidence sought by Petitioners has been lost.

Collins testified that she was interviewed about a week later after she applied. *Appendix, p. 279, lines 22-24.* Mike Ball was the one who called her to schedule the interview and he was also the one who conducted the interview. *Appendix p. 280, lines 1-4.* Collins testified that at the end of the interview, Ball told her she was hired and gave her an apron, shirt and a hat. *Appendix p. 280, lines 19-20.*

Respondent testified all she received was a shirt, apron, and hat. *Appendix p. 283, lines 17-19.* She testified she did not receive a handbook. *Appendix p. 283, lines 15-16.* She also testified she did not receive the documents that were attached as "Exhibit 2" (Appendix p.350-353) to her deposition, including the arbitration agreement. *Appendix p. 281-282, lines*

13-19. Collins testified she did not complete an I-9 or provide proof she was authorized to work in the United States. *Appendix, p. 281 lines 3-6.*

Respondent did confirm that there were work related posters near the time clock in the worker's lounge area. *Appendix p. 285, lines 11-15.* Collins testified she never read them. *Appendix p. 285, lines 14-17.* Mike Ball testified that these posters included reminders of the arbitration agreement. *Appendix p. 446-448, ¶14.*

Subsequent to her deposition, Petitioners produced a copy of Collins' I-9 along with a copy of her driver's license to prove she was authorized to work in the United States as well as her W-9 indicating what withholdings should be made for taxes. *Appendix, p. 449-456.* Accordingly, the Respondent's recollection of these events is inaccurate.

Mike Ball testified he has worked for Wendy's since 2005. Appendix *p. 150 lines 13-14.* The entire time he has been an assistant manager, though the job may have been called different things over the years. *Appendix p. 150-151, lines 17-6.*

Ball testified that the application process begins with an applicant going to 4awendysjob.com. *Appendix p. 154, lines 18-21.* The application is online. Once completed, it is sent to Ball. Ball testified he reviews the application and decides if he wants to try to hire the person or not. If so, he calls the applicant and schedules an interview. *Appendix p. 155, lines 1-9.* Ball testified that he always uses the website, or "job bank" when hiring. *Appendix p. 156, lines 3-7.*

Ball testified that his interviews usually last about 15 minutes. If he likes the applicant he proceeds to hire them. Ball explained that he tells the applicant that they will be emailed some paperwork. Ball explained that part of this paperwork is the Dispute Resolution

Program or arbitration agreement. Ball explains to the applicant that all of the paperwork needs to be filled out before he can do orientation. *Ball p. 157, lines 6-20; p. 161 lines 13-17.*

The email sending the paperwork is generated automatically. Ball testified that at the end of the interview, he will go to the computer, enter that the person is being hired, and TalentReef generates the email and sends the forms. *Ball p. 161-162, lines 23-17.*

Ball explained that the applicant reviews and completes the dispute resolution agreement, the I-9, the tax documents, along with normal employee information. *Appendix p. 158, lines 3-11.* Ball testified that the computer lets him now what percentage of paperwork has been completed by the prospective hire and he is able to look as to what has been completed and what has not. Ball testified he does this prior to scheduling any orientation. *Appendix p. 158, lines 14-21.*

During orientation Ball testified that he looks at the new hire's social security card and picture id as part of the I-9 process. He makes a copy of them and places them in the restaurant file. *Appendix p. 159, lines 17-24.* Ball testified orientation is also when he logs in to the TalentReef program, and he digitally signs off on all the paperwork the employee has reviewed. Ball discusses some of the material and also asks if the new employee has any questions. *Appendix p. 160, lines 11-21.*

Ball was shown Collins' application which was marked as "Exhibit 1" (Appendix p. 346-349) to her deposition. He confirmed this was in fact Collins' application, that the application is generated by TalentReef, and that Collins had provided an email account so the materials could be emailed to her. *Appendix p. 218, lines 11-21.* Ball also testified that the documents marked as "Exhibit 2" (Appendix p. 350-353) to Collins' deposition were the documents emailed to her for her to digitally sign. *Appendix p. 219, lines 2-15.*

Ball explained how Collins digitally signed these documents. When Collins completed the application online, she set up an online profile. As part of that process, she created a pass code. Collins enters that passcode to sign the documents online. *Appendix p. 219-220, lines 19-4.* Collins testified that while she does not remember if she had to create an account when applying for Wendy's, if she did, she would not have shared her password with anyone. *Appendix p. 318-319, lines 9-1.* Ball explained that when Collins enters her password, her name is stamped to the document as being signed. *Appendix p. 231, lines 6-9.* Collins must enter her password for every signature block. *Appendix p. 91, lines 16-17.*

