UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

JODIE LYMAN, an individual, Plaintiff, v. MOR FURNITURE FOR LESS, INC., a foreign corporation, Defendant.	3:06-CV-00666-ECR-RAM **ORDER**

In this action, Plaintiff Jodie Lyman seeks relief for alleged sex discrimination in violation of Title VII. Plaintiff objects (#13) to the Magistrate Judge's Order (#12) granting Defendant's motion (#8) for an order compelling arbitration pursuant to 9 U.S.C. § 4. The objection simply incorporates by reference Plaintiff's opposition (#9) to Defendant's motion,[1] which alleged that the arbitration provision of Plaintiff's employment contract was unconscionable under Nevada law because it neither disclosed any waiver of the right to a jury trial nor "the potential for Plaintiff

[1]The Court does not approve of this practice, but will consider the merits of Plaintiff's objection.

to shoulder substantial costs." Conversely, Defendant's opposition to Plaintiff's objection argues that the arbitration provision is not unconscionable.

Under the Federal Arbitration Act, "written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (1996) (quoting 9 U.S.C. § 2); see also Southland Corp. v. Keating, 465 U.S. 1, 16 n.11 (1984) ("a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement"). One such ground is unconscionability. Under Nevada law, "[g]enerally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a clause as unconscionable." D.R. Horton, Inc. v. Green, 96 P.3d 1159, 1162 (Nev. 2004) (per curiam) (internal quotation marks and ellipsis omitted). "A clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." Id. Substantive unconscionability, on the other hand, "focuses on the one-sidedness of the contract terms." Id. at 1162-63. "[L]ess evidence of substantive unconscionability is required in cases involving great procedural unconscionability." Id. at 1162; see also Burch v. Second Judicial Dist. Court, 49 P.3d 647, 650 (Nev. 2002).

> The arbitration clause in the contract at issue states:
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> ARBITRATION: Except as may be otherwise required by law or as set forth in a separate written agreement, any controversy or claim arising out of or relating to my employment with Mor or any agents of Mor shall be settled by arbitration administered by the JAMS' rules for the resolution of employment disputes in the city and state where the undersigned employee is employed, and judgment upon the award rendered by the arbitrator(s) may be entered by any court having jurisdiction thereof.

(Order (#12) of August 7, 2007, p. 5.) The language is in bold face and the Magistrate Judge's finding that the arbitration clause is conspicuous within the contract is certainly not clearly erroneous. We therefore view the first issue presented as whether a conspicuous arbitration clause in an employment contract that fails to mention the waiver of any rights, including the waiver of the right to jury trial, is procedurally unconscionable under Nevada law.

It appears that a standardized employment contract cannot be a contract of adhesion as a matter of Nevada law. See Kindred v. Second Judicial Dist. Ct., 996 P.2d 903, 907 (Nev. 2000) (per curiam) ("We have never applied the adhesion contract doctrine to employment cases."). This, however, does not end the inquiry because both the clause and its effects must still be "readily ascertainable."[2] D.R. Horton, 96 P.3d at 1162. Reading D.R. Horton

[2]Defendant relies on Kindred, which discusses (1) whether federal discrimination law — specifically, Title VII and the Family and Medical Leave Act — prevents enforcement of arbitration clauses, 996 P.2d at 906-07, and (2) whether an employment contract can be a contract of adhesion. Id.; see also E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 749-50 (9th Cir. 2003) (en banc) (there is no conflict between compulsory arbitration and the purposes of Title VII). Kindred does not address any of the issues raised by Plaintiff in her objection. We do not view Kindred as implicitly standing for the proposition that an employment contract cannot be unconscionable. See, e.g., Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000), cited at D.R. Horton, 96 P.3d at 1162 n.12.

as a case that only requires that arbitration clauses be conspicuous, the Magistrate Judge concluded that the arbitration clause inherently functioned as a sufficient waiver because it "clearly inform[ed]" Plaintiff of her waiver of the right to a jury trial. We note that there are ambiguities in D.R. Horton, but reviewing the Magistrate Judge's legal conclusions de novo, we disagree for the reasons set out below.

Defendants have placed a great deal of emphasis on footnote 4 in D.R. Horton, which states:

> [T]he district court erred in analyzing this case as a waiver of the right to a jury trial. The contract contains no such waiver clause, and our case law regarding enforceability of jury trial waivers is not applicable to the enforceability of a binding arbitration clause.

