IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly situated, Respondents, v. PAGLIACCI PIZZA, INC., a Washington corporation, Petitioner.	)	No. 97429-2 En Banc Filed August 20, 2020

MADSEN, J.—This case has its genesis in a putative class action alleging wage and hour claims by delivery drivers against their employer, Pagliacci Pizza Inc. At issue on interlocutory review is whether the trial court sustainably denied the employer's motion to compel arbitration. The Court of Appeals affirmed, determining that the mandatory arbitration policy contained in the employee handbook, which was provided to the named plaintiff after he signed the employment relationship agreement, was procedurally and substantively unconscionable and, thus, unenforceable. For the reasons discussed below, we affirm the denial of the motion to compel arbitration.

FACTS

After two interviews, Pagliacci Pizza hired Steven Burnett as a delivery driver. Burnett attended a mandatory new employee orientation at a local Pagliacci Pizza location on October 16, 2015 that lasted between 40 minutes and an hour. During the orientation, Pagliacci gave Burnett multiple forms and told him to sign them so that he could start working. One of the forms that Burnett signed was a one-page "Employee Relationship Agreement" (ERA).

The ERA does not mention arbitration. Instead, it contains a section entitled "Inconsistencies in Hours/Pay/Breaks" that instructs employees to "promptly inform Human Resources" if they have concerns about breaks, pay, hours, or benefits. Clerk's Papers (CP) at 58. It says nothing about arbitration of disputes.

A section of the ERA, entitled "Accountability," addresses employee till shortages and employee failure to return "non-cash property of Pagliacci Pizza." *Id*. It authorizes Pagliacci to deduct directly from an employee's pay the amount of any till shortage, money the employee otherwise owes to Pagliacci, or the cost of any noncash property.

Pagliacci's "Mandatory Arbitration Policy" (MAP) is printed in Pagliacci's employee handbook, "Little Book of Answers." CP at 60-73. Little Book of Answers is a 23-page booklet in which Pagliacci's MAP appears on page 18. The MAP is not listed in the handbook's table of contents, and page 18 falls within the "Mutual Fairness Benefits" section. CP at 62.

Burnett was given a copy of Little Book of Answers during his orientation and told to read it at home. Consistent with that instruction, the ERA contains a section

entitled "Rules and Policies." CP at 58. It provides, "On your own initiative you will learn and comply with the rules and policies outlined in our Little Book of Answers, including those that relate to positive attitude, public safety, company funds, tips and FAIR policy." *Id*. It also says that Pagliacci "will on occasion" change the policies and procedures contained in Little Book of Answers. *Id.*

The MAP contained in the handbook states, in full:

> The company has a mandatory arbitration policy with which *you* must comply for the binding resolution of disputes without lawsuits. If *you* believe *you* have been a victim of illegal harassment or discrimination or that you have not been paid for all hours worked or at less than the rate of pay required by law or that the termination of *your* employment was wrongful, *you* submit the dispute to resolution in accordance with the F.A.I.R. Policy and if those procedures are not successful in resolving the dispute, *you* then submit the dispute to binding arbitration before a neutral arbitrator pursuant the Washington Arbitration Act.

CP at 71 (emphasis added). As can be seen, the MAP provides that the employee must submit disputes "to resolution in accordance with the F.A.I.R. Policy" before commencing arbitration. *Id*.

The "F.A.I.R. Policy," which is also contained in the handbook, is an informal multistep process that utilizes "supervisor review" and "conciliation." CP at 70. The opening paragraph of the F.A.I.R. Policy states:

> F.A.I.R. stands for Fair and Amicable Internal Resolution. If you believe you have been treated unfairly in any way in your employment at Pagliacci Pizza (i.e., in the application of its rules and policies to you, not in the content of the rules and policies themselves), or if you believe the content of any of the rules or policies to be unlawful, or if you believe any of your rights have been violated, or if you believe you have been harassed, discriminated against or wrongfully terminated as described in the Pagliacci Pizza Arbitration Policy or the Pagliacci Pizza Unlawful Harassment Policy, you will use the steps and procedures of the F.A.I.R. Policy to

> attempt in good faith to resolve the dispute to the mutual satisfaction of you and Pagliacci Pizza without arbitration.

Id. The F.A.I.R. Policy then directs:

> 1ST STEP – SUPERVISOR REVIEW
>
> Informally report the matter and all details to your supervisor who will discuss the matter with you.
>
> 2ND STEP – CONCILIATION
>
> If Supervisor Review does not resolve the matter to your satisfaction, you may initiate non-binding Conciliation. The F.A.I.R. Administrator will designate a responsible person at Pagliacci Pizza (who may be its owner) to meet face-to-face with you in a non-binding Conciliation.

