In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00010-CV

THE WOODLANDS CHRISTIAN ACADEMY, Appellant

V.

MONICA WEIBUST, Appellee

On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 09-10-09979 CV

MEMORANDUM OPINION

Monica Weibust sued The Woodlands Christian Academy for constructive discharge, harassment, retaliation, and employment discrimination under Chapter 21 of the Texas Labor Code. *See* TEX. LAB. CODE ANN. §§ 21.001-.556 (Vernon 2006 & Supp. 2010). The Academy answered her suit, propounded some discovery, and later filed a motion to compel arbitration. The trial court denied the arbitration motion, and The Academy filed its appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1), (b) (Vernon 2005). We hold that the arbitration agreement is valid and enforceable, and we remand the case to the trial court for entry of an order compelling arbitration.

The parties disagree on what law applies -- the Federal Arbitration Act or the Texas Arbitration Act. The Federal Arbitration Act applies when a dispute concerns a contract evidencing a transaction involving interstate commerce. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269-70 (Tex. 1992); *see also* 9 U.S.C.A. §§ 1, 2 (West 2009). The dispute between Weibust, a teacher, and The Woodlands Christian Academy, a Texas private school, involves an employment agreement. The statutory claims are based on the Texas Labor Code. The Texas Arbitration Act applies to this dispute. Nevertheless, "[w]hether a case is governed by the Federal Arbitration Act (FAA) or the TAA, many of the underlying substantive principles are the same; where appropriate, this opinion relies interchangeably on cases that discuss the FAA and TAA." *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 56 n.10 (Tex. 2008).

CONTRACT

Weibust contends the contract containing the arbitration clause is "null and void[,]" and the trial court was correct in denying arbitration. She asserts that the contract is void because it was untimely executed. Generally, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *In re Labatt Food Serv., Inc.*, 279 S.W.3d 640, 647-48 (Tex. 2009) (orig. proceeding). Furthermore, although Weibust sought to challenge the arbitration clause on the untimely execution grounds, her argument lacks merit. The agreement contained the following provision:

> This contract offer shall be null and void unless [Wiebust] returns an executed copy of this contract to the school by March 28, 2008, unless this deadline is extended in writing by the Head of School or his/her designee.

Both parties executed the agreement on April 25, 2008, rather than by the March 28 deadline. "Where an offer prescribes the time and manner of acceptance, those terms must ordinarily be complied with to create a contract." *Padilla v. La France*, 907 S.W.2d 454, 460 (Tex. 1995). "However, a different method of acceptance may be effectual where the 'original offeror thereafter manifests his assent to the other party.'" *Id.* (quoting *Town of Lindsay v. Cooke County Elec. Coop. Ass'n*, 502 S.W.2d 117, 118 (Tex. 1973)). By executing the agreement on April 25, 2008, the school, in effect, extended the deadline in writing, and Weibust effectively expressed her consent to it by her execution of the contract that same day. Also, Weibust taught school at The Woodlands Christian Academy during the 2008-09 school year. Acceptance of an offer to contract "may be shown by conduct." *Horton v. DaimlerChrysler Fin. Servs. Americas, L.L.C.*, 262 S.W.3d 1, 6 (Tex. App.--Texarkana 2008, no pet.); *see also In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (orig. proceeding) (holding arbitration clause was accepted by continued employment).

WAIVER

Weibust contends The Academy waived its right to arbitrate by taking substantial action inconsistent with the right to arbitration. A claim of waiver of arbitration presents "a legal question for the court based on the totality of the circumstances[.]" *In re*

Fleetwood Homes of Tex., L.P., 257 S.W.3d 692, 694 (Tex. 2008) (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008)).

Weibust argues The Academy waived arbitration because it did not first mediate the dispute. The contract contains the following arbitration clause:

> J. The parties to this agreement are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian community in conformity with the Biblical injunctions of Matthew 18:15-20. Therefore, the parties agree that any claim or dispute arising out of, or related to, this agreement or to any aspect of the employment relationship, including statutory claims, shall be settled by Biblically based mediation.
>
> If resolution of the dispute and reconciliation do not result from such efforts, the matter shall then be submitted to a panel of three arbitrators for binding arbitration. Each party to the agreement shall have the right to select one arbitrator. The two arbitrators selected by the parties shall jointly select the neutral, third arbitrator. If there is an impasse in the selection of the third arbitrator, the Institute for Christian Conciliation, Billing, MT . . . , shall be asked to provide the name of a qualified person that will serve in that capacity. The arbitration shall be conducted in accordance with the Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation as printed in the Christian Conciliation Handbook.
>
> The parties agree that these methods shall be the sole remedy for any controversy or claim arising out [of] the employment relationship or this agreement and expressly waive their right to file a lawsuit against one another in any civil court for such disputes, except to enforce a legally binding arbitration decision. Each party, regardless of the outcome of the matter, agrees to bear the cost of his own arbitrator and one half of the fees and costs of the neutral arbitrator and any other arbitration expenses.

The arbitration agreement provides that the parties will attempt mediation before submitting the dispute to arbitration. The parties did not mediate prior to the motion to compel arbitration.

Weibust cites a Texas Supreme Court case holding that a party may waive its right to arbitration by taking action inconsistent with its right to arbitrate.[1] She offers no case law or other support, however, for the proposition that a party's failure to mediate prior to that party's request for arbitration necessarily waives the right to arbitration. *See In re U.S. Home Corp.*, 236 S.W.3d 761, 764 (Tex. 2007) (Failure to invoke mediation before seeking arbitration did not preclude arbitration.). Although Weibust asserts she was prejudiced by The Academy's refusal to mediate, she does not explain how she was prejudiced. She did not ask the trial court to require mediation. Considering the circumstances, we conclude the lack of mediation does not nullify the right to arbitrate under the contract. *See id.*

Weibust also contends the school waived its right to arbitrate because it engaged in extensive discovery prior to its arbitration request. Public policy favors resolution of disputes through arbitration, and there is a strong presumption against the waiver of arbitration clause rights; however, a party cannot cause unfairness "by switching between litigation and arbitration to its own advantage[.]" *Cull*, 258 S.W.3d at 584, 597. A party

[1] *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996).

seeking to establish waiver of arbitration rights has a heavy burden. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (Tex. 1998) (orig. proceeding).

Merely participating in a minimal amount of discovery does not necessarily mean a party has waived the right to arbitrate. *See id*. at 704. When a party has conducted only a minimal amount of discovery that has not unfairly prejudiced the other party, ordinarily a court does not infer waiver. *Id*. Nevertheless, conducting extensive discovery may substantially invoke the judicial process and constitute a waiver of arbitration. *Nationwide of Bryan, Inc. v. Dyer*, 969 S.W.2d 518, 522 (Tex. App.--Austin 1998, no pet.); *see also Cull,* 258 S.W.3d at 595-600 (extensive discovery and prejudice).

Two months elapsed between Weibust's filing of suit and The Academy's motion to arbitrate. Prior to the motion to compel arbitration, Weibust filed a request for disclosure and a request for production. The Academy responded to both requests. The Academy conducted some discovery: a disclosure request, two sets of production requests, and the scheduling of a deposition. Weibust filed responses to the disclosure and production requests.

When a party conducts full discovery, files motions addressing the merits, and seeks arbitration only on the eve of trial, it may waive any contractual right to arbitration. *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 625 (Tex. 2008) (orig. proceeding). The record does not show that any interrogatories were propounded or depositions taken prior to the arbitration motion. The record does not contain any motions addressing the

merits of the case. The December 2009 motion to arbitrate was filed well in advance of the trial setting. Considering the totality of the circumstances in this case, we hold that The Academy did not waive its right to arbitrate.

VALIDITY AND SCOPE

The Academy argues the arbitration clause is valid and enforceable under the Texas Arbitration Act.[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.001 (Vernon 2005). The trial court's determination of the validity of the arbitration agreement is a legal question subject to *de novo* review. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003).

The parties signed an employment contract that contained an arbitration agreement: the parties agreed "that any claim or dispute arising out of, or related to, this agreement or to any aspect of the employment relationship, including statutory claims, shall be settled by Biblically based mediation[,]" and if that is not successful, the matter "shall then be submitted to a panel of three arbitrators for binding arbitration." An arbitration agreement existed between The Woodlands Christian Academy and Weibust. The Academy had the burden to establish that Weibust's claims fall within the scope of

[2]Weibust apparently argues that the arbitration agreement was not properly before the trial judge, because it was not sworn to or authenticated. The Academy attached the contract containing the arbitration clause to The Academy's motion to arbitrate. It does not appear that Weibust objected to the trial judge's consideration of the arbitration agreement at the trial court level, or that there is any meritorious dispute over the authenticity of the document.

the agreement. *See id.* Weibust's causes of action arise out of "the employment relationship" and the employment contract. They fall within the scope of the arbitration clause.

