34887

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

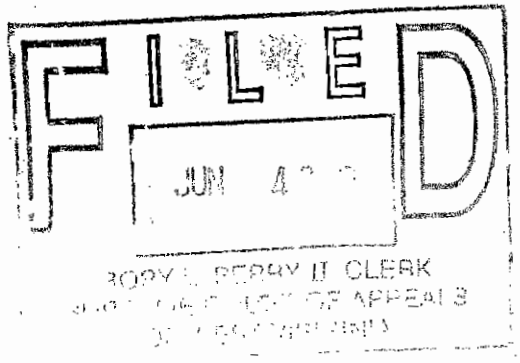
STATE EX REL. JILL CLITES,

Petitioner,

v.

THE HONORABLE RUSSELL M. CLAWGES, JR., Chief Judge, 17th Judicial Division II, TELETECH CUSTOMER CARE MANAGEMENT (WEST VIRGINIA), INC., LOR WINDLE and MICHELLE EBERT,

Respondents.



RESPONSE OF TELETECH CUSTOMER CARE MANAGEMENT (WEST VIRGINIA), INC., LOR WINDLE AND MICHELLE EBERT TO THE RULE TO SHOW CAUSE AND THE PETITION FOR A WRIT OF PROHIBITION

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Now come Respondents TeleTech Customer Management (West Virginia), Inc. ("TeleTech WV"), Lor Windle and Michelle Ebert (collectively "Respondents"), pursuant to this Court's Rule to Show Cause issued on May 13, 2009 for their Response to the Petition for a Writ of Prohibition ("Petition") and state as follows:

1. The Respondents admit the allegation in Paragraph 1 of the Petition that this Court has original jurisdiction pursuant to W. Va. Code § 53-1-3 and Rule 14(a), West Virginia Rules of Appellate Procedure to consider matters filed in the form of a Writ of Prohibition. The Respondents deny the remaining allegations in Paragraph 1 of the Petition to the extent that they allege that the Petitioner is entitled to the relief requested in the Petition or that the Writ of Prohibition has any merit as a matter of law.

2. The Respondents deny the allegations in Paragraph 2 of the Petition and they aver that Chief Judge Russell M. Clawges, Jr. found that even though the Agreement was a standardized form and a contract of adhesion, it was valid and enforceable. At page seven of the Order, he specifically found that the "terms of the Arbitration Agreement are not unreasonably favorable to TeleTech and not so one-sided to render the Agreement unconscionable." (App. at p. 7). The Respondents further aver that, in order to successfully argue that the Circuit Court "sanitized" or re-wrote unconscionable cost provisions in the Agreement, Ms. Clites not only has to establish that the cost provisions are unconscionable, but she cannot overcome the fact that she failed, at the trial court level, to meet her burden to establish the likelihood of incurring prohibitive costs in arbitration. As Ms. Clites cannot establish that the cost provisions are unconscionable on their face, there was nothing for the Circuit Court to "sanitize" in this case. In response to this allegation, the Respondents also incorporate by reference the Second Affirmative Defense set forth below.

3. The Respondents deny the allegations in Paragraph 3 of the Petition and they aver that Chief Judge Clawges' opinion made no finding that Ms. Clites had a duty to read the Agreement. He simply noted at pages three and four of his Order that Ms. Clites does not dispute that she signed the Agreement. (App. 3-4). The specific statement to which Ms. Clites refers is found at page four of the Order and it consists of a quote from *Reddy v. Community Health Foundation of Man*, 171 W. Va. 368, 373, 298 S.E. 2d 906 (1982): "In the absence of extraordinary circumstances, a failure to read a contract before signing it does not excuse a party from being bound by its terms." (App. 4). This is a correct statement of law that should not be disturbed by this Court.