Id. The F.A.I.R. Policy then provides a "Limitations on Actions" section, stating:

> You may not commence an arbitration of a claim that is covered by the Pagliacci Pizza Arbitration Policy or commence a lawsuit on a claim that is not covered by the Pagliacci Pizza Arbitration Policy unless you have first submitted the claim for resolution in conformity with the F.A.I.R. Policy and fully complied with the steps and procedures in the F.A.I.R. Policy. If you do not comply with a step, rule, or procedure in the F.A.I.R. Policy with respect to a claim, you waive any right to raise the claim in any court or other forum, including arbitration. The limitations set forth in this paragraph shall not be subject to tolling, equitable or otherwise.

Id.

Pagliacci terminated Burnett on June 22, 2017. On October 20, 2017, Burnett filed a putative class action complaint alleging various wage related claims. Pagliacci moved to compel arbitration under its MAP contained in Little Book of Answers.

Burnett opposed Pagliacci's motion to compel arbitration, arguing that the MAP was both procedurally and substantively unconscionable. The trial court denied Pagliacci's motion to compel arbitration. In its oral ruling, the court expressed its concerns regarding both procedural and substantive unconscionability but declined to

reach those issues and instead ruled that the arbitration provision contained in the handbook was not incorporated into the ERA. Pagliacci moved for reconsideration, which the trial court denied.

Pagliacci appealed, and the Court of Appeals affirmed. *Burnett v. Pagliacci Pizza, Inc.*, 9 Wn. App. 2d 192, 442 P.3d 1267 (2019). The Court of Appeals agreed with Pagliacci that the trial court erred in concluding the MAP was not incorporated into the ERA and consequently there was no agreement to arbitrate. Nevertheless, the Court of Appeals ruled that because Burnett did not have a reasonable opportunity to review the arbitration policy before he was required to sign the ERA, the circumstances surrounding the formation of the parties' agreement to arbitrate were procedurally unconscionable. The court further held that the MAP is substantively unconscionable because certain prerequisites to arbitration required by the policy unreasonably favor Pagliacci by limiting employees' access to substantive remedies and discouraging them from pursuing valid claims. Pagliacci petitioned for and was granted this court's review. *Burnett v. Pagliacci Pizza, Inc.*, 194 Wn.2d 1001 (2019).

ANALYSIS

Standard of Review

Washington policy favors arbitration. RCW 7.04A.060; *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004). This policy does not, however, lessen the court's responsibility to determine whether the arbitration contract is valid. *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013). The agreement to arbitrate is a contract, the validity of which courts review absent a clear agreement to not do so.

Id. Whether or not a contract is unconscionable is a preliminary question for judicial consideration. *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 740, 349 P.3d 32 (2015).

A reviewing court reviews de novo a trial court's decision to compel or deny arbitration. *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 602, 293 P.3d 1197 (2013); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). The burden of demonstrating that an arbitration agreement is not enforceable is on the party opposing the arbitration. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004).

Assent to Arbitration

As a threshold matter, Burnett argues that because he had no notice of the MAP when he signed the ERA, he never assented to the MAP and "[t]his alone is a basis for affirming the trial court." Resp't's Suppl. Br. at 9. We agree.

Pagliacci's MAP contains a choice of law provision that expressly selects "the Washington Arbitration Act."[1] CP at 71. The Washington arbitration act requires courts to determine whether there is an agreement to arbitrate and, if so, whether it is enforceable. *See Saleemi v. Doctor's Assocs.*, 176 Wn.2d 368, 376, 292 P.3d 108 (2013) (courts "determine the threshold matter of whether an arbitration clause is valid and

[1] Although the Washington arbitration act "does not apply to any arbitration agreement between employers and employees," RCW 7.04A.030(4), an employer and employee may select the Washington arbitration act as the governing law in an agreement to arbitrate. *See Dep't of Soc. & Health Servs. v. State Pers. Bd.*, 61 Wn. App. 778, 783, 812 P.2d 500 (1991) (so holding, addressing the equivalent provision under the prior act).

enforceable"). "If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate."[2] RCW 7.04A.070(2).

Arbitration agreements stand on equal footing with other contracts and may be invalidated by "[g]eneral contract defenses such as unconscionability." *McKee v. AT&T Corp*., 164 Wn.2d 372, 383, 191 P.3d 845 (2008); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, ___ U.S. ___, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017) (court may invalidate arbitration clause based on generally applicable contract defenses like fraud or unconscionability); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (same).

"Mutual assent is required for the formation of a valid contract. 'It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.'" *Yakima County* (*W. Valley*) *Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993) (quoting *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980)). This rule applies to the formation of an arbitration agreement just as it does to the formation of any other contract. "While a strong public policy favoring arbitration is recognized under both federal and Washington law, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"

[2] The same would be true if the Federal Arbitration Act, 9 U.S.C. §§ 1-16, were applicable. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) ("a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*," and the court must resolve any issues over "whether the clause was agreed to").