ENFORCEABILITY

If a party establishes that a claim is within the scope of an arbitration agreement, the trial court must compel arbitration of the claim unless the party opposing arbitration meets its burden of presenting evidence that prevents enforcement of the agreement. *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 367 (Tex. App.--Houston [14th Dist.] 2000, orig. proceeding); *see also J. M. Davidson, Inc.*, 128 S.W.3d at 227. The party seeking to avoid the arbitration agreement may attempt to show that some ground exists in law or equity for the revocation of the arbitration agreement; the grounds may include fraud, waiver, or unconscionability. *Dallas Cardiology Assocs., P.A. v. Mallick*, 978 S.W.2d 209, 212 (Tex. App.--Texarkana 1998, pet. denied).

Weibust argues in this appeal, though not in the trial court, that the lack of meaningful judicial review of the arbitration panel's award is a ground for denying the motion to arbitrate. She asserts that "manifest disregard of the law as a vehicle for setting aside an arbitration award has been abandoned by the United States Supreme Court[,]" and that therefore any judicial review would be meaningless. She also argues that the First Amendment prohibits courts from examining religious doctrine, and therefore judicial review is not permitted.

Under the TAA, Texas courts may review and vacate an arbitrator's award in appropriate circumstances for such reasons as an arbitrator's misconduct or willful misbehavior, the arbitrator's exceeding his or her powers, or an arbitrator's partiality that prejudices the rights of a party. TEX. CIV. PRAC. & REM. CODE ANN. § 171.088 (Vernon 2005). We decline Weibust's invitation to find that judicial review would be meaningless.

Weibust also argues the agreement is unconscionable.[3] Unconscionability involves two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision; and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. *In re Halliburton Co.*, 80 S.W.3d at 571. The burden of proving unconscionability rests on the party seeking to invalidate the arbitration agreement. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) (orig. proceeding); *In re People's Choice Home Loan, Inc.* 225 S.W.3d 35, 44 (Tex. App.--El Paso 2005, orig. proceeding).

Weibust contends the arbitration agreement is unconscionable because it requires the substitution of "biblical scripture" as the "law of the case," and thereby creates an unconscionable limitation on her remedies under the Texas Commission on Human

[3]In her affidavit attached to her response to the motion to compel arbitration, Weibust states The Academy did not provide her a copy of the "Rules of Procedure for Christian Conciliation of the Institute for Christian Conciliation as printed in the Conciliation Handbook." Her counsel attached a copy of the rules as an exhibit to Weibust's response. Assuming Weibust did not receive a copy from The Academy, we fail to see how this alone rendered the arbitration agreement unconscionable. *See In re December Nine Co.*, 225 S.W.3d 693, 701-02 (Tex. App.--El Paso 2006, orig. proceeding) (The fact that employees were not provided a copy of the rules of arbitration, but could request a copy, did not render the arbitration agreement unconscionable.).

Rights. "An arbitration agreement covering statutory claims is valid so long as 'the arbitration agreement does not waive [the] substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights.'" *In re Poly-America, L.P.*, 262 S.W.3d 337, 352 (Tex. 2008) (orig. proceeding) (quoting *In re Halliburton*, 80 S.W.3d at 572). An agreement to arbitrate a statutory claim does not necessarily require a party to forego the substantive rights afforded by the statute; "'it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

Weibust directs us to Rule 4 of the Rules of Procedure for Christian Conciliation, which provides:

> 4. Application of Law
> Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.

The conciliation "process" is defined in the rules as more than the arbitration "process."

Other rules clarify that the arbitrators' decision does not trump the law (statutes, constitutions, case law, or rules).

> 40. Decisions
> . . . .
> E. The arbitrators' decision shall be legally binding on the parties, except as provided by law, and may be filed as a judgment and enforced by a court of law.
> . . . .

> G. The arbitration decision is final and cannot be reconsidered or appealed except as provided by Rule 41 [Request for Reconsideration] and/or civil law.
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> . . . .
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> 42. Conflict of Rules
> Should these Rules vary from state or federal arbitration statutes, these Rules shall control except where the state or federal rules specifically indicate that they may not be superseded.

