UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DESIREE KNATT and SARAH LOWE, Plaintiffs, v. J. C. PENNEY CORPORATION, INC., Defendant.	CASE NO. 15cv2516 JM(KSC) ORDER GRANTING MOTION TO COMPEL ARBITRATION

Defendant J. C. Penney Corporation, Inc. ("JCP") moves to compel arbitration of Plaintiffs Desiree Knatt and Sarah Lowe's claims asserted in the class action Complaint. Plaintiffs oppose the motion. Pursuant to Local Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below the court grants the motion to compel arbitration. The Clerk of Court is instructed to administratively close the file.

BACKGROUND

On November 6, 2015, Plaintiffs commenced this diversity action by alleging two claims for relief against JCP: (1) violation of Cal. Labor Code §227.3 and (2) violation of Cal. Bus. and Prof. Code §17200 et seq. The underlying claims of Plaintiffs are related, if not identical to, those asserted in Tschudy v. J. C. Penney Corp., Inc., No. 11cv1011 JM(KSC) ("Tschudy").

Plaintiffs are former employees of JCP and classified as Part-Time Non-

Management Associates ("PTNMA"). In broad brush, Plaintiffs allege that JCP's My Time Off Vacation Policy ("MTO Policy") violates Labor Code §227.3 and constitutes an unlawful business practice under Bus. and Prof. Code §17200. Plaintiffs allege that the 12 month waiting period and the minimum average hours of work requirement of the MTO Policy are invalid under Labor Code §227.3.

Unlike the Tschudy plaintiffs, each Plaintiff executed an arbitration provision which provides, in pertinent part:

> J. C. Penney Company, Inc., including its subsidiaries (hereinafter "JCPenney"), and I voluntarily agree to resolve disputes arising from, related to, or asserted after the termination of my employment with JCPenney through mandatory binding arbitration under the JCPenney Rules of Employment Arbitration. JCPenney and I voluntarily waive the right to resolve these disputes in courts.
>
> I acknowledge that I was given the opportunity to review the Rules and consult with an attorney prior to signing this Agreement. I understand that I will, however, be bound by this Agreement and the Rules once I sign electronically, regardless of whether I have reviewed the Rules, or consulted with an attorney prior to signing. I hereby agree to arbitrate disputes covered by and pursuant to the JCPenney Rules of Employment Arbitration.

(Buckingham Decl. Exhs. B and C).

JCP now moves to compel arbitration of Plaintiffs' claims. Plaintiffs oppose the motion.

DISCUSSION

The Federal Arbitration Act ("FAA") provides that:

> a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract.

9 U.S.C. §2. The FAA establishes federal policy favoring arbitration of disputes. Federal courts are required to "rigorously" enforce the parties agreement to arbitrate. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987). Indeed, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language

or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

> [W]here a contract contains an arbitration clause, there is a presumption of arbitrability in a sense that [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

A.T.&T. Tech. Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986) (citations omitted).

The FAA creates "a body of federal substantive law of arbitrability," enforceable in both state and federal courts and preempting any state laws or policies to the contrary. Moses H. Cone, 460 U.S. at 24. "The availability and validity of defenses against arbitration are therefore to be governed by application of federal standards." Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988). This body of federal law also requires that federal courts apply state law, "whether of legislative or judicial origin [] if that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 493, fn. 9 (1987). Thus, state law applies to interpret arbitration agreements as long as those state laws are generally applicable to all contracts, and not just agreements to arbitrate.

In opposing the motion to compel arbitration, Plaintiffs generally contend that the arbitration provision is unconscionable and their claims are excluded from the scope of the FAA by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157 et seq.