Satomi Owners Ass'n, 167 Wn.2d at 810 (internal quotation marks and citations omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)); *Woodall v. Avalon Care Ctr.–Federal Way, LLC*, 155 Wn. App. 919, 934-35, 231 P.3d 1252 (2010) ("As an important policy of contract, one who has not agreed to arbitrate cannot generally be required to do so."); *Lamps Plus, Inc. v. Varela*, ___ U.S. ___, 139 S. Ct. 1407, 1415, 203 L. Ed. 2d 636 (2019) ("'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" (alterations in original) (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010))).

Here, the trial court found "there is no agreement to arbitrate" between Burnett and Pagliacci. CP at 227. The trial court explained in part that a reasonable person could not find that Burnett had agreed to arbitration by signing the ERA, given the ERA's failure to mention arbitration and because the terms of the handbook directly contradict the ERA's language about hours, pay, and breaks, as to what an employee is supposed to do and is agreeing to do. The trial court correctly determined that if an arbitration clause is not agreed to by both sides, "then it's not binding." Verbatim Transcript of Proceedings at 24.

The Court of Appeals acknowledged the trial court's concerns, expressing skepticism that "under the circumstances presented here, Burnett [had] effectively waived any statutorily conferred right to maintain a civil action." *Burnett*, 9 Wn. App. 2d at 212. The Court of Appeals explained, "Burnett did not have a reasonable opportunity to understand that he was agreeing to arbitrate—much less to understand the types of claims

he was agreeing to arbitrate or to intentionally and voluntarily relinquish his right to pursue those claims in court." *Id*. Nevertheless, the Court of Appeals concluded "that an agreement to arbitrate exists here" because Little Book of Answers was incorporated by reference into the ERA. *Id*. at 201.

Burnett effectively argues that this conclusion is error. The Court of Appeals recognized that incorporation by reference does not, in itself, establish mutual assent to the terms being incorporated. *Id*. at 200. "'[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'" *Id*. (alteration in original) (internal quotation marks omitted) (quoting *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc*., 102 Wn. App. 488, 494-95, 7 P.3d 861 (2000)). Even if the Court of Appeals is correct that the mention of the handbook in the ERA effectively incorporates the handbook by reference into the ERA, that does not mean there was an effective arbitration *agreement* between Burnett and Pagliacci. Burnett still had no knowledge of the arbitration provision terms when he signed the ERA. While the arbitration provision existed in the handbook when Burnett signed the ERA, Burnett still had no knowledge of it as he was expected to read the handbook later, on his own time. *See Weiss v. Lonnquist*, 153 Wn. App. 502, 511, 224 P.3d 787 (2009) (under Washington law, for a contract to exist there must be mutual assent to its essential terms).

Mutual assent is gleaned from outward manifestations and circumstances surrounding the transaction. *Id*. The Court of Appeals held, "[T]here is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the

ERA." *Burnett*, 9 Wn. App. 2d at 204. "Instead, the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA." *Id*. Because Burnett lacked knowledge of the incorporated terms, he never assented to the MAP.

As Amicus Washington Employment Lawyers Association (WELA) notes, an arbitration provision included in an employee handbook is enforceable only if the employee is given explicit notice about such provision. *See* Amicus Br. of WELA at 12 (citing *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013), for the proposition that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he has not agreed so to submit). WELA points to *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997), in which the Ninth Circuit addressed the efficacy of an arbitration clause contained in a handbook under circumstances similar to this case. The court noted that when the employee was given a copy of the revised employee handbook, he "signed an acknowledgment of receipt," but "[n]othing in that acknowledgment notified Nelson either that the Handbook contained an arbitration clause or that his acceptance of the Handbook constituted a waiver of his right to a judicial forum in which to resolve claims covered by the ADA [(Americans with Disabilities Act)]." *Id*. at 761. "Merely signing the form did not in any way constitute a 'knowing agreement to arbitrate,' and thereby to surrender his statutory right to a judicial forum." *Id*.

The Ninth Circuit further concluded that "Nelson's continued employment after he received the Handbook, and after he read it (and we assume he did), did not amount to [a] 'knowing agreement.'" *Id*. at 762. That was so because "[n]othing in either the

acknowledgment form or the Handbook itself put Nelson on notice that by not quitting his job he was somehow entering into an agreement to waive a specific statutory remedy afforded him by a civil rights statute." *Id.* "Any bargain to waive the right to a judicial forum for civil rights claims, including those covered by the ADA, in exchange for employment or continued employment *must at the least be express*: the choice *must be explicitly presented to the employee* and the *employee must explicitly agree* to waive the specific right in question." *Id*. (emphasis added).