4. The Respondents deny the allegations in Paragraph 4 of the Petition and they aver that Paragraph 7.2 of the Agreement identifies two limited exclusions from the scope of arbitration as follows: "The following categories of disputes are excluded from the scope of coverage of the Arbitration Agreement: (1) Worker's Compensation and unemployment compensation claims; and (2) claims for injunctive relief arising out of irreparable injury from breach or threatened breach of any duty owed by Employee to the Company." (App. 55). Chief Judge Clawges acknowledged that there was a reasonable justification for the limited carve-out in the Agreement in his Order at pages 6-7:

> The Arbitration Agreement requires the parties to arbitrate all disputes except workers' compensation claims, unemployment claims, and claims for injunctive relief arising out of *irreparable* injury from breach or threatened breach of any duty owed by Employee to the Company. This is a very narrow and specific exclusion to allow TeleTech to quickly obtain an emergency temporary injunction in Court. This very limited exception is not so one-sided as to render the Agreement unconscionable. Injunctive relief for harm that was not deemed by the Court to be irreparable would still be subject to arbitration.(emphasis in original)(App. 6-7).

Chief Judge Clawges italicized the word "irreparable" adding emphasis to his recognition that the exclusion for emergency injunctive relief was indeed narrow. This Court should uphold the ruling of Chief Judge Clawges in this regard.

5. The Respondents deny the allegations in Paragraph 5 of the Petition and they aver that Chief Judge Clawges reviewed the arguments of the parties on the waiver argument and he rejected Ms. Clites' argument holding at page six of the Order: "The United States Supreme Court found no inherent problem with statutory claims such as a Human Rights Act claim being part of an arbitration agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Preston v. Ferrer*, 128 S.Ct. 978 (2008). A party does not forgo the substantive rights afforded by the statute; he or she only submits their resolution in an arbitral, rather than judicial, forum." (App. 6).

6. The Respondents admit the allegation in Paragraph 6 of the Petition that the Petitioner filed suit on or about March 21, 2008, in the Circuit Court of Monongalia County, West Virginia, alleging claims of sexual harassment and wrongful discharge under the Human Rights Act. The Respondents took the position that Ms. Clites was legally required to arbitrate her dispute and they filed a Motion to Dismiss or in the Alternative to Stay. To the extent that the Petitioner is alleging that any allegations in the Complaint have merit, the remaining allegations of Paragraph 6 of the Petition are denied.

7. The Respondents admit the allegations in Paragraph 7 of the Petition.

8. The Respondents admit the allegations in Paragraph 8 of the Petition.

9. The Respondents admit the allegations in Paragraph 9 of the Petition.

10. The Respondents admit the allegations in Paragraph 10 of the Petition.

11. The Respondents admit the allegations in Paragraph 11 of the Petition.

12. The Respondents admit the allegations in Paragraph 12 of the Petition.

13. The Respondents admit the allegations in Paragraph 13 of the Petition.

14. The Respondents admit the allegations in Paragraph 14 of the Petition.

15. The Respondents admit the allegations in Paragraph 15 of the Petition.

16. The Respondents admit the allegations in Paragraph 16 of the Petition.

17. The Respondents deny the allegation in Paragraph 17 and further aver that they have reviewed Ms. Clites deposition and they have been unable to locate where Ms. Clites testified to this fact in her deposition.

18. The Respondents admit the allegations in Paragraph 18 of the Petition.

19. The Respondents admit the allegations in Paragraph 19 of the Petition.

20. The Respondents admit the allegations in Paragraph 20 of the Petition.

21. The Respondents admit that Ms. Travato testified that the TeleTech HR Director's signature was stamped on documents as alleged in Paragraph 21 of the Petition but further aver that a review of Ms. Travato's deposition fails to reveal that Ms. Travato ever testified that this was done hundreds of times and therefore, that allegation is denied.

22. The Respondents deny the allegations in Paragraph 22 of the Petition.

23. The Respondents admit the allegations in Paragraph 23 of the Petition but further aver that the signed documents were available upon request.

