**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**RENE G. DENISE,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO.: 19-C-1045**
**JUDGE SALANGO**

**STATE OF WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, FRANCIS STUMP, and JANE DOE,**

**Defendants.**

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, COMPEL ARBITRATION AND GRANTING PLAINTIFF'S LEAVE TO FILE A SECOND AMENDED COMPLAINT**

On a previous day came the Defendant, West Virginia Department of Health and Human Resources (hereinafter "DHHR"), and filed its *Motion to Dismiss or, in the Alternative, Compel Arbitration* ("Motion to Dismiss"). Defendant Frances Stump also joined in the Motion to Dismiss.

In their Motion to Dismiss, the Defendants argue that the Plaintiff's Complaint should be dismissed because she failed to provide at least 30 days pre-suit notice of her potential claims to Defendants DHHR and Stump. Defendants argue that such notice is required by *W. Va. Code* § 55-17-3 because DHHR is a state agency and Defendant Stump is a public official sued in her in her official capacity. Conversely, plaintiff argues that she provided the required notice to DHHR prior to commencing an action against it and that notice was not required as to Defendant Stump because she is not a "public official" pursuant to the plain meaning of that term.

The Defendants also argue that Plaintiff's Complaint should be dismissed on grounds of sovereign immunity because she failed to explicitly allege that the recovery she seeks is limited to the state's applicable insurance coverage as contemplated in Syl. Pt. 2, *Pittsburgh Elevator* v. W. Va. Bd. of Regents, 172 W. Va. 743, 310 S.E.2d 675 (1983). In response, the Plaintiff has represented to the Court that it does not, in fact, seek any recovery in this action from state funds,

but rather only seeks recovery under an up to the states applicable insurance coverage as contemplated in *Pittsburgh Elevator*. The Plaintiff has further represented that the omission of such an explicit allegation from the Complaint was inadvertent and has requested that the Court grant her leave to file a Second Amended Complaint for the purposes of correcting this pleading defect so that her claim can be decided on the merits. The Plaintiff has filed a separate motion for leave to file her Second Amended Complaint.

The Defendants also argue that the Court should enter an Order compelling Plaintiff to arbitrate her claims pursuant to an employment agreement she entered into with Sunbelt Staffing, LLC, which she has alleged jointly employed her along with the DHHR. The Defendants argue that, although they are not parties to the arbitration agreement, they should be able to enforce it against Plaintiff based on the doctrine of equitable estoppel. The Plaintiff asserts, however, that equitable estoppel does not apply and, even if it does, the arbitration agreement cannot be enforced as to Plaintiff's claims against the moving Defendants because such claims do not fall within the scope of the arbitration agreement and the agreement is procedurally and substantively unconscionable.

Finally, Defendants argue that the Court should dismiss Plaintiff's claims for punitive damages against them because punitive damages are not available against governmental agencies and public officials sued in their official capacity. Plaintiff counters that a Rule 12(b)(6) Motion To Dismiss is not the proper procedural device for disposing of a request for punitive damages and that punitive damages are available against Defendant Stump because she is not a public official under the plain meaning of that term.

The parties have submitted extensive briefing on the issues implicated by the Motion to Dismiss. After mature consideration of the Motion to Dismiss, including a review of such motion and all memoranda of law in opposition to and in support of the same, the Court hereby **DENIES** the Motion to Dismiss. Additionally, the Court hereby **GRANTS** Plaintiff's Motion for Leave to File a Second Amended Complaint, which is attached hereto as ***Exhibit 1*** and makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Plaintiff was hired by Sunbelt Staffing, LLC to work at William R. Sharpe, Jr. Hospital, which is operated under the direction of DHHR.

2. Plaintiff has alleged that she was jointly employed by DHHR and Sunbelt.

3. Just prior to starting her employment, Plaintiff signed a *Consultant Employment Agreement.*

4. The only parties to the *Consultant Employment Agreement* are Plaintiff and Sunbelt. Specifically, DHHR nor Defendant Stump are parties.

5. The *Consultant Employment Agreement* contains the following arbitration provision:

**Arbitration**

> 15. Any dispute or difference ***between Sunbelt and Consultant*** arising out of or relating to this Agreement shall be finally settled by arbitration in accordance with the rules of the American Arbitration Association by a single arbitrator. The [*sic*] Sunbelt and Consultant shall agree on an arbitrator. If Sunbelt and the Consultant fail to agree on an arbitrator within thirty (30) days after notice of commencement of arbitration, the American Arbitration Association shall, upon request of either party, appoint the arbitrator to constitute the panel. Arbitration proceedings hereunder may be initiated by either Sunbelt or Consultant by making a written request to the American Arbitration Association, together with any appropriate filing fee, at the office of the American Arbitration Association in Jacksonville, Florida. ***All arbitration proceedings shall be held in Jacksonville, Florida.*** Any order or determination of the arbitral tribunal shall be final and binding upon the parties to the arbitration and may be entered in any court having jurisdiction.

