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IN THE
COURT OF APPEALS OF INDIANA

GREGORY SMITH, RAYNESHA JORDAN, JOYCE SUICH, CANDICE DYE, POLLYANNA ELAM, PHILIP MANNING, MARK WILLIAMS, JENNIFER SOSBE, PHILLIP PARK, CAROLYN O'CONNOR, KEVIN SMITH, TAMARA FRANCE, STACEY COBB, JACKIE CARTER, and SANDRA ROBERSON, on Behalf of Themselves and All Others Similarly Situated,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A04-0601-CV-12
MEIJER, INC.,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0409-PL-1654

December 11, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Gregory Smith appeals the trial court's order granting Meijer, Inc.'s motion to compel arbitration. Smith raises one issue, which we revise and restate as whether the trial court erred by granting Meijer's motion to compel arbitration.[1] We affirm.

The relevant facts follow.[2] On August 24, 1999, Smith signed and submitted an employment application to Meijer, which contained the following:

> PLEASE READ THE FOLLOWING AND SIGN BELOW:
>
> * * * * *
>
> If I am hired into or later transferred or promoted to a non-bargaining unit position, I agree to arbitrate any claim, controversy, dispute or complaint arising out of or relating to the termination of my employment under any company arbitration policy and/or procedure which exists at the time of the termination of my employment and for which I am eligible.

Appellant's Appendix at 33. On September 7, 1999, Meijer hired Smith, and Smith acknowledged receipt of a "team handbook." Id. at 29. Smith also signed a document entitled "COMPANY POLICIES AND PROCEDURES," which in part stated:

> THE COMPANY'S WRITTEN POLICIES AND PROCEDURES ARE FOUND IN A NUMBER OF PUBLICATIONS AND DOCUMENTS AND ARE AVAILABLE FOR VIEWING ON-LINE. OTHERS MAY BE UNWRITTEN. YOU WILL BE INFORMED ABOUT THE POLICIES

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[1] Smith phrases the issue as "[w]hether the trial court erred by granting Meijer's Motion to Reconsider Granting Plaintiff Leave to Amend his Complaint to Assert Class Allegations and Motion to Compel Arbitration." Appellant's Brief at 1. However, Smith's failure to develop the argument relating to the class action allegations or support it with citations to authority waives this issue. See, e.g., Loomis v. Ameritech Corp., 764 N.E.2d 658, 668 (Ind. Ct. App. 2002) (holding that the party waived issue by failing to cite to authority and develop their argument), reh'g denied, trans. denied.

[2] We remind Smith that Ind. App. Rule 46(A)(6)(a) provides that "[t]he facts shall be supported by page references to the Record on Appeal or Appendix in accordance with Rule 22(C)."

> AND PROCEDURES WHICH PERTAIN TO OR AFFECT YOU. IT IS YOUR RESPONSIBILITY TO BE FAMILIAR WITH THOSE POLICIES AND PROCEDURES AND TO FOLLOW THEM.
>
> * * * * *
>
> I HAVE READ AND UNDERSTOOD THE ABOVE. IN CONSIDERATION OF MY EMPLOYMENT I AGREE TO FOLLOW THE COMPANY'S POLCIES AND PROCEDURES, INCLUDING ANY AMENDMENTS TO EXISTING POLICIES AND PROCEDURES AND ANY POLICIES AND PROCEDURES HEREAFTER ADOPTED.

Id. Meijer's "PEER REVIEW AND ARBITRATION PROCEDURE FOR HOURLY TEAM MEMBERS," ("Arbitration Procedure") discusses the arbitration procedure. Id. at 20.

At some point, Meijer terminated the employment relationship with Smith.[3] Smith filed a complaint against Meijer for his personal time off and vacation wages.[4] Meijer filed a motion to compel arbitration. Meijer argued that Smith acknowledged his obligation to arbitrate any termination-related dispute when he signed his employment application, signed a document entitled "COMPANY POLICES AND PROCEDURES,"

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[3] Neither party cites to the record to support the fact that Meijer terminated Smith. On appeal, Smith states that he is a "former employee of Meijer." Appellant's Brief at 2. Meijer states that "Meijer does not dispute that it employed Smith as an hourly team member and that it terminated his employment." Appellee's Brief at 3.

[4] A copy of the complaint is not included in the Appellant's Appendix or the Appellee's Appendix. Smith argues that "[t]his is an action under the Indiana Wage Claims Statute, I.C. § 22-2-9 *et. seq*., and the Wage Payment Statute, I.C. § 22-2-5 *et. seq*." Appellant's Brief at 2.