In answer to WELA, Pagliacci Pizza summarily dismisses *Nelson* as an "old" and "inapposite" case, relying instead on *Adler* for the proposition that a person who knowingly and voluntarily agrees to arbitration implicitly waives the right to a jury trial by agreeing to the alternate forum of arbitration. *See* Pet'r's Resp. to Amicus Br. of WELA at 8-9 (citing *Adler*, 153 Wn.2d at 337). But that is precisely the point, Burnett, like the employee in *Nelson*, did not agree to arbitrate. In such circumstance, the *Nelson* court concluded that "the unilateral promulgation by an employer of arbitration provisions in an Employee Handbook does not constitute a 'knowing agreement' on the part of an employee to waive a statutory remedy." 119 F.3d at 762. "[T]he right to a judicial forum is not waived even though the Handbook is furnished to the employee and the employee acknowledges its receipt and agrees to read and understand its contents." *Id*. "[T]he right is not waived even when the employee performs his obligations by

commencing or continuing to do his assigned work and accepting a paycheck in return." *Id*.[3]

[3] Under *Nelson*, the fact that Burnett delivered pizzas after signing the ERA, and was paid for doing so, did not render the arbitration provision contained in Little Book of Answers a "knowing agreement." *Nelson*, 119 F.3d at 762. As noted, the waiver of a judicial forum via an arbitration provision "must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question." *Id.*; *see also id.* 762 n.12 (noting that "the 'knowing waiver' standard" is the "controlling law" in the Ninth Circuit). "'[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Granite Rock*, 561 U.S. at 301 n.8 (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)). While "contract law defines formation as acceptance of an offer on specified terms," *id*. at 304 n.11, "[t]he test for arbitrability remains whether the parties consented to arbitrate the dispute in question." *Id*.; *see also Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1156 (9th Cir. 1998) (where employer did not explicitly present the arbitration agreement to the new employee, and the employee did not explicitly accept the agreement, employee did not knowingly enter into an agreement to arbitrate; that is, no arbitration agreement was formed); *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 687 (N.D. Ohio 1998) (relying on *Nelson* in denying motion to compel arbitration because "there is no reference to the [arbitration] clause or its significance in the acknowledgment plaintiff was asked to sign" and "[a]ccordingly, it cannot be concluded that there was a knowing waiver of the right to a judicial forum, nor can it be concluded that plaintiff, or any ordinary person, would contemplate that such an important legal right was at issue"); *cf. Bailey v. Fed. Nat'l Mortg. Ass'n*, 341 U.S. App. D.C. 112, 209 F.3d 740, 741 (2000) (where new arbitration provision was unilaterally imposed on existing employee who continued to work, there was no meeting of minds and, thus, no arbitration agreement to enforce). In *Ramirez-De-Arellano v. Am. Airlines, Inc.*, 133 F.3d 89 (1st Cir. 1997), the First Circuit Court of Appeals noted "the existence of a strong federal policy favoring arbitration," but nevertheless acknowledged that "the threshold question for review must always be whether the agreement to arbitrate was, indeed, voluntary and intentional." *Id*. at 90 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). The First Circuit quoted *Nelson* with approval for the proposition that "'[a]ny bargain to waive the right to a judicial forum . . . in exchange for employment or continued employment, must at least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.'" *Id*. at 91 n.2 (quoting *Nelson*, 119 F.3d at 762).

Further, performance of job duties by Burnett here could not substitute for the required consent and agreement to arbitrate, *see Granite Rock*, 561 U.S. at 301 n.8, 304 n.11; *Nelson*, 119 F.3d at 762, particularly where, as the trial court found, the ERA that Burnett signed did not mention arbitration and the terms of Little Book of Answers contradicted the ERA's language about hours, pay, and breaks as to what an employee was supposed to do concerning disputes. *See P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 207, 289 P.3d 638 (2012) (contract formation requires an objective manifestation of mutual assent of both parties and the terms assented to

Pagliacci's asserts, based on *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 815 P.2d 1362 (1991), that an employer can impose an arbitration agreement by unilaterally including it in an employee handbook. But *Gaglidari* does not support that notion. In *Gaglidari,* this court acknowledged that "[a]n employer may unilaterally amend or revoke policies and procedures established in an employee handbook." *Id*. at 434. "However, an employer's unilateral change in policy will not be effective until employees receive reasonable notice of the change." *Id*. This court explained that this "reasonable notice rule" is warranted "because it is unfair to place the burden of discovering policy changes on the employee. While the employee is bound by unilateral acts of the employer, it is incumbent upon the employer to inform employees of its actions." *Id*. at 435. *Gaglidari* did not address arbitration, it concerned alteration of the at-will employment relationship based on the employer's policy of progressive discipline as stated in the employee handbook. That is, the case addressed the employer's obligations that were voluntarily undertaken concerning progressive discipline as expressed in the handbook. That has nothing to do with arbitration. *See Satomi Owners Ass'n*, 167 Wn.2d at 810-11 (arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he has not agreed so to submit). As the Court of Appeals noted, "Pagliacci cites no Washington authority holding that an employer can foist an arbitration agreement on an employee simply by including an

must be sufficiently definite); *id*. at 209 (a valid contract requires the parties to objectively manifest their mutual assent to all material terms of the agreement).