Ball digitally signs the documents in a similar manner as Collins did. *Appendix p. 220-221, lines 9-10.* Ball goes into the TalentReef website, logs in, and selects whose records he wants to review. *Appendix p. 221, lines 11-24.*

Finally, Ball testified that Collins would be able to print any of the documents that were emailed to her at home. Ball testified that Collins was emailed and could have printed all of the records that were made "Exhibit 2" (Appendix p. 350-353) to her deposition, the Employee Resource Group Dispute Resolution Program, and the employee handbook. *Appendix p. 222, lines 4-23.*

The arbitration agreement in this case is procedurally fair and sound. The Dispute Resolution Program Booklet sets forth the process through which the arbitration should be handled. While Petitioners recognize the Court can review the booklet in detail, it is thought a summary of key points would be helpful to the Court in conducting its analysis and review of the procedure of the arbitration process. First, the arbitration would be handled in accord with the American Arbitration Association (AAA). This is perhaps the most preeminent and well respected arbitration association in the nation. One of the AAA's approved arbitrators would

ultimately be retained to hear the dispute. The arbitrator will be well versed in employment law, both state and federal. *Appendix, p. 60.* The arbitration will take place in the community where Plaintiff is employed or in another mutually agreeable location. *Appendix, p. 59.* Arbitration will be handled in accord with the AAA's "Employment Arbitration Rules and Mediation Procedures." *Appendix, p. 60.* Those procedures are akin to, if not an exact duplicate, of the procedural rules which bind this Court. For example, motions are governed by the standards set forth in the Federal Rules of Civil Procedure. *Appendix, p. 60.* And, most importantly, the arbitrator has the full power to award the whole spectrum of damages that might possibly be obtained through this Court. *Appendix, p. 60.*

III.

SUMMARY OF ARGUMENT

The Petitioner's Dispute Resolution Program is enforceable as a matter of law. Overwhelming evidence was presented to the Circuit Court demonstrating the process by which Respondent was presented with and agreed to the arbitration agreement. Accordingly, this Court should reverse the Circuit Court's decision and refer this matter to arbitration.

IV.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument pursuant to Rule 19.

V.

ARGUMENT

Whether or not the arbitration agreement is enforceable is a question of law. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Chrystal R.M. v. Charlie

A.L., Syl. Pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995). This Court has previously ruled when it comes to motions to enforce arbitration agreements, its review is *de novo*. Shorts v. AT&T Mobility, 2013 W.Va. LEXIS 720, p. 11.

It should be noted that this Court has already reviewed the arbitration agreement at issue for both substantive and procedural unconscionability. In Employee Resource Group, LLC v. Harless, No. 16-0493, 2017 WL 1371287 (W.Va. Apr. 13, 2017) (memorandum decision) this Court held that the arbitration agreement at issue was in fact enforceable.

The trial court refused to enforce the arbitration agreement because it mistakenly found the arbitration agreement was not an enforceable contract. First, the trial court found that the arbitration agreement was ambiguous because it contained language stating that it was not an employment contract. The West Virginia Supreme Court has reviewed the issue of "at-will" language appearing in arbitration agreements. Hampden Coal, LLC v. Varney, ___ W.Va. ___, 810 S.E.2d 286 (2018). In Hampden Coal, this Court explained that a mutual agreement to arbitrate and an employment contract are two different things. Whether or not there is an employment contract has no bearing on whether or not there is an agreement to arbitrate. Hampden Coal at p. 13-14.

The trial court also made several findings that are not supported by the record. For instance, in Paragraph 27 of its Order, the Court found that merely acknowledging receipt of a document is insufficient to create a contractual obligation. However, the documents provided to the Court go well beyond a simple acknowledgment. The document digitally signed by the Petitioner is titled "Agreement & Receipt for Dispute Resolution Program." *Appendix p. 63-64.* A brief review of that document clearly shows it is much more than a receipt. The third

paragraph contains the following language: The Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration..." The next paragraph begins "The mutual obligations set forth in this Agreement shall constitute a contract between the Employee and the Company..." The sixth paragraph begins "I understand and agree that by entering into this Agreement..." On the second page of the document, two paragraphs above her digital signature next to the heading "VOLUNTARY AGREEEMNT," THE FOLLOWING LANGUAGE APPEARS "...I have entered into the Agreement voluntarily...." And, the final sentence before the Respondent's digital signature begins "This Agreement shall apply to me..." The only receipt or acknowledgment language appears in the sixth paragraph on the first page which reads "This procedure is explained in the Dispute Resolution Program Booklet, which I acknowledge I have received and read or have had an opportunity to read." Accordingly, the trial court committed clear legal error when it found that the evidence submitted was merely acknowledgment of the receipt of a document.