Unconscionability

Under California state law the court may invalidate an unconscionable contract provision. Civil Code section 1670.5, subdivision (a) states: "If the court as a matter of law finds the contract or any clause of the contract to be unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the

remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

Unconscionability has both a procedural and a substantive element. Stirlen v. Supercuts, Inc., 51 Cal.App.4th 1519,1531 (1997). Both elements must be present for a contract or a clause therein to be invalidated, but they need not be present in the same degree. Armendariz v. Found Health Psychare Servs., 24 Cal.4th 83, 114 (2000); Stirlen, 51 Cal.App.4th at 1533. A sliding scale is utilized so that, for example, the more substantively oppressive a contract is, the lesser the showing of procedural unconscionability is required to conclude the contract is unconscionable. Armendariz, 24 Cal.4th at 114.

Procedural Unconscionability

Procedural unconscionability is oppression or surprise arising out of unequal bargaining power, which results from a lack of real negotiations and the absence of meaningful choice. Stirlen, 51 Cal.App.4th at 1532. Procedural unconscionability often arises when the contract in question is one of adhesion. Id. at 1533. A contract of adhesion is a "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." Id.

Here, as noted by Plaintiffs, the arbitration provision is an adhesive contract and was presented to Plaintiffs on a take-it-or-leave-it basis. This factor favors a finding of procedural unconscionability. However, the fact that it was presented on a take-it-or-leave-it basis does not render the arbitration provision unenforceable. See Dotson v. Amgen, 181 Cal.App. 4th 975, 981 (2010) ("A contract of adhesion is not per se unenforceable.").

Another factor is surprise. Plaintiffs testified that they were provided with the opportunity to access and read the arbitration provision as well as JCP's Rules of Employment Arbitration before executing the document. Further, Plaintiffs were provided with up to seven days to review and execute the documents after they started

their employment. While Plaintiffs contend that they had no "meaningful opportunity" to review the documents, the evidence shows that Plaintiffs had an adequate opportunity to review the arbitration provision (whether Plaintiffs took advantage of this opportunity is another matter, not relevant to the present discussion). See Kinney v. United Healthcare Servs., Inc., 70 Cal.App. 4th 348, 352-53) (to determine procedural unconscionability, the court considers the manner in which the contract was negotiated and relevant circumstances of the parties). This factor weighs against a finding of procedural unconscionability.

Another factor is choice. JCP, by any stretch of the imagination, does not control the labor market nor possess monopoly power to lock Plaintiffs out of the labor market. JCP is one employer among thousands of employers in San Diego County. Plaintiffs were, and are, free to seek private or government employment of their choice. Plaintiffs were presented with sufficient information upon which prospective employees could make an informed decision whether to accept employment with JCP, subject to an arbitration provision or, alternatively, seek employment elsewhere. This factor weighs against a finding of procedural unconscionability.

In sum, the court concludes, under the sliding scale articulated in Armendariz, that the arbitration provision is minimally procedurally unconscionable such that Plaintiffs must make a substantial showing of substantive unconscionability.

Substantive Unconscionability

Substantive unconscionability arises when (1) the contract terms are so one-sided as to shock the conscience or (2) the contract terms imposed are harsh or oppressive. Stirlen, 51 Cal.App.4th at 1532. Plaintiffs contend that the arbitration provision is substantively unconscionable because (1) the arbitration provision and Rules of Arbitration "are presumed to be substantively unconscionable" and not bilateral, (2) the Rules of Arbitration have different filing deadlines than either the Federal Rules of Civil Procedure or California's Rules of Court, and (3) several miscellaneous reasons favor litigation over arbitration. The court concludes that the grounds of substantive

unconscionability identified by Plaintiffs are insufficient to invalidate the arbitration provision.