6. The arbitration provision is contained in a five-page document of small, single-spaced print. The text of the arbitration provision is not set off from the rest of the document by bolded typeface, enlarged print, all caps, or any other method of ensuring that he provision is made to be conspicuous to the reader of the document.

7. The arbitration provision requires that arbitration be conducted in Jacksonville, Florida. Jacksonville, Florida is approximately 743 miles and nearly 11 hours from Plaintiff's home in Elkins, West Virginia.

8. Paragraph 17 of the *Consultant Employment Agreement* also contains a unilateral fee-shifting provision requiring Plaintiff to pay Sunbelt's legal fees and costs if it prevails in arbitration to enforce any terms of the Agreement.

9. During her employment at William R. Sharpe, Jr. Hospital, Plaintiff alleges she was subjected to sexual harassment by a co-worker, which she ultimately reported to Defendant Stump.

10. Defendant Stump was employed as a supervisor for DHHR at the hospital. She has not been elected or appointed to any public office. She has not been cloaked with any authority over the public regarding the State of West Virginia's exercise of its sovereign powers.

11. Plaintiff alleges that, after reporting the sexual harassment to Defendant Stump, she was transferred to a less desirable shift.

12. On or about November 9, 2017, Plaintiff learned that she had been terminated and her Agreement with Sunbelt had been canceled.

13. On or about October 21, 2019, Plaintiff notified DHHR and the office of the West Virginia Attorney General, via certified mail, return receipt requested, that she intended to assert claims against DHHR for violation of the *West Virginia Human Rights Act* ("WVHRA") and for negligent retention, negligent supervision, and Intentional Infliction of Emotional Distress/Tort of Outrage.

14. On or about October 22, 2019, Plaintiff filed her original Complaint naming Sunbelt[1], Scott Starcher, Defendant Stump, and Jane Doe as Defendants. Although Plaintiff inserted a footnote stating that she had provided pre-suit notice to DHHR and intended to amend her Complaint to add it as a Defendant, DHHR was not named as a Defendant in the original Complaint.

15. Plaintiff did not commence an action against DHHR until she amended her Complaint to add it as a Defendant on November 22, 2019. Therefore, Plaintiff provided 31 days' notice of her potential claims to DHHR before commencing an action against it.

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[1] Sunbelt and Scott Starcher have been voluntarily dismissed by Plaintiff pursuant to Rule 41(a)(1)(i) of the West Virginia Rules of Civil Procedure.

## CONCLUSIONS OF LAW

### A. Plaintiff complied with the pre-suit notice provisions of W. Va. Code § 55-17-3.

16. W. Va. Code § 55-17-3(a)(1) prescribes as follows regarding the pre-suit notice required before commencing an action against a "government agency" in West Virginia:

> Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired. Upon receipt, the chief officer of the government agency shall forthwith forward a copy of the notice to the President of the Senate and the Speaker of the House of Delegates. . . .

W. VA. CODE § 55-17-3(a)(1) (2020).

17. W. Va. Code § 55-17-2(2) defines a "government agency" as "a Constitutional officer or other public official named as a Defendant or Respondent in his or her official capacity, or a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued." *Id.* at § 55-17-2(2).

18. There can be no dispute that Plaintiff provided the required notice to DHHR because she did not commence an action against it until 31 days after she provided notice of her potential claims. The question that must be resolved in this case is whether notice was required as to Defendant Stump.

19. To decide whether notice was required to Defendant Stump, this Court must decide whether she was a "government agency" as defined by *W. Va. Code* § 55-17-2(2). Pursuant to § 55-17-2(2), Defendant Stump would fall within the definition of a "government agency" if she is (1) a constitutional officer; (2) a "public official" sued in her official capacity; or (3) a department, division, bureau, board, commission or other agency or instrumentality within the executive branch of state government that has the capacity to sue or be sued.

20. Here, the Defendants assert that Defendant Stump constitutes a government agency because she is a public official sued in her official capacity. Thus, the dispositive question is whether Ms. Stump is a public official as contemplated by *W. Va. Code* § 55-17-2(2). This Court finds that she is not.

21. At the outset, the Court recognizes that "[w]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 715, 172 S.E.2d 384, 385 (1970). "In the absence of any definition of the intended meaning of words or terms used in a [statute], they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syl. Pt. 1, *Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 638, 17 S.E.2d 810, 811 (1941).

22. No definition for "public official" can be found in Chapter 55, Article 17 of the *West Virginia Code*. However, the Court can ascertain its unambiguous, common, ordinary and accepted meaning from dictionaries, other parts of the *West Virginia Code*, and prior West Virginia case law.

23. *Black's Law Dictionary* defines "public official" as "[o]ne who holds or is invested with a ***public office***; a person ***elected or appointed to carry out some portion of a government's sovereign powers.*** *Black's Law Dictionary* 1119, 1267 (8th ed. 2004) (emphasis added). Likewise, *Merriam-Webster's Collegiate Dictionary* defines the noun "official" as "one who ***holds or is invested with an office.***" *See Merriam-Webster's Collegiate Dictionary* 861 (11th Ed. 2014) (emphasis added).