arbitration clause in an employee handbook that is provided to the employee." *Burnett*, 9 Wn. App. 2d at 208.[4]

Procedural Unconscionability

Burnett argues that even if he is deemed to have agreed to arbitration by virtue of being given the company handbook, the arbitration agreement is both procedurally and substantively unconscionable and, thus, unenforceable in any event.

Washington recognizes two types of unconscionability for invalidating arbitration agreements, procedural and substantive. *McKee*, 164 Wn.2d at 396. Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to cases where a term in the contract is alleged to be one-sided or overly harsh. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995). Either is sufficient to void the agreement. *Hill*, 179 Wn.2d at 55.

[4] Amicus Washington State Association for Justice Foundation (WAJF) adds that Pagliacci's arbitration clause was likely also unenforceable because it constituted an illusory promise. *See* Br. of Amicus WAJF at 14 n.5. This is so because in the ERA, Pagliacci expressly reserved the right to unilaterally modify all terms in Little Book of Answers, stating, "We will on occasion change the policies and procedures contained in this employee handbook." CP at 58. Generally, courts have refused to enforce arbitration clauses as illusory promises to arbitrate where the agreement allows one party to unilaterally modify the arbitration agreement. *See, e.g., Salazar v. Citadel Commc'ns Corp.*, 2004-NMSC-013, ¶ 11, 135 N.M. 447, 450-51, 90 P.3d 466, 469-70 (holding that where the employer "retained the authority to unilaterally modify both the arbitration section of the Handbook and the annexed Agreement to Arbitrate," the arbitration agreement was "illusory and unenforceable"); *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 205-06 (5th Cir. 2012) (where employer reserved the "'right to revise, delete, and add to the employee handbook,'" arbitration clause was an unenforceable illusory promise); *Canales v. Univ. of Phoenix, Inc.*, 854 F. Supp. 2d 119, 124-25 (D. Me. 2012) (collecting cases so noting). While we do not disagree with WAJF, we need not reach this issue to resolve this case. This court need not decide every issue raised, but only those that are dispositive of the case. *See Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 435, 938 P.2d 819 (1997) ("Although numerous issues are raised, we find that two issues are dispositive of Plaintiffs' claims and, accordingly, do not reach the remaining issues.").

To determine whether an agreement is procedurally unconscionable, we examine the circumstances surrounding the transaction, including (1) the manner in which the contract was entered, (2) whether Burnett had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print, to determine whether a party lacked a meaningful choice. *See Nelson*, 127 Wn.2d at 131; *Schroeder v. Fageol Motors, Inc*., 86 Wn.2d 256, 260, 544 P.2d 20 (1975); *Zuver*, 153 Wn.2d at 304.

A contract is "procedurally unconscionable" when a party with unequal bargaining power lacks a meaningful opportunity to bargain, thus making the end result an adhesion contract. *Adler*, 153 Wn.2d at 348. The fact that a contract is an adhesion contract is relevant but not determinative. *Zuver*, 153 Wn.2d at 306-07. An adhesion contract is not necessarily procedurally unconscionable. *Adler*, 153 Wn.2d at 348. The key inquiry is whether the party lacked meaningful choice. *Zuver*, 153 Wn.2d at 305.

Here, the Court of Appeals held that the circumstances surrounding the formation of the parties' arbitration agreement were procedurally unconscionable. *Burnett*, 9 Wn. App. 2d at 202. The Court of Appeals relied on *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn. App. 376, 238 P.3d 505 (2010). *See Burnett*, 9 Wn. App. 2d at 203-05. But that case did not concern arbitration, it concerned a home buyer's additional warranty, which Division Two of the Court of Appeals found procedurally unconscionable. *Mattingly*, 157 Wn. App. at 392. *Mattingly* is distinguishable on the key point that the homebuyer acknowledged the warranty, signed an application for it at closing, and expressly acknowledged that he had read and understood it (even though he had not). In *Mattingly*,

the homebuyer overtly entered into the warranty contract. The problem in *Mattingly* was that the homebuyer did not actually know the terms contained in the warranty, which he had applied for and received, believing that it would provide additional protection when it actually limited his remedies. *Id*. at 383. By contrast, as discussed above, Burnett had no notice and was unaware of the existence of the MAP when he signed the ERA. While there are some similarities in the cases, i.e., neither the homebuyer nor Burnett received and read relevant documents before signing contracts, the key distinction is that the homebuyer in *Mattingly* overtly embraced the warranty, while Burnett was unaware of the arbitration provision in the handbook when he signed the ERA.