Smith filed an amended complaint, which is not included in the record. The trial court approved an order granting Smith's motion to amend his complaint. Meijer filed a motion to vacate Smith's motion to amend his complaint, which the trial court denied. Meijer later filed a motion to reconsider granting Smith leave to amend his complaint to assert class allegations, which the trial court granted.

and when he signed a document accepting receipt of Meijer's Team Handbook, which references the Arbitration Procedure.

The trial court held a hearing on Meijer's motion to arbitrate, and granted Meijer's motion to compel arbitration. The trial court did not enter findings and conclusions.

We review a trial court's ruling on a motion to compel arbitration de novo. HemoCleanse, Inc. v. Philadelphia Indem. Ins. Co., 831 N.E.2d 259, 262 (Ind. Ct. App. 2005) (relying on Polinsky v. Violi, 803 N.E.2d 684, 687 (Ind. Ct. App. 2004)), reh'g denied, trans. denied. "It is well settled that Indiana recognizes a strong policy favoring enforcement of arbitration agreements." Homes By Pate, Inc. v. DeHaan, 713 N.E.2d 303, 306 (Ind. Ct. App. 1999). A party seeking to compel arbitration must satisfy a two-pronged burden of proof. Mislenkov v. Accurate Metal Detinning, Inc., 743 N.E.2d 286, 289 (Ind. Ct. App. 2001). First, the party must demonstrate the existence of an enforceable agreement to arbitrate the dispute. Id. Second, the party must prove that the disputed matter is the type of claim that the parties agreed to arbitrate. Id. Once the court is satisfied that the parties contracted to submit their dispute to arbitration, the court is required by statute to compel arbitration. Id. (citing Ind. Code § 34-57-2-3(a)).

"Whether a particular claim must be arbitrated is a matter of contract interpretation." Isp.com LLC. v. Theising, 805 N.E.2d 767, 775 (Ind. 2004), reh'g denied. The question of whether the parties agreed to arbitrate a particular dispute is an issue for judicial determination. See AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 1418 (1986) ("the question of arbitrability--

whether [an agreement] creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination"); Isp.com LLC, 805 N.E.2d at 776 (determining whether the claims are within the terms of the arbitration agreement and holding that "the arbitration clause in the Asset Purchase Agreement applies to the claims [the plaintiff] asserts").

When determining whether the parties have agreed to arbitrate a dispute, we apply ordinary contract principles governed by state law. Showboat Marina Casino Partnership v. Tonn & Blank Const., 790 N.E.2d 595, 598 (Ind. Ct. App. 2003). In answering whether parties agreed to arbitrate a particular dispute, the court decides whether the dispute, on its face, is within the language of the arbitration provision. St. John Sanitary Dist. v. Town of Schererville, 621 N.E.2d 1160, 1162 (Ind. Ct. App. 1993). In addition, "[w]hen construing arbitration agreements, every doubt is to be resolved in favor of arbitration," and the "parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used." Mislenkov, 743 N.E.2d at 289 (citing St. John Sanitary Dist., 621 N.E.2d at 1162). However, parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication. Id. The court should attempt to determine the intent of the parties at the time the contract was made by examining the language used to express their rights and duties. Showboat Marina, 790 N.E.2d at 597. Words used in a contract are to be given their usual and common meaning unless, from the contract and the subject matter thereof, it is clear that some other meaning was

intended. Id.

Smith's signed employment application stated, in pertinent part:

> I agree to arbitrate any claim, controversy, dispute or complaint arising out of or relating to the termination of my employment under any company arbitration policy and/or procedure which exists at the time of the termination of my employment and for which I am eligible.

Appellant's Appendix at 33. According to Smith, his complaint is under the Indiana Wage Claims Statute and the Wage Payment Statute and seeks monetary compensation and liquidated damages for failure to pay wages due and owing upon separation from employment. Smith's complaint is a "claim, controversy, dispute or complaint arising out of or relating to the termination" of Smith's employment because Smith seeks "monetary compensation and liquidated damages owing upon separation from employment."[5] Appellant's Brief at 4.

Meijer appears to argue that we cease our analysis at this point. Specifically, Meijer argues that "[t]o the extent there is any question about whether the broadly-worded arbitration agreements encompass the wage claim asserted by Smith, Indiana Supreme Court precedent is clear that issues of arbitrability are for the arbitrator to decide." Id. Meijer relies on PSI Energy, Inc. v. AMAX, Inc., 644 N.E.2d 96 (Ind. 1994), for this argument.