24. Additionally, "public official" *is* defined elsewhere in the *West Virginia Code*. Specifically, the *West Virginia Governmental Ethics Act* ("WVGEA") defines "public official" as follows:

> 'Public official' means any person who is ***elected to***, ***appointed to***, or ***given the authority to act in any state, county, or municipal office or position***, whether compensated or not, and who is ***responsible for the making of policy or takes official action which is either ministerial or nonministerial***, or both . . . .

W. VA. CODE § 6B-1-3(k). The WVGEA explicitly distinguishes between a "public employee" and a "public official" by separately defining a "public employee" as "any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards." The legislature also adopted this definition of "public official"

for the *Medical Cannabis Act's* prohibition of public officials' financial or employment interest in a medical cannabis organization. *See id.* at 16A-15-2(c).

25. *W. Va. Code* § 6B-2B-1 similarly defines "public official" as "any person who is ***elected or appointed*** to any state, county, or municipal office or position, including boards, agencies, departments, and commissions, or in any other regional or local governmental agency." W. VA. CODE § 6B-2B-1(i) (emphasis added). It also separately defines "public employee" as "any full-time or part-time employee of any state, or political subdivision of the state, and their respective boards, agencies, departments, and commissions, or in any other regional or local governmental agency." *Id.* at (h).

26. These definitions of "public official" contained elsewhere in the West Virginia Code are consistent with the definitions from Merriam-Webster and *Black's Law Dictionary*.

27. Additionally, The Supreme Court of Appeals of West Virginia has recognized that "the public official category '***cannot be thought to include all public employees.***'" *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 180, 423 S.E.2d 560, 583 (1992) (emphasis added) (quoting *Hutchinson v. Proxmire,* 443 U.S. 111, 119, 61 L. Ed. 2d 411, 99 S. Ct. 2675 n.8 (1979)). Rather, the Court found that "[p]ublic officials are 'those among the hierarchy of government employees who have, or appear to the public to have, ***substantial responsibility for or control over the conduct of governmental affairs.***'" Id. (quoting *Rosenblatt v. Baer,* 383 U.S. 75, 85, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966)).

28. Based upon the foregoing, this Court finds that the common, ordinary, and accepted meaning of "public official" is one who is elected or appointed to a public office or position to exercise the state's sovereign powers or substantial responsibility for or control over the conduct of governmental affairs. The Court is bound to apply this meaning in determining whether Defendant Stump is a "public official."

29. Here, there is no dispute that Defendant Stump is not an elected or appointed public office holder. Likewise, the record contains no suggestion or evidence that she is cloaked with any authority to exercise the state's sovereign powers or otherwise has any responsibility for or control

over governmental affairs. Accordingly, she is not a "public official" and, thus, has no official capacity in which she could be sued. She is merely a public employee. Therefore, Plaintiff was not required to provide notice of her claims against Defendant Stump pursuant to *W.Va. Code* § 55-17-3(a)(1).

30. Based upon the foregoing, this Court finds that Plaintiff complied with the pre-suit notice requirements of *W.Va. Code* § 55-17-3(a)(1) by providing 31 days' notice of her claims against DHHR before commencing an action against it.

**B. Plaintiff should be granted leave to amend her Complaint to correct the jurisdictional pleading deficiency of omitting an explicit allegation that she is not seeking recovery from state funds.**

31. Article VI, Section 5 of the *West Virginia Constitution* provides sovereign immunity to the State from damages suits. *See e.g., Parkulo v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 167, 483 S.E.2d 507, 513 (1996). However, in *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, The Supreme Court of Appeals of West Virginia held that "[s]uits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State. 172 W. Va. 743, 310 S.E.2d 675 (1983) at Syl. Pt. 2.

32. The Supreme Court has since held that it would "not review suits against the State brought under the authority of *W.Va. Code* § 29-12-5 [state insurance] unless it is alleged that the recovery sought is limited to the applicable insurance coverage and the scope of the coverage and its exceptions are apparent from the record." *Syl. Pt. 3, Parkulo*, 199 W. Va. 161, 483 S.E.2d 507. *See also Johnson v. C.J. Mahan Constr. Co.,* 210 W. Va. 438, 441 n.4, 557 S.E.2d 845, 848 (2001). However, the Supreme Court *has* made exceptions to review such cases on multiple occasions. *See Parkulo*, 199 W. Va. 161, 483 S.E.2d 507; *Johnson,* 210 W. Va. 438, 441 n.4, 557 S.E.2d 845, 848. In *Parkulo*, the Supreme Court instructed the trial court on remand to allow amendment of the Complaint to cure the omission of an allegation that recovery was not sought from state funds. *See Parkulo*, 199 W. Va. at 170, 483 S.E.2d at 516.