24. The Respondents deny the allegations in Paragraph 24 of the Petition that the Arbitration Agreement at issue was "nestled among the 22 documents requiring an employee signature." The Respondents further aver that the Arbitration Agreement was just one of many documents that the employees signed on their first day of employment.

25. The Respondents admit the first sentence of Paragraph 25 of the Petition. The Respondents deny the remaining allegations in Paragraph 25 of the Petition and incorporate herein their response to Paragraph 4 of the Petition.

26. The Respondents deny the allegations in Paragraph 26 of the Petition and they further aver that neither Ms. Clites nor Ms. Trovato have testified that Ms. Trovato ever discussed her understanding or lack of understanding of the Agreement at the new employee orientation and therefore, it would appear that Ms. Trovato's knowledge has no relevance to this case. (Clites Depo. at p. 61, App. 16 and Trovato depo. at pp. 18-19, App. 24). Certainly, no argument can be made in this case that Ms. Clites relied on Ms. Travato's knowledge, since neither recall her saying anything about the Agreement at the training session. At page five of the Order, Chief Judge Clawges recognized this point as he specifically concluded that it "is irrelevant what Ms. Travato did or did not understand regarding the Agreement. Plainly stated and underlined on page one (1) of the Agreement is the phrase, 'the Company and the Employee give up the right to a jury trial.'" (App. 5). This Court should review the evidence of record and affirm Chief Judge Clawges conclusion in this regard.

27. The Respondents deny the allegations in Paragraph 27 of the Petition and incorporate herein their response to Paragraph 26 of the Petition.

28. The Respondents deny the allegations in Paragraph 28 of the Petition and incorporate herein their response to Paragraph 26 of the Petition.

29. The Respondents deny the allegations in Paragraph 29 of the Petition and incorporate herein their response to Paragraph 26 of the Petition. The Respondents further aver with regard to the document entitled "New Employee Orientation" (App. 66-67) that Ms. Ellen Trovato, former Human Resources Generalist for TeleTech, testified that she did not have a manual from the company for the new employee orientation, that she created her own manual out

of the paperwork that she distributed to the new employees at the training session. (Trovato Depo. at pp. 26-27, 36, App. 26, 28). The document entitled "New Employee Orientation" (App. 66-67) is nothing more than a fugitive document in this case, produced during discovery because it was requested, but bearing in no manner to the evidence of record in this case.

30. The Respondents admit the allegations in Paragraph 30 of the Petition.

31. The Respondents admit the allegations in Paragraph 31 of the Petition.

32. The Respondents admit the allegations in Paragraph 32 of the Petition.

33. The Respondents admit the allegations in Paragraph 33 of the Petition.

34. The Respondents deny the allegations in Paragraph 34 of the Petition and they further aver that no evidence was introduced below to establish whether the Petitioner was or was not working at the time of the hearing. In response to this allegation, the Respondents also incorporate by reference the Second Affirmative Defense set forth below.

35. The Respondents deny the allegations in Paragraph 35 of the Petition.

36. The Respondents deny any allegations of the Petition not admitted herein.

The Respondents deny that the Petitioner is entitled to any relief as requested and they request that this Court dismiss the Petition for Writ of Prohibition as without merit and that this Court uphold Chief Judge Clawges decision below.

FIRST AFFIRMATIVE DEFENSE

The Respondents reserve onto themselves the affirmative defense of preemption of Petitioner's claims pursuant to the Federal Constitution's supremacy clause (U.S. Const., Art. VI, cl. 2) and the Federal Arbitration Act (9 U.S.C.S. § 1 *et seq.*). The Federal Arbitration Act, 9 U.S.C.S. § 1 *et seq.*,("FAA") declares a national policy favoring arbitration and withdraws a States' power to require a judicial forum for the resolution of claims that parties agree to resolve by arbitration. The FAA has further formed a body of substantive law of arbitratibility. The