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[5] On appeal, Smith appears to concede at least some connection between his employment and his claims when he states that "[t]he wage claim accrued under Indiana law, and did not arise out of or relate to the termination of his employment except in the most remote sense." Appellant's Brief at 7.

In PSI Energy, PSI Energy and AMAX Coal agreed to arbitrate "any controversy, claim, counterclaim, defense, dispute, difference, or misunderstanding arising out of or relating to" the contract "[e]xcept as otherwise specifically provided for herein . . . ." PSI Energy, Inc., 644 N.E.2d at 97. A dispute arose regarding the interpretation of the gross inequities clause of the contract, and PSI sought to submit it to arbitration. Id. at 97-98. The section of the contract addressing gross inequities did "not contain any language providing a means other than arbitration for the resolution of conflicting interpretations as to its meaning." Id. at 98. AMAX initiated a lawsuit to stay the arbitration. Id. at 97. While AMAX did not challenge the validity of its contract containing the arbitration clause, it maintained that the particular dispute was not arbitrable and sought a judicial determination to that effect. Id. AMAX asserted that questions of arbitrability are for the court to determine, not an arbitrator. Id. at 99. AMAX argued that the existence of a valid agreement to arbitrate was a threshold question for judicial determination. Id.

On appeal, the Indiana Supreme Court held:

> Certainly, the validity of an arbitration agreement is a justiciable question, for as Justice Brennan observed more than thirty years ago, "the arbitration promise is itself a contract." United Steelworkers v. American Mfg. Co., 363 U.S. 564, 569, 80 S.Ct. 1343, 1347, 4 L.Ed.2d 1403 (1960) (Brennan, J., concurring). Before a court compels arbitration, it must resolve any claims the parties had concerning the validity of the contract containing the arbitration clause. Once satisfied that the parties contracted to submit their disputes to arbitration, however, the court is required by statute to compel arbitration. Judicial inquiry is thus limited to the validity of the contract containing the arbitration clause, not the construction of that clause. More particular to this case, when a valid contract contains a broad arbitration clause, resolution of disputes about various other clauses should be through arbitration.

Id.

We cannot say that the arbitration clause present here is as broad as the arbitration clause present in PSI Energy. Here the arbitration clause in the employee application states:

> I agree to arbitrate any claim, controversy, dispute or complaint arising out of or relating to the termination of my employment *under any company arbitration policy and/or procedure which exists at the time of the termination of my employment and for which I am eligible*.

Appellant's Appendix at 33 (emphasis added). Thus, to determine whether an enforceable agreement to arbitrate this particular dispute, we must look at whether a company arbitration policy and/or procedure existed at the time of the termination of Smith's employment and whether Smith was eligible for such a policy and/or procedure.

Smith argues that he was not eligible for the arbitration procedure. Specifically, Smith appears to argue that he was not eligible for the arbitration policy that appears in the Arbitration Procedure[6] because it "is intended to apply to employee complaints that exist *while* the employee is employed." Id. at 4. We disagree. The Arbitration Procedure states, in pertinent part:

B. ***ELIGIBILITY***

[6] Our analysis focuses on the Arbitration Procedure because the document entitled "COMPANY POLICIES AND PROCEDURES" does not reference arbitration, and the Team Handbook, according to Meijer, "served to summarize Meijer's 'Peer Review and Arbitration Procedure for Hourly Team Members.'" Appellee's Brief at 3.

> You are eligible to use this procedure if you are *or were* a full-time or part-time hourly team member of Meijer in Indiana or Illinois.

Appellant's Appendix at 20 (emphasis added). Smith was an hourly team member of Meijer in Indiana. Thus, Smith was eligible for the Arbitration Procedure.

Smith also argues that the Arbitration Procedure does not apply to his wage claim. Specifically, Smith argues that the Arbitration Procedure "do[es] not encompass, and do[es] not even contemplate, arbitration of a post-employment claim that wages were not paid as required by Indiana law regarding post-employment payment of wages earned during the employment relationship." Appellant's Brief at 5.

Meijer's Arbitration Procedure states:

> I. **GENERAL INFORMATION**
>
> A. ***PURPOSE AND PHILOSOPHY***
>
> * * * * *
>
> The company has adopted this procedure to provide a uniform, systematic and prompt method for team members to resolve all work-related complaints.
>
> C. ***DEFINITIONS***
>
> Work-related complaint includes complaints about problems with fellow team members or team leaders, complaints regarding promotion, demotion, discipline, discrimination or discharge and complaints about the interpretation or application of established company policy or procedures.
>
> A discrimination complaint means specifically a complaint that you were discriminated against in violation of applicable federal, state or local civil rights or employment discrimination laws and includes, but is not limited to, complaints of discrimination based on race, sex, sexual harassment, pregnancy, religion, national origin, age, and disability.