33. In this case, the Plaintiff has represented to the Court that she does not intend to seek any recovery from state funds, but rather seeks recovery only under and up to the state's applicable liability insurance coverage as contemplated by the *Pittsburgh Elevator* case. The Plaintiff has moved the Court for leave to file a *Second Amended Complaint* for the purposes of curing the omission of an explicit allegation to that effect.

34. Rule 15 of the *West Virginia Rules of Civil Procedure* prescribes that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. W. Va. R. Civ. P. 15(a).

35. Rule 15 must be liberally construed, such that "[u]nless the amendment of a pleading will prejudice the opposing party by not affording him an opportunity to meet the issue, it should be allowed so as to permit an adjudication of the case on its merits." *Emp'rs Fire Ins. Co. v. Biser*, 161 W. Va. 493, 497, 242 S.E.2d 708, 711 (1978) (citing *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E. 2d 50 (1973); *Foman v. Davis*, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); *Conley v. Gibson*, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)).

36. The goal of Rule 15 is "'to insure [*sic*] that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties.'" *Brooks v. Isinghood*, 213 W. Va. 675, 684, 584 S.E.2d 531, 540 (2003) (quoting *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001). Accordingly, amendments to pleadings shall rarely be denied. *See id.*

37. Leave to amend "'should ***always*** be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue." *E.g., Id.* at Syl. Pt. 5 (emphasis added).

38. Other courts have recognized that "courts should 'freely grant leave to amend jurisdictional allegations,' and should refrain from dismissing actions 'based solely on a *technical error* in jurisdictional pleading.'" *Asset Value Fund Ltd. Pshp. v. Care Grp.*, 179

F.R.D. 117, 119 (S.D.N.Y. 1998) (emphasis in original) (quoting 6 Moore § 15.14[3]). *See also Oliver Sch. v. Foley*, 930 F.2d 248, 252 (2d Cir. 1991) ("Rule 15(a) of the Federal Rules of Civil Procedure provides that the court should grant leave to amend "freely . . . when justice so requires," and the principle that permission to amend to state a claim should be freely granted . . . is likewise applicable to dismissals for failure to plead an adequate basis for federal jurisdiction.") (quoting 3 *Moore's Federal Practice* para. 15.10, at 15-104 (2d ed. 1990) ("in dismissing a complaint for . . . failure to show jurisdiction, the court should heed the admonition of Rule 15 and allow amendment 'freely' if it appears at all possible that the plaintiff can correct the defect.)).

39. Thus, "[w]here the possibility exists that [a jurisdictional] defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course." *Foley*, 930 F.2d at 253.

40. The requirement to explicitly allege in the Complaint that recovery is not sought from state funds is a procedural requirement for asserting a claim against the State outside of its constitutional immunity. It is not a substantive requirement. *See Rex v. W. Va. Sch. of Osteopathic Med.*, 119 F. Supp. 3d 542, 555 (S.D. W. Va. 2015). Accordingly, to dismiss Plaintiff's claims for the omission of such an allegation would frustrate the purpose of the Rules of Civil Procedure by allowing such claims to be dismissed on a procedural error when the error could be corrected with an amendment, which would allow for presentation of the claims on their merits.

41. Moreover, nothing in the record suggests that Defendants would be prejudiced by the amendment or that they will not have an ample opportunity to meet the issue. Additionally, because the Court is denying the instant Motion to Dismiss in total, the Amendment will not be futile.

**C. Plaintiff is not required to submit her claims to arbitration.**

42. Before referring this case to arbitration, the Court must resolve the questions of whether 1) a valid arbitration agreement exists and 2) the Plaintiff's claims fall within the

substantive scope of the arbitration agreement. *See State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 228 W. Va. 125, 133-34, 717 S.E.2d 909, 917-18 (2011).

43. This case is governed by the *Federal Arbitration Act* ("FAA").

> Pursuant to the Federal Arbitration Act ("FAA"), a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract."

Id. at Syl. Pt. 1 (internal quotations omitted). The purpose of the FAA is not to elevate the importance of arbitration agreements above other types of contracts, but rather to ensure that arbitration agreements are treated the same as any other contract and enforced according to their terms. *See id.* at Syl. Pt. 2. In other words, "'arbitration agreements are [as much] enforceable as other contracts, but not more so.'" *State ex rel. Barden & Robeson Corp. v. Hill*, 208 W. Va. 163, 168, 539 S.E.2d 106, 111 (2000) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S. Ct. 1801, 1806 n.12, 18 L. Ed. 2d 1270, 1277 n.12 (1967)).