Division Two in *Mattingly* held that the "circumstances surrounding the . . . warranty agreement's formation" rendered the warranty procedurally unconscionable and unenforceable. *Id*. at 392. The court noted that the homebuyer did not receive a copy of the warranty booklet before closing and when he did receive the booklet (after moving into the house), the warranty's limiting provisions appeared on page 7 of the 32-page booklet. *Id*. at 391-92.

Relying on *Mattingly*, the Court of Appeals here stated:

> [A]s in *Mattingly*, the circumstances surrounding the formation of the parties' arbitration agreement are suspect. As in *Mattingly*, there is no evidence in the record that Burnett had a reasonable opportunity to understand the terms contained in the Little Book—and specifically the mandatory arbitration policy—before he signed the ERA. Instead, the record reflects that Burnett was not afforded an opportunity to review the Little Book before signing the ERA: Burnett testified that he was told to sign the ERA to begin work and instructed to read the Little Book at home. Furthermore, like the warranty limitations in *Mattingly*, Pagliacci's mandatory arbitration policy is buried in a booklet: although it is written in plain English, it appears on page 18 of the 23-page Little Book, in the same

> font size and with the same formatting as surrounding sections. For these reasons, we conclude that Burnett lacked meaningful choice in *agreeing* to arbitrate and thus the circumstances surrounding the formation of *the parties' arbitration agreement* were procedurally unconscionable.

Burnett, 9 Wn. App. 2d at 204-205 (emphasis added). Here, while some of the listed facts appear to meet the procedural unconscionability circumstances noted above, such as hidden terms and lack of reasonable opportunity to review terms, *see Zuver*, 152 Wn.2d at 304, the material difference in the two cases is that in Burnett's case he had no knowledge or notice that Pagliacci's MAP even existed when he signed the ERA. Thus, he *never agreed* to arbitrate. In this circumstance, the fact that "Burnett was not afforded an opportunity to review the Little Book before signing the ERA," *Burnett*, 9 Wn. App. 2d at 204, speaks primarily to the issue of contract formation rather than to unconscionability of an existing arbitration contract.

Nevertheless, even assuming a valid agreement was formed, the facts here show that Burnett "lacked meaningful choice," which is the key inquiry for finding procedural unconscionability. *Zuver*, 153 Wn.2d at 305. As noted, the employment agreement that Burnett signed did not mention arbitration, Pagliacci's arbitration policy appeared on page 18 of the 23-page handbook that Burnett received *after* he signed the employment agreement, and the arbitration policy was not identified in the handbook's table of contents. Because essential terms were hidden and Burnett had no reasonable opportunity to understand the arbitration policy before signing the employment contract, the manner in which the contract was entered demonstrated that Burnett lacked a meaningful choice regarding the arbitration policy. Because these facts satisfy the

criteria articulated in *Zuver*, *see* 153 Wn.2d at 304, we hold that even *if* an arbitration agreement was indeed established, it was procedurally unconscionable and unenforceable.

Substantive Unconscionability

The Court of Appeals determined that "the effect of Pagliacci's two-step mandatory arbitration policy is 'so one-sided and harsh that it is substantively unconscionable.'" *Burnett*, 9 Wn. App. 2d at 218 (quoting *Zuver*, 153 Wn.2d at 318). We agree.

Substantive unconscionability exists when a provision in the contract is one-sided. *Adler*, 153 Wn.2d at 344. In determining if a contractual provision is one-sided or overly harsh, courts have considered whether the provision is shocking to the conscience, monstrously harsh, and exceedingly calloused. *Id*. at 344-45; *see Nelson*, 127 Wn.2d at 131.