A discipline complaint means specifically a complaint that you were disciplined unfairly, without just cause or for reasons which violate applicable public policy or applicable federal, state, or local laws.

A discharge complaint means specifically a complaint that you were discharged from employment without just cause or for reasons which violate applicable public policy or applicable federal, state or local laws.

Discharge from employment means you were involuntarily and permanently separated from employment by the company and includes a constructive discharge. Constructive discharge means the company deliberately made your working conditions so difficult or unpleasant that you felt you had no other alternative but to resign or quit.

* * * * *

B. *ARBITRATION*

Arbitration is a process similar to a court proceeding except that the final decision is made by a neutral arbitrator instead of a judge or jury. At our company, you must use arbitration if you want to contest the recommendation of the peer review panel.

* * * * *

Arbitrator's Authority

The arbitrator's authority is limited to deciding discrimination and discharge complaints.

* * * * *

Relief

The arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant, subject to the following: (1) the arbitrator shall not award relief greater than that sought by the team member; (2) the arbitrator may not reduce any penalty imposed by the company if the arbitrator finds the team member was disciplined or terminated in accordance with company policy and not for an unlawful

> reason; and (3) if the arbitrator awards back pay, the arbitrator shall deduct from the award all lawful setoffs, including but not limited to, the team member's interim earnings, unemployment compensation payments, any other sums paid in lieu of employment during the period after discharge and any amount attributable to the team member's failure to mitigate damages or for periods of unavailability for work.
>
> * * * * *

Appellant's Appendix at 20-21, 23, 25.[7]

Because the Arbitration Procedure does not explicitly exclude wage claims, we must determine whether Smith's wage claim reasonably fits within the language used. See Mislenkov, 743 N.E.2d at 289 ("[w]hen construing arbitration agreements, every doubt is to be resolved in favor of arbitration," and the "parties are bound to arbitrate all matters, not explicitly excluded, that reasonably fit within the language used.").

Meijer adopted the Arbitration Procedure to "resolve all work-related complaints." Appellant's Appendix at 20. The Arbitration Procedure defined "work-related complaint" as including "complaints about problems with fellow team members or team leaders, complaints regarding promotion, demotion, discipline, discrimination or discharge and complaints about the interpretation or application of established company policy or procedures." Id. The dispute at issue, whether the parties must arbitrate Smith's complaint against Meijer for his personal time off and vacation wages, involves

[7] The Arbitration Procedure also includes a section on arbitration procedure including the election to arbitrate, selection of the arbitrator, representation, discovery, rules governing the arbitration hearing, the arbitrator's authority, relief, the form of arbitrator's award, arbitrator's fees. See Appellant's Appendix at 23-26.

the interpretation or application of established company policy or procedures. The Arbitration Procedure also states that the arbitrator may award "back pay." Id. at 25. The Arbitration Procedure does not define back pay, but "back pay award" is generally defined as the "[d]ifference between wages already paid an employee and higher wages granted retroactively. A determination by a judicial or quasi judicial body that an employee is entitled to accrued but uncollected salary, wages, or fringe benefits. Such may be awarded in employment discrimination cases." BLACK'S LAW DICTIONARY 138 (1990). Smith seeks monetary compensation for failure to pay wages due and owing upon separation from employment, which reasonably fits within the language of back pay.

Based on the language in the employee application and the Arbitration Procedure, we conclude that Smith's claim fits reasonably within the language used in the employee application and the Arbitration Procedure. See, e.g., St. John Sanitary Dist., 621 N.E.2d at 1163 (holding that issue fits reasonably within the language used and was arbitrable under the agreement); Chesterfield Mgmt., Inc. v. Cook, 655 N.E.2d 98, 101-102 (Ind. Ct. App. 1995) (holding that arbitration clause, which provided that "[a]ny dispute under any of the paragraphs of this Lease shall be settled by arbitration," when viewed in light of strong policy favoring enforcement of arbitration agreements was clearly intended to apply to all disputes under the lease, including those which arose after the lease term expired), reh'g denied, trans. denied. Thus, the trial court did not err by granting Meijer's motion to compel arbitration.

For the foregoing reasons, we affirm the trial court's grant of Meijer's motion to compel arbitration.

Affirmed.

KIRSCH, C. J. and MATHIAS, J. concur