44. Accordingly, the FAA does not override normal state law rules of contract interpretation, such that the questions of whether an arbitration agreement was validly formed and whether a Plaintiff's claims fall within the scope of the arbitration agreement are decided pursuant to state law. *See State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 134, 717 S.E.2d at 918 (2011). Therefore, courts may apply its "[g]enerally applicable contract defenses such as laches, estoppel, waiver, fraud, duress, or unconscionability to invalidate an arbitration agreement." *Id.*

**1. Plaintiff is not required to arbitrate claims between her and the Defendants because the scope of arbitrable disputes is explicitly limited to disputes or differences between Plaintiff and Sunbelt.**

45. "Arbitration is a matter of contract and ***a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate***." *E.g., State ex rel. U-Haul Co. v. Zakaib*, 232 W. Va. 432, 439, 752 S.E.2d 586, 593 (2013) (emphasis added). Therefore, "[u]nder the [FAA] parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate." *Id. See also State ex rel. City Holding Co. v. Kaufman*, 216 W. Va. 594, 598-99,

609 S.E.2d 855, 859-60 (2004) (arbitration provisions are "binding and enforceable on all causes of action arising under the contract that, by the contract terms, are made arbitrable.").

46. The FAA does not override normal rules of contract interpretation. *See State ex rel. U-Haul Co.*, 232 W. Va. at 439, 752 S.E.2d at 593. It merely ensures that contracts to arbitrate are enforced according to their terms. *See State ex rel. U-Haul Co.*, 232 W. Va. at 439, 752 S.E.2d at 593. Thus, in interpreting the scope of the subject arbitration agreement, this Court must be guided by traditional state law principles of contract interpretation. *See id.; Richmond Am. Homes of W. Va., Inc,* 228 W. Va. at 134, 717 S.E.2d at 918.

47. "[I]t has long been the law in West Virginia that "'[w]hen a written contract is clear and unambiguous its meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions.'" *Hampden Coal, LLC v. Varney*, 240 W. Va. 284, 299, 810 S.E.2d 286, 301 (2018) (quoting Syl. Pt. 3, in part, *Kanawha Banking & Trust Co. v. Gilbert*, 131 W.Va. 88, 46 S.E.2d 225 (1947)). "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Certain Underwriters at Lloyd's v. PinnOak Res., LLC*, 223 W. Va. 336, 338, 674 S.E.2d 197, 199 (2008). Thus, "[n]o addition to the terms of a written contract, or transposition or modification thereof, can be made by construction, unless it has foundation in the written words of the paper or in a reasonable and fair implication arising out of such words or some provision thereof or purpose expressed by it." *Syl. Pt. 2, Leckie v. Bray*, 91 W. Va. 456, 457, 113 S.E. 746, 747 (1922).

48. Therefore, an agreement to arbitrate certain claims cannot be extended by construction or implication to include additional claims. *See id.*; *Gas Co. v. Wheeling*, 8 W. Va. 320, 350-51 (1875) ("Though courts wish to have [an arbitration] submission and award terminate as many disputes as are reasonably and rightfully within its scope, still disputes obviously not included, though so cognate that their annexation would have been highly natural and proper, will not be added by a forced construction.")).

49. In this case, Plaintiff clearly did not agree to arbitrate claims between her and DHHR, as the plain and unambiguous text of the arbitration agreement explicitly limits the scope of arbitrable disputes to disputes or differences ***"between Sunbelt and Consultant."*** The claims at issue here are claims between DHHR/Defendant Stump and Plaintiff, not Plaintiff and Sunbelt. Clearly then, such claims do not fall within the scope of disputes made arbitrable by the subject arbitration agreement.

50. The Court finds that because it cannot make Plaintiff arbitrate claims that she did not agree to arbitrate and because it must apply the plain and unambiguous meaning and legal effect of the language in the subject arbitration provision, Plaintiff's claims against DHHR fall outside the scope of the subject arbitration agreement. Therefore, the Court cannot compel Plaintiff to arbitrate her claims.

**2. Equitable Estoppel does not apply to allow Defendants, non-signatories to the subject arbitration agreement, to enforce the agreement against Plaintiff.**

51. DHHR is not a party to the subject arbitration agreement. Generally, non-parties to an arbitration agreement cannot enforce the agreement against a party to the agreement. *See Bayles v. Evans*, 2020 W. Va. LEXIS 258 at 15-16 (Apr. 24, 2020). Only in very limited circumstances can a non-signatory to an arbitration agreement executed by others be bound by or enforce the agreement against a signatory. *See id.* at 16 – 17; *Bluestem Brands, Inc. v. Shade*, 239 W. Va. 694, 702, 805 S.E.2d 805, 813 (2017).

52. The Supreme Court of Appeals of West Virginia has recognized that in certain cases "[a] non-signatory to a written agreement requiring arbitration may utilize the [theory of estoppel] to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement." *Bluestem Brands, Inc.*, 239 W. Va. at 702, 805 S.E.2d at 813.