Similarly, the Court's findings that the Plaintiff's name is "pre-stamped" on the Agreement (Paragraph 27) and that ERG cannot conclusively produce a signed agreement (Paragraph 31) are erroneous. The testimony presented clearly explained the process by which one's digital signature is affixed to the documents in question. Further, the document appearing at pages 63-64 of the Appendix is in fact the very signed agreement the Court claimed was never produced.

What was not produced, were the Respondent's copies of the emails and documents sent to her. However, that issue cannot be blamed on the Petitioner. Respondent claimed she could no longer access her yahoo email account and therefore could not produce her copies of the records in question. As outlined above, Petitioner went to the extreme of issuing a

subpoena to Yahoo and trying to get a written authorization from the Respondent permitting Yahoo to disclose the records to no avail. Petitioner also provided the trial court with instructions issued by Yahoo as to how to restore access to a locked email account. The fact that the Respondent chose not to restore her account or otherwise failed to preserve the evidence desired by the Court is a factor that should be weighed against the Respondent, not the Petitioner.

The Court also erroneously found that the claims asserted by the Respondent were outside the scope of the arbitration agreement. Again, this ruling directly conflicts with the language contained in the agreement. In Paragraphs 33-34 of the trial court's order, the Court finds that disputes with co-workers are "non-legal disputes" and are not subject to the agreement to arbitrate.

The Arbitration Agreement contains a section identifying "Claims Subject to Arbitration" as well as a section identifying "Claims not Subject to Arbitration." *Appendix p. 59-60.* Claims that are subject to arbitration are "...legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents...The legal claims subject to arbitration include, but are not limited to: claims for wages or other compensation...tort claims; claims for wrongful termination; sexual harassment; discrimination..." *Appendix p. 59.* In her Complaint, the Respondent sets forth claims of sexual harassment in violation of the Kentucky Civil Rights Act, wrongful termination, hostile work environment, extreme and outrageous conduct, and negligent supervision/retention. *Appendix p. 4-13.* Further, Respondent's Complaint alleges that Petitioners Curry and Mollett were employees or agents of the Company. *Appendix p. 5.*

Clearly these are legal claims, based upon statutory and case law, pertaining to the precise subject matters listed in the arbitration agreement, *i.e.* discrimination, sexual harassment,

wrongful termination. However, the trial court erroneously claimed these causes of action to be "non-legal disputes." But the arbitration agreement defines "non-legal disputes" as "...disputes over a performance evaluation, issues with co-workers, or complaints about your work site or work assignment which do not allege a legal violation. In declaring the claims contained in the Respondent's Complaint to be "non-legal disputes" the trial court failed to afford meaning to the end of the sentence, "...which do not allege a legal violation." Indeed, in the Respondent's Complaint, Respondent specifically cites statutory authority as well as case law she believes to have been violated by one or more of the Petitioners. Thus, the trial court ignored the plain meaning of the arbitration agreement.

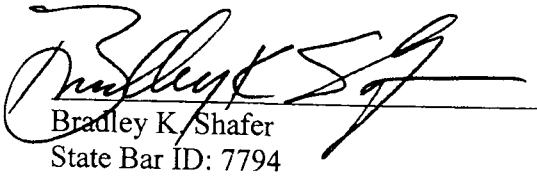
The question as to whether a contract is ambiguous is a question of law to be determined by the court. Citynet, LLC v. Toney, Syl Pt. 1, 235 W.Va. 79, 772 S.E.2d 36 (2015) *citing* Berkeley County Public Service Dist. v. Vitro Corporation of America, 152 W.Va. 252, 162 S.E.2d 189 (1968). When the language of a contract is clear and unambiguous, it must be applied, not construed or interpreted. Citynet, LLC *supra* Syl. Pt. 2 *citing* Bethlehem Mines Corp. v. Haden, 153 W.Va. 721, 172 S.E.2d 126 (1969). Courts should not alter or destroy the clear meaning and intent of the parties expressed in the unambiguous terms of their contract. Citynet *supra* Syl Pt. 3, *citing* Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962), Hatfield v. Health Management Associates of West Virginia, 223 W. Va. 259, 672 S.E.2d 395 (2008). Dan's Carworld, LLC v. Serian, 223 W. Va. 478, 677 S.E.2d 914 (2009). As can be seen, the trial court refused to enforce the plain language of the arbitration agreement, often misconstruing its provisions.

VI.

CONCLUSION

WHEREFORE, the Petitioner prays that this Honorable Court will reverse the Mingo County Circuit Court order of December 5, 2017 refusing to enforce the arbitration agreement.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Bradley K. Shafer, counsel for the Petitioners, do hereby certify that on this 4th day of April, 2017, a copy of the foregoing Petition for Appeal was served upon Nathan Brown, Counsel for Respondent, by depositing true copies thereof in the regular United States Mail, postage prepaid, and addressed to him at his last known address.

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