Here, Pagliacci's handbook required employees to submit their claims to arbitration. The handbook also provided that employees were required to first submit any such claims to Pagliacci's F.A.I.R. Policy before pursuing arbitration. F.A.I.R. Policy required employees to first report the matter to a supervisor, and if that did not resolve the matter, the "F.A.I.R. Administrator" would designate a person at Pagliacci to meet with the employee. CP at 70. If the employee did not follow the F.A.I.R. procedure, the employee "waive[d] any right to raise the claim in any court or other forum, including arbitration." *Id*. Compliance with the noted F.A.I.R. Policy procedures and limitations "shall not be subject to tolling, equitable or otherwise." *Id*. The Court of Appeals found

these procedures substantively unconscionable because they (1) operate as a complete bar as to terminated employees because they have no way to report the matter to a supervisor, (2) shorten the statute of limitations for any employee because the procedures do not toll the statute of limitations (and the time for completing the procedures is completely within the Pagliacci's control), and (3) provide no exception to the requirement for supervisor review where a supervisor is the person subjecting the employee to unfair treatment. *See Burnett*, 9 Wn. App. 2d at 214-17. Because the F.A.I.R. Policy provided unfair advantages to Pagliacci and because full compliance with F.A.I.R Policy procedures is a prerequisite to arbitration, the Court of Appeals correctly held that the limitations provision in the F.A.I.R. Policy renders the MAP substantively unconscionable. *Id*. at 217.

Pagliacci cites *Zuver*, 153 Wn.2d at 312, for the proposition that the F.A.I.R. procedures cannot void the arbitration agreement "based on hypothetical outcomes that did not occur." *See* Suppl. Br. of Pet'r at 13, 16. But Pagliacci misconstrues *Zuver*. There, the plaintiff brought a discrimination claim that entitled her to an award of fees if she prevailed. The arbitration clause provided the prevailing party "may be entitled to receive reasonable attorney fees." *Zuver*, 153 Wn.2d at 310 (emphasis and internal quotation marks omitted). This court held the attorney fee provision was not substantively unconscionable because it would be speculative to assume the arbitrator would ignore controlling law and fail to award the plaintiff fees if she prevailed in arbitration. *See id*. at 312.

Here, there is nothing speculative about the effect of Pagliacci's requirement that its employees follow the F.A.I.R. Policy procedures prior to pursuing arbitration and that the statute of limitations would not toll during the time that it takes to pursue the F.A.I.R. procedures. F.A.I.R. provides that it is mandatory that Pagliacci's employees follow the F A.I.R. procedures, and failure to comply results in a waiver of the right to raise their claims in any court or in arbitration.

Further, Pagliacci argues, "The only reasonable interpretation here is that the F.A.I.R. Policy applies to current employees for whom they have a supervisor to report." Suppl. Br. of Pet'r at 16. But that contention is belied by the plain language of the F.A.I.R Policy, which by its express terms applies to persons who believe they have been "wrongfully terminated." CP at 70.

Amicus Public Justice P.C. argues in support of Burnett's view that by effectively requiring Burnett to bring his claims in arbitration and not so limiting Pagliacci Pizza, the MAP is excessively one-sided and thus unconscionable. Br. of Pub. Justice in Supp. of Resp't at 5. Amicus notes that this comports with the prevailing view of a majority of jurisdictions, citing *Taylor v. Butler*, 142 S.W.3d 277, 286 and n.4 (Tenn. 2004), in which the Tennessee Supreme Court identifies the "majority view" of jurisdictions to be that a one-sided arbitration clause that allows the corporation's claims to remain in court while requiring the individual's claims to go to arbitration is unconscionable. *See also Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 290, 737 S.E.2d 550 (2012) ("In a majority of jurisdictions, it is well-settled that a contract which requires the weaker party

to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, may be found to be substantively unconscionable.").

Pagliacci answers that *Taylor* is distinguishable because the arbitration clause in that case contained express language preserving the drafter's right to "'pursue recovery . . . by state court action,'" but no such express language preserving court action for Pagliacci appears in its MAP. *See* Pet'r's Resp. to Amicus Pub. Justice at 6 (emphasis omitted) (quoting *Taylor*, 142 S.W.3d at 284). Nevertheless, the effect of the plain language of the MAP achieves the same end, it requires Burnett to arbitrate but does not so limit Pagliacci. The MAP language remains so one-sided as to be unconscionable. As the California Supreme Court has explained, "Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 118, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (2000). "[I]n the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable." *Id.*

Severence

Pagliacci argues that if its arbitration agreement provisions are deemed substantively unconscionable, the appropriate remedy is severance. *See* Suppl. Br. of Pet'r at 14-15. However, where unconscionable provisions pervade an arbitration agreement, the entire agreement should be invalidated. *See Gandee*, 176 Wn.2d at 607-09; *McKee*, 164 Wn.2d at 402-03. Here, Pagliacci's F.A.I.R. Policy procedures are

intertwined with the arbitration provision. As noted, Pagliacci's employees are not permitted to pursue arbitration until proceeding through the F.A.I.R. procedures, and the statute of limitations continues to run while the employees comply with every step and procedure. "Permitting severability . . . in the face of a contract that is permeated with unconscionability only encourages those who draft contracts of adhesion to overreach. If the worst that can happen is the offensive provisions are severed and the balance enforced, the dominant party has nothing to lose by inserting one-sided, unconscionable provisions." *McKee*, 164 Wn.2d at 403. In *Zuver*, this court severed the unconscionable provisions because the remainder of the agreement could be preserved and because the parties had "explicitly assented to a severability provision in their agreement and thus intended that courts sever any unconscionable provisions." 153 Wn.2d at 320 n.20. Here, no severance clause is included in the ERA, the MAP, or the F.A.I.R. Policy. Accordingly, we hold that severance is not appropriate here, and we find the arbitration clause invalid.