Plaintiffs first argue that the Rules of Arbitration are not bilateral because employees are more likely to commence arbitration proceedings than JCP. As the Rules of Arbitration contain certain limitations, such as the number of pages in a complaint and a nine-point font, Plaintiffs conclude that the arbitration provision overwhelmingly burdens Plaintiffs and is, therefore, substantively unconscionable.[1] Plaintiffs' reliance on Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) to support this argument is misplaced. In Ingle, the Ninth Circuit concluded that arbitration provisions in the employment context "are grossly one-sided, and therefore presumptively substantively unconscionable." Id. at 1174 n.10. The court declines to follow this portion of Ingle because the Supreme Court has repeatedly instructed that agreements to arbitrate are to be "rigorously enforced," Shearson/American Express, 482 U.S. 220, and the Ninth Circuit's presumption that arbitration provisions in the employment context are substantively unconscionable runs counter to Supreme Court precedent that arbitration provisions should be treated no differently than other contracts. DirecTV, Inc. v. Imburgia, 136 S.Ct. 463, 471 (2015) (unique interpretation of arbitration contract was invalid because it did not apply to non-arbitration contracts); Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 581-82 (2008) (The very purpose of the FAA was to reverse perceived "judicial indisposition" to arbitration agreements and to place those agreements on equal footing with all other contracts.).

Next, Plaintiffs contend that the arbitration agreement is substantively unconscionable because the time periods to file an answer, oppositions for motions to dismiss, and oppositions to motions for summary judgment are different under the Rules of Arbitration than either the Federal Rules of Civil Procedure or California

[1] As noted by Plaintiffs, neither JCP nor any employee has ever commenced an arbitration proceeding against the other party. This evidence undermines Plaintiffs' argument that employees are more likely to commence arbitration proceedings than JCP.

Rules of Court. While these three sets of procedural rules contain different filing deadlines, Plaintiffs make no showing that the time periods provided in the Rules of Arbitration are insufficient to accomplish the objective of the filing or, are in any other manner, harsh or oppressive. As such, this argument fails to establish substantive unconscionability.

Finally, Plaintiffs raise a number of miscellaneous arguments that the arbitration provision is substantively unconscionable because (1) employees are prohibited from resorting to Small Claims Court, (2) there is a $75 filing fee, (3) the statute of limitations is not tolled unless an aggrieved employee files a complaint and pays the filing fee, and (4) no employee has ever commenced an arbitration proceeding against JCP. The court gives short shrift to these arguments: (1) arbitration, by its very nature, precludes access to government courts, including Small Claims Court; (2) the filing fee is substantially lower than the filing fee in federal court ($400) and cannot reasonably be construed as overly harsh or oppressive; (3) there is no showing that the tolling of the statute of limitations is overly harsh or burdensome (or even applicable under the present circumstances) and (4) the fact that no employee or JCP has ever commenced an arbitration provision against the other party does not demonstrate overly harsh or oppressive conduct that would invalidate the arbitration provision.

In sum, the arbitration provision is not unconscionable.

The NLRA

In broad brush, Plaintiffs characterize their claims as arising under the NLRA, which expressly provides that employees have the right to engage in collective actions, 29 U.S.C. §157, and are therefore not subject to arbitration under Rule of Arbitration 3.A.4. The difficulty with this argument is that Plaintiffs' claims do not arise under the NLRA. JCP's MTO Policy is a non-ERISA welfare benefit plan, not subject to the scope of ERISA. Under ERISA, a "welfare benefit plan" is a term of art that expressly excludes "payroll practices" such as vacation time compensation paid out of an employer's "general assets." 29 C.F.R. §2510.3-1(b)(3)(i); see Massachusetts v.

Morash, 490 U.S. 107, 120-21 (1989) ("a single employer's administration of a vacation pay policy from its general assets does not possess the characteristics of a welfare benefit plan"). As Plaintiffs' claims do not relate to an ERISA welfare benefit plan, the court does not reach other NLRA-related arguments raised by Plaintiffs.

In sum, the court grants the motion to compel arbitration. The court instructs the Clerk of Court to dismiss the complaint and to close the file. In the event any party desires to stay, rather than to dismiss the complaint, that party shall make a timely application to stay this proceeding. See 9 U.S.C. §3.

IT IS SO ORDERED.

DATED: March 30, 2016

Hon. Jeffrey T. Miller
United States District Judge

cc: All parties