96 P.3d at 1162 n.4. First, in finding that the arbitration clause contains no waiver clause, the footnote seems to stand for the proposition that a waiver of the right to a jury trial must be explicit to the extent that the waiver is required for the contract to be enforceable. Second, with respect to the issue of whether a waiver is required at all, the footnote is oddly tautological and cryptic in characterizing the lower court's error, since it states that unspecified prior case law related to jury trial waivers is not applicable to a binding arbitration clause. However, reading footnote 4 in the context of the opinion as a whole, we find that it is intended to mean that the Nevada Supreme Court considers the waiver of the right to a jury trial in the context of arbitration clauses to be distinguishable from other areas where waivers are

required. Cf. id. at 1164 (there is no "duty to explain in detail each and every right" that is waived).[3]

That the footnote does not stand for the proposition that the absence of an explicit waiver of the right to a jury trial is simply irrelevant to the issue of procedural unconscionability is made quite clear by the Nevada Supreme Court's subsequent statement that even if the plaintiffs in D.R. Horton had in fact "noticed and read" the arbitration clause, id., they would not have been put on legally adequate notice that they were forgoing "important rights under state law." Id. The "important rights" discussed by the Nevada Supreme Court included the right to a jury trial. Id. It follows that the mere presence of an arbitration clause is not sufficient on its own to "clearly put a purchaser on notice that he or she is waiving important rights under Nevada law," id., and relatedly, that conspicuousness is not, on its own, sufficient without considering the contents of the arbitration clause.[4] See id. (while there is no duty "to explain in detail each and every right," "an arbitration clause must at least be conspicuous and clearly put a purchaser on notice that he or she is waiving important rights under Nevada law") (emphasis supplied). We find that the employment contract's

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[3]That is, a court applying Nevada law need, and should not apply the "knowing, voluntary, and intentional" test for the contractual waiver of the right to jury trial, Lowe Enterprises Residential Partners, L.P. v. Eighth Judicial Dist., 40 P.3d 405, 409 (Nev. 2002), and related sub-inquiries, id., to arbitration clauses.

[4]This finding is harmonious with Lawrence v. Household Bank (SB), N.A., 397 F.Supp.2d 1332 (M.D. Ala. 2005), which construed Nevada law, and found that a very explicit waiver of the right to a jury trial in an arbitration clause met the requirements of D.R. Horton. Id. at 1336.

arbitration clause, which fails to mention the waiver of important legal rights, is procedurally unconscionable under Nevada law.

This does not end the analysis, however, because "[g]enerally, both procedural and substantive unconscionability must be present," id. at 1162, and this is not the sort of case where no showing of substantive unconscionability is required. Plaintiff argues that the arbitration provision is substantively unconscionable because it fails to disclose the substantial costs of arbitration. An arbitration provision that is silent regarding "potentially significant arbitration costs" may be substantively unconscionable if those costs lack any "modicum of bilaterality" because, for example, they effectively preclude an ordinary litigant from utilizing the arbitral forum. See id. at 1165 (discussing arbitration costs and adopting California's "modicum of bilaterality" standard for asymmetrical remedies as stated in Ting v. AT & T, 319 F.3d 1126, 1149 (9th Cir. 2003)); see also Armendariz, 6 P.3d at 669-772 (discussing California's "modicum of bilaterality" standard in the employment context); Burch, 49 P.3d at 651 (finding substantive unconscionability based on "oppressive terms").

Defendant argued, in a nutshell, that the JAMS procedures were fair and not substantively unconscionable in terms of costs. Defendant did not describe those procedures in detail, and Plaintiff did not describe the procedures at all. Instead, Plaintiff argued that the failure to provide evidence of the nature of the arbitration procedures and costs constituted a failure to provide evidence that Plaintiff would not face substantial arbitration

costs. Plaintiff even went further and argued that the procedures cannot be judicially noticed.

While the burden of showing a valid arbitration agreement lies with the party seeking to enforce the arbitration clause, D.R. Horton, 96 P.3d at 1162, this is not a heavy burden,[5] and arbitration clauses are not by any means presumed to be unenforceable under Nevada law. See id. ("Strong public policy favors arbitration because arbitration generally avoids the higher costs and longer time periods associated with traditional litigation."). It was Plaintiff's burden to make a showing of unconscionability. See Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 915-16 (Cal. 1997) ("The petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense."); Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999) ("The party challenging a contract provision as unconscionable generally bears the burden of proving unconscionability."); see generally Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1412-13 (9th Cir. 1996). Under the circumstances of this case, and notwithstanding the fact that Nevada has a sliding scale with respect to substantive

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[5]This is, of course, particularly true where a contract cannot be described as a contract of adhesion. See Obstetrics and Gynecologists v. Pepper, 693 P.2d 1259, 1260-61 (Nev. 1985) (per curiam) (finding that the appellant had failed to show a patient had given a "knowing consent" to an arbitration clause where the district court's findings were unclear, and where the contract was one of adhesion).

unconscionability, Plaintiff was required to make at least some showing of substantive unconscionability in order to demonstrate that the arbitration provision was unenforceable. This Plaintiff failed to do.

In sum, although the clause is procedurally unconscionable, no showing has been made that it is substantively unconscionable. Plaintiff's argument that Defendant has waived the right to enforce the arbitration clause is meritless for the reasons stated by the Magistrate Judge. Accordingly, in light of the policy favoring arbitration and Plaintiff's burden in showing unconscionability, the motion to compel arbitration was properly granted. **IT IS, THEREFORE, HEREBY ORDERED** that Plaintiff's Objection (#13) to the Magistrate Judge's Order (#12) is **OVERRULED**.

DATED: This 28th day of February, 2008.

Edward C. Reed.

UNITED STATES DISTRICT JUDGE