53. The Supreme Court of Appeals of West Virginia has cautioned that the doctrine of estoppel should be applied cautiously and only "'in very compelling circumstances, where the interests of justice, morality and common fairness clearly dictate that course.'" *Id.* at 18-

19 (quoting *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 948 (3d Cir. 1998)). In other words, estoppel should only be applied where it is necessary to prevent a party from "cherry picking" certain favorable terms in a contract to rely upon for his claims or claiming entitlement to direct benefits of a contract, while at the same time avoiding the contract's burdens. *See id.* at 19-21

54. Plaintiff is not attempting in this case to rely upon, enforce, or benefit from the terms of her employment agreement with Sunbelt. Specifically, Plaintiff has not made a claim for breach of any of the terms of the contract; she is not seeking to recover any direct benefits promised under the contract; and she is not seeking enforcement of any of the contract's terms. Rather, Plaintiff's claims are based upon rights, duties, and obligations imposed by law pursuant to the WVHRA, such that her claims do not rely upon, reference, or presume the existence of the contract. *See Wright v. Universal Maritime Service Corporation, et al., 525 U.S. 70 (1998)* (distinguishing a statutory anti-discrimination claim from a claim arising from contractual obligations). In fact, the existence of the subject agreement is of no consequence whatsoever to Plaintiff's claims because she could recover from DHHR under the WVHRA even if no contract existed between her and Sunbelt. *See id.*

55. Accordingly, this case is distinguishable from *Bayles* and *Bluestem*, West Virginia cases that have applied the estoppel theory to allow a non-signatory to be bound by or enforce an arbitration agreement.

56. For instance, in *Bayles*, Ameriprise, a signatory to investment contracts containing arbitration agreements was attempting to enforce it against the Plaintiff, who was a non-signatory. The Court applied equitable estoppel to enforce the arbitration agreement because Plaintiff relied upon enforcement of certain provisions of the contract for his claims and claimed entitlement to benefits that were due under the contract, all while disclaiming that the arbitration provision in the same contract could be enforced. There, the Court believed that fairness dictated that equitable estoppel be applied to prevent Plaintiff seeking direct benefits of the contract as a non-signatory while at the same time disavowing enforcement of the

arbitration clause based upon her status as a non-signatory. *See Bayles*, 2020 W. Va. LEXIS 258 at 22-23.

57. In *Bluestem*, a non-signatory attempted to enforce an arbitration agreement against the Plaintiff who was a signatory. Like in *Bayles*, the Plaintiff in *Bluestem* was relying on the terms of the subject contracts for her claims while at the same time disclaiming that arbitration provisions in the very same contracts could be enforced. Therefore the court found again that estoppel was necessary in the interests of justice and common fairness to prevent Plaintiff Shade from using certain terms of her contracts as a sword against Bluestem while at the same time disclaiming the application of the arbitration provision found in the same agreement.

58. Because such concerns of fairness do not exist in this case because the Plaintiff is not attempting to rely upon or enforce any of the contract terms for her claims, this is not a compelling case that warrants the application of equitable estoppel. Therefore, the Defendants cannot enforce the arbitration agreement against Plaintiff.

**3. Plaintiff's statutory anti-discrimination claims do not fall within the scope of the subject arbitration agreement because the agreement does not clearly and unmistakably require arbitration of such claims.**

59. The Plaintiff's claims herein arise from the WVHRA, a statutory anti-discrimination statute.

60. The United States Supreme Court has held that to compel a statutory anti-discrimination claim to arbitration, the requirement to arbitrate such claims must be particularly clear such that the waiver of a judicial forum is clear and unmistakable. *See Wright v. Universal Maritime Service Corporation, et al.*, 525 U.S. 70 (1998); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009). In other words, a Court "'will not infer from a general contractual provision that the parties intended to waive a [legally] protected right unless the undertaking is ***explicitly stated***.'" *See Wright*, 525 U.S. 70.

61. Numerous federal circuit courts of appeal have also weighed in on what is required to constitute a clear and unmistakable requirement to arbitrate statutory anti-discrimination claims.

In summary, the consensus is that broad and general language, even if it may well be interpreted to require arbitration under ordinary principles of contract interpretation, does not suffice as the clear and unmistakable language required to force arbitration of statutory anti-discrimination claims. *See Carson v. Giant Food, Inc.*, 175 F.3d 325, 332 (4th Cir. 1999); *Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 52-53 (1st Cir. 2013); *Ibarra v. UPS*, 695 F.3d 354, 358-60 (5th Cir. 2012); *Wawock v. CSI Elec. Contractors, Inc.*, 649 F. App'x 556, 558-59 (9th Cir. 2016); *Matthews v. Denver Newspaper Agency LLP*, No. 09-1233, 2011 U.S. App. LEXIS 11454, at *17-20 (10th Cir. May 17, 2011). Rather, an agreement must plainly specify the intent to have an arbitrator decide the merits of statutory anti-discrimination claims. *See Carson*, 175 F.3d at 332.

62. Accordingly, specific incorporation of the relevant statutory anti-discrimination claims somewhere into the agreement is required to compel a case to arbitration. *See Id.* ("When the parties use . . . broad but nonspecific language in the arbitration clause, they must include an "explicit incorporation of statutory antidiscrimination requirements elsewhere in the contract."); *Ibarra v. UPS*, 695 F.3d 354, 358-60 ("[C]ourts have concluded that for a waiver of an employee's right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the CBA must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims."); *Wawock,* 649 F. App'x at 558 ("Making no reference to [anti-discrimination] claims necessarily falls short of an explicit statement concerning them."); *Mathews v. Denver Newspaper Agency LLP,* 2011 U.S. App. LEXIS 11454 at 17-20 ([W]aiver [of a judicial forum] may only occur where the arbitration agreement expressly grants the arbitrator authority to decide statutory claims."). *See also Manning*, 725 F.3d at 52-53 ("[S]omething closer to specific enumeration of the statutory claims to be arbitrated is required.").