The Court of Appeals Did Not Misapply *Zuver*

Burnett has raised a contingent issue, asserting that the Court of Appeals misread and misapplied *Zuver*. *See* Resp't's Resp. to Pet. for Review at 15-17. Here, the Court of Appeals stated, "[T]he *Zuver* court's analysis demonstrates that arbitration agreements are not substantively unconscionable merely because they are not mutual. Therefore, we reject Burnett's argument that Pagliacci's mandatory arbitration policy is substantively unconscionable merely because it requires Burnett, but not Pagliacci, to arbitrate certain claims." *Burnett*, 9 Wn. App. 2d at 214. The Court of Appeals explained,

> But *Zuver* also demonstrates that nonmutual provisions in an arbitration agreement are substantively unconscionable *when*, like the confidentiality and remedies limitations provisions in *Zuver*, they have the *effect* of *limiting an employee's ability to access substantive remedies* or discouraging an employee from pursuing valid claims. *To that end*, we conclude for the reasons that follow that the mandatory arbitration policy is substantively unconscionable because the F.A.I.R. Policy, which is a prerequisite to arbitration, contains a limitations provision that is substantively unconscionable.

Id. (emphasis added). The Court of Appeals then explained that because the limitation provisions of the F.A.I.R. Policy acted as a "complete bar to arbitration and suit for [former] employees[,] . . . [s]uch a bar 'blatantly and excessively favors' Pagliacci and is substantively unconscionable." *Id*. (quoting *Zuver*, 153 Wn.2d at 318-19). This is not at odds with *Zuver*.

In *Zuver*, this court addressed in part the efficacy of an arbitration agreement provision that heavily favored the employer in that it barred Zuver from collecting any punitive or exemplary damages for her common law claims but permitted her employer to claim these damages (under Colorado law). *See Zuver*, 153 Wn.2d at 318. This court noted that Zuver "does not simply argue that the arbitration agreement here lacks mutuality. Rather, she contends that the *effect* of this provision is so one-sided and harsh that it is substantively unconscionable. We agree." *Id*. at 317-18 (emphasis, footnote, and citation omitted). This court reasoned, "The remedies limitation provision blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse. Consequently, we conclude that this provision is substantively unconscionable in these circumstances." *Id*. at 318-19.

In a footnote, this court further noted, "[W]e are not concerned here with whether the parties have mirror obligations under the agreement, but rather whether the effect of the provision is so 'one-sided' as to render it patently 'overly harsh' in this case." *Id*. at 317 n.16 (citing *Schroeder*, 86 Wn.2d at 260). Accordingly, the core of *Zuver*'s holding as identified above is that a provision is substantively unconscionable where its *effect* is so one-sided as to render it overly harsh. The Court of Appeals here properly applied that standard. *See Burnett*, 9 Wn. App. 2d at 212-14.

In his supplemental brief, Burnett urges this court to clearly "adopt the California Supreme Court's rule that 'an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party' is substantively unconscionable." Resp't's Suppl. Br. at 10-20 (quoting *Armendariz*, 24 Cal. 4th at 119). While this court cited *Armendariz* with approval in *Zuver*, it also made clear in its concluding footnote in the same section that "future litigants must show, as was done in this circumstance, that the disputed provision is so 'one-sided' and 'overly harsh' as to render it unconscionable." *Zuver*, 153 Wn.2d at 319 n.18.

As discussed above, on this issue the Court of Appeals properly applied *Zuver*. Burnett does not effectively argue that this court should alter or expand the rules stated in that case.

CONCLUSION

We hold that the MAP at issue in this case is unenforceable because no arbitration agreement was formed when the employee signed the employment agreement when he had no notice of the arbitration provision contained in the employee handbook. We also

hold that in light of the noted circumstances, even if an arbitration contract exists, it is procedurally unconscionable and unenforceable. We also hold that the same arbitration provision is substantively unconscionable because its one-sided terms and limitation provisions would bar any claim by the terminated employee here, an overly harsh result. Accordingly, we affirm the trial court's order denying the employer's motion to compel arbitration and remand for further proceedings.

Madsen, J.

WE CONCUR:

Stephens, C.J.

Johnson, J.

Owens, J.

González, J.

Gordon McCloud, J.

Yu, J.

Montoya-Lewis, J.

Wiggins, JPT