substantive law created under the FAA specifically preempts Petitioner's claims related to W.Va. C.S.R. § 6-3. Further, Petitioner argues for and attempts to create a heightened standard for the review of arbitration agreements that has been pre-empted under the FAA and the substantive body of law created under that statute. *See e.g. 14 Penn Plaza, LLC v. Pyette*, 556 U.S. __ (No. 07-581, April 1, 2009)(holding that a provision in a collective bargaining agreement that required arbitration of age discrimination claims under the ADEA was enforceable as a matter of law); *Preston v. Ferrer*, 128 S.Ct. 978 (2008)("The FAA's displacement of conflicting state law is 'now well-established,' *Allied-Bruce Terminix Cos. v. Dobson*, 513 U. S. 265, 272 (1995), and has been repeatedly reaffirmed"); *Doctor's Associates, Inc. et al. v. Casarotto et ux.*, 517 U.S. 681 (1996)(holding a state notice statute requiring an arbitration clause contain notice, in underlined capital letters on the first page of the contract preempted); *Perry et al. v. Thomas*, 482 U.S. 483 (1987)(holding that the FAA is a substantive law, and that California's wage collection action statute providing that actions under that statute could proceed in court despite private arbitration agreements was preempted*); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)(the FAA was intended to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

SECOND AFFIRMATIVE DEFENSE

The Petitioner carries the burden of proof to establish that she will face unreasonably burdensome costs in arbitration. *State ex rel. Dunlap v. Berger,* 211 W. Va. 549, 566, 567 S.E.2d 265 (2002)("the responsibility of showing the costs likely to be imposed by the application of such provision is on the party challenging the provision."). *See also, State ex rel. Wells v. Matish,* 215 W. Va. 686, 600 S.E. 2d 583 (2004) ("the burden of proving excessive costs is upon the party challenging the arbitration provision."). At page 24 of her Memorandum, the Petitioner makes a statement that "Ms. Clites met her burden of showing the costs she would likely incur

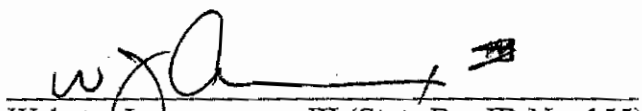
under the express terms of Teletech's adhesive arbitration agreement." However, Ms. Clites' statement in the Memorandum is not evidence and the record in this case appears to be otherwise completely devoid of any evidence introduced before the Circuit Court as to the actual costs and expenses that Ms. Clites is "likely" to incur in any arbitration under the Agreement. Ms. Clites failed to introduce any evidence below regarding her present employment and/or financial circumstances that would suggest her income and whether or not she could or could not afford to pay fees associated with the arbitration. Ms. Clites chose not to have an evidentiary hearing before the Circuit Court or otherwise introduce any evidence by way of affidavit to establish what she contended were the costs of arbitration in this case and whether she could or could not pay those costs. Tr. 9/11/08 hearing, p. 3. (Resp. App. 10). On this basis, this Court should conclude as a matter of law that the Petitioner failed to meet her burden of proof to show that the costs of arbitration were unreasonably burdensome.

CONCLUSION

Chief Judge Clawges authored a well-reasoned opinion and found that the Arbitration Agreement is valid and enforceable. This Court should review Chief Judge Clawges opinion and deny Ms. Clites is entitled to any relief as requested under her Petition for Writ of Prohibition.

TELETECH CUSTOMER CARE
MANAGEMENT (WEST VIRGINIA), INC.,
LOR WINDLE and MICHELLE EBERT
By Counsel,

LEWIS, GLASSER, CASEY & ROLLINS, PLLC



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of June, 2009, he served the foregoing Response of Teletech Customer Care Management (West Virginia), Inc., Lor Windle and Michelle Ebert to the Rule to Show Cause and the Petition for a Writ Of Prohibition upon the following by enclosing a true and accurate copy thereof in an envelope addressed to them at their last known addresses, shown below their name, and depositing the same, postage prepaid, in the regular United States Mail, unless otherwise provided below:

Georgia Lee Gates, Esq.
310 Adams Street