63. The Fourth Circuit has set forth the clearest test for whether an agreement clearly and unmistakably requires arbitration of statutory anti-discrimination claims. Specifically, the Fourth Circuit has held that the clear and unmistakable standard can be satisfied in the following two ways:

> The first is the most straightforward. It simply involves drafting an explicit arbitration clause. Under this approach, the CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all . . . causes of action arising out of their employment. . . .
>
> The second approach is applicable when the arbitration clause is not so clear. General arbitration clauses, such as those referring to 'all disputes' or 'all disputes concerning the interpretation of the agreement,' taken alone do not meet the clear and unmistakable requirement of *Universal Maritime*. When the parties use such broad but nonspecific language in the arbitration clause, they must include an 'explicit incorporation of statutory antidiscrimination requirements' elsewhere in the contract. *Universal Maritime*, 119 S. Ct. at 396. If another provision, like a nondiscrimination clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims.

*Carson v. Giant Food, Inc.*, 175 F.3d at 331-32. *See also Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 216 (4th Cir. 2007).

64. Although the above-cited cases involved arbitration clauses contained in collective bargaining agreements ("CBA"), their holdings apply with equal force to agreements between individuals as to agreements between an employer and a collective bargaining unit:

> Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.

*14 Penn Plaza LLC*, 556 U.S. at 258.

65. In this case, the Court finds that the arbitration agreement at issue does not contain a clear and unmistakable waiver for Plaintiff's statutory anti-discrimination claims. Specifically, the arbitration clause in this case contains broad and general language akin to the language rejected in *Wright*. There is no explicit arbitration clause containing a clear and unmistakable provision under which Plaintiff agreed to submit to arbitration all causes of action arising out of her employment. Additionally, the subject agreement does not explicitly include within its scope statutory anti-discrimination claims like Plaintiff's into the scope of arbitrable disputes like the one in *14 Penn Plaza* where the Court compelled arbitration. And finally, the agreement does not contain any language elsewhere in the agreement that explicitly incorporates

Plaintiff's statutory anti-discrimination claims to make it unmistakably clear that the anti-discrimination statute at issue (the WVHRA) is part of the agreement.

66. Based upon the foregoing, Plaintiff's statutory anti-discrimination claims do not fall within the scope of the subject arbitration agreement.

**4. The Court will not enforce the subject arbitration clause because it is procedurally and substantively unconscionable.**

67. Unconscionability is a legitimate reason for invalidating an arbitration agreement. *See e.g., State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. 125, 717 S.E.2d 909 at Syl. Pt. 3. Under the doctrine of unconscionability, a court may refuse to enforce a contract as written if there is "an overall and gross imbalance, one-sidedness or lop-sidedness in a contract." *Id.* at 136, 920 (quoting Syl. Pt. 12, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011) (overruled on other grounds)).

68. A trial court considering the unconscionability of an arbitration agreement must weigh the fairness of the contract as a whole, take into consideration all of the facts and circumstances relevant to the entire contract, and apply the concept of unconscionability in a flexible manner. See *id.* at 134 – 135, 918 – 919. "If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract." *Id.* at 135, 919

69. Unconscionability is analyzed in terms of procedural unconscionability and substantive unconscionability. A contract term is unenforceable only if it is both procedurally and substantively unconscionable, although both do not have to be present to the same degree. *See id.* at 136, 920. Rather, courts must apply a sliding scale to evaluate unconscionability, such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Id.*

70. The West Virginia Supreme Court has set forth the following guidelines for determining procedural unconscionability:

> 'Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract.'

*Id.* (quoting *Brown*, 228 W. Va. 646, 724 S.E.2d 250 at Syl. Pt. 17 (overruled on other grounds)). Based upon these factors, "courts are more likely to find unconscionability in consumer contracts and employment agreements than in contracts arising in purely commercial settings involving experienced parties." *Id.* (internal quotations omitted).

71. The following guidelines are used to analyze substantive unconscionability:

> Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns.

*See id.* at 137, 921.

72. If an arbitration agreement imposes unreasonably high costs on a litigant that might deter him from bringing a claim, a court may consider such costs in determining whether the agreement is substantively unconscionable:

> Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

*State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 551, 567 S.E.2d 265, 267 (2002). *See also State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 137 -138, 717 S.E.2d at 921-922. "[I]t is not only the costs imposed on the claimant but the *risk* that the claimant may have

to bear substantial costs that deters the exercise of the constitutional right of due process." *State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 137, 717 S.E.2d at 921 (internal quotations omitted).

73. For example, the Supreme Court of Appeals of West Virginia has recognized that forum selection provisions or choice of law provisions in an employment agreement that require arbitration in a remote jurisdiction would be troubling:

> A forum selection clause in an employment contract, contained in a contract of adhesion, which requires an employee to arbitrate or litigate his or her employment claims in far-away jurisdictions, remotely removed from the employee's actual place of employment or residence, would be troubling to this Court. It would also be troubling if such an employment contract required the employee to be subject to the substantive law of a far-away jurisdiction.

*State ex rel. Clites v. Clawges*, 224 W. Va. 299, 307 n.4, 685 S.E.2d 693, 701 (2009).

74. The Court finds the subject arbitration clause to be both procedurally and substantively unconscionable. Sunbelt, as Plaintiff's potential employer, occupied a far superior bargaining position to Plaintiff. Specifically, Sunbelt is a large, sophisticated company which possessed all the leverage over the Plaintiff because the Plaintiff could not be employed by Sunbelt unless she agreed to the arbitration clause. Additionally, the subject agreement was a pre-printed "take it or leave it" adhesion contract. Moreover, the arbitration provision is not conspicuously set forth in the agreement, but instead buried in a contract consisting of five pages of small, single-spaced text without any bolded text, all caps, larger print, or other methods of drawing attention to the arbitration provision. Additionally, there is no language in the arbitration agreement to explain the meaning of arbitration or to otherwise put one on notice that, by agreeing to the provision, the parties are relinquishing their right to a jury trial

75. Given that Plaintiff has no legal background or training, the nature of the agreement and the disparity between the bargaining power of the respective parties made the arbitration agreement procedurally unconscionable.

76. The subject arbitration agreement is also substantively unconscionable. The agreement requires Plaintiff to arbitrate her claims in Jacksonville, Florida which is approximately 743 miles and nearly 11 hours from her home in Elkins, West Virginia. This will impose unreasonable costs and burdens upon her and could deter her from prosecuting her claims. Moreover, such a far-flung jurisdiction will significantly hamper Plaintiff's ability to prosecute her claims due to the unavailability and/or unwillingness of witnesses who live in West Virginia to travel to Jacksonville, Florida to testify in an arbitration.

77. Additionally, the subject arbitration agreement is commercially unreasonable because it lacks mutuality of obligation. *See State ex rel. Richmond Am. Homes of W. Va., Inc.*, 228 W. Va. at 137, 717 S.E.2d at 921 ("In assessing substantive unconscionability, the paramount consideration is mutuality. Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability."). Specifically, the contract contains a fee shifting provision requiring Plaintiff to pay Sunbelt's attorney's fees and costs if Sunbelt prevails on any arbitration it brings against Plaintiff to enforce the terms of the agreement, but does not contain a similar provision requiring Sunbelt to pay Plaintiff's attorneys fees if she prevails in an arbitration to enforce the terms of the agreement.

78. Based on the foregoing, the court finds that the subject arbitration agreement is unenforceable based on unconscionability.

**D. Plaintiff is entitled to seek punitive damages against Defendant Stump and Plaintiff's ability to recover punitive damages is not the proper subject of a Rule 12(b)(6) Motion to Dismiss.**

79. As discussed above, Defendant Stump is not a public official and, thus, cannot be sued in any official capacity. There can be no dispute that punitive damages are available against her as an individual for the claims asserted by the Plaintiff.

80. Moreover, the Supreme Court of Appeals of West Virginia has held that "the right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto." *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 521, 146 S.E. 57, 58 (1928) (overruled on other grounds by *Jarrett v. E. L. Harper & Son*, 160 W. Va. 399, 403, 235 S.E.2d 362, 365 (1977)).

Accordingly, a Rule 12(b)(6) motion to dismiss for "failure to state a ***claim*** for which ***relief*** may be granted," *W. Va. R. Civ. P.* 12(b)(6) (emphasis added), is not the proper procedural device for prohibiting the Plaintiff from recovering punitive damages because punitive damages is an element of "relief" (i.e., damages) that may be granted and not the "claim."

81. Based upon the foregoing, the Court will not rule upon Defendant's motion to dismiss Plaintiff's punitive damages claim. Rather, if Defendants do not believe that Plaintiff is entitled to punitive damages, such issue may be considered at the pre-trial stage of this case in the form of jury instructions, verdict forms, and motions *in limine* to exclude evidence of punitive damages.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court **DENIES** Defendants' *Motion to Dismiss or, in the Alternative, Compel Arbitration*. Additionally, the Court hereby **GRANTS** *Plaintiff's Motion to for Leave to File a Second Amended Complaint*. The Court **ORDERS** that the *Second Amended Complaint* attached hereto as ***Exhibit 1*** is deemed filed upon entry of this Order.

The Court **ORDERS** that the Clerk mail a copy of this Order to all counsel of record as follows:

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ENTERED this 8th day of June, 2020.

Honorable Tera Salango, Circuit Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th DAY OF June 2020
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA CLERK