Rule 40 states the caveat -- "except as provided by Rule 41 and/or civil law." Rule 42 expressly provides that in circumstances where state or federal statutes indicate they are preemptive, the rules of arbitration under the Institute for Christian Conciliation do not control. The Texas Arbitration Act also authorizes courts to overrule an arbitrator's award in certain limited circumstances that focus on the integrity of the process. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.088. The arbitration agreement does not limit Weibust's remedies under state and federal law.

Weibust argues the arbitration costs she will likely incur in arbitration are excessive.[4] The arbitration clause requires Weibust to pay the expenses of her own arbitrator, one-half of the fees and costs of the neutral arbitrator, and one-half of any other arbitration expenses. She also contends there is the possibility of discovery and defense cost-shifting to her. Weibust argues that fee-splitting provisions like the ones here serve to "prohibit an employee from fully and effectively vindicating statutory

[4]As part of her argument, Weibust asserts that The Academy, while believing that Weibust likely would not recover "anything at all" from her suit, nonetheless sought to compel her to arbitrate, and arbitration would cause her to incur substantial costs. The fact that The Academy may not believe Weibust's suit has merit does not render its arbitration request unconscionable and does not preclude arbitration.

rights" and are therefore unconscionable and unenforceable. *In re Poly-America, L.P.*, 262 S.W.3d at 355-56.

An agreement that provides for fee-splitting is not, by itself, unconscionable. *In re Weeks Marine, Inc.*, 242 S.W.3d 849, 860 (Tex. App.--Houston [14th Dist.] 2007, orig. proceeding) (citing *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 822 (Tex. App.--San Antonio 1996, no pet.)). To establish unconscionablility of a fee-splitting agreement, the complaining party must present some evidence that she "will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum." *In re Poly-America, L.P.*, 262 S.W.3d at 356; *In re Weeks Marine, Inc.*, 242 S.W.3d at 859; *see also In re FirstMerit Bank*, 52 S.W.3d at 756-57. In support of her claim, Weibust compares the costs of court and the costs of arbitration. She presents no support for her contention that "[c]ourt is free; Christian conciliation is not." *See* TEX. R. APP. P. 38.2(a), 38.1(i). The arbitration rules provide for discretion in the granting of fees, costs, and expenses; the arbitration rules state that "[a]ll fees and costs incurred by the Administrator shall be shared equally by the parties unless agreed otherwise in a fee agreement or determined otherwise by the arbitrators[.]" "The Administrator may reduce the fee or arrange a payment plan for parties who would not otherwise be able to afford Christian conciliation." Given the arbitration administrator's discretion, the assertion that the arbitration costs are unconscionable is speculative at this stage. *See In re Poly-*

America, 262 S.W.3d at 356-57 (Arbitration costs were speculative, and the contract provided that the arbitrator could modify unconscionable terms.).

Weibust contends there was inequality in bargaining power, which rendered the agreement unconscionable. Weibust did not present evidence to show her alleged lack of bargaining power or inability to negotiate the contract terms. *In re People's Choice Home Loan, Inc.*, 225 S.W.3d at 44-45. Mere inequality of bargaining power is not by itself a sufficient reason to hold an arbitration agreement unenforceable in the employment context. *Gilmer*, 500 U.S. at 33; *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 377 (Tex. App.--Texarkana 1999, orig. proceeding [mand. denied]). An employer's entering into an arbitration agreement with an employee is not unconscionable merely because the employer had greater bargaining power or because the contract did not result from specific bargaining by the parties. *See Smith v. H. E. Butt Grocery Co.*, 18 S.W.3d 910, 912 (Tex. App.--Beaumont 2000, pet. denied). Weibust has not shown the arbitration agreement to be unconscionable.

CONCLUSION

We sustain appellant's issues one and two. Weibust's claims fall within the scope of the arbitration clause. The Academy did not waive arbitration. Weibust did not establish her unconscionability defenses. We reverse the trial court's order denying arbitration and remand the case with instructions for the trial court to compel arbitration of the claims.

REVERSED AND REMANDED.

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DAVID GAULTNEY
Justice

Submitted on July 1, 2010
Opinion Delivered October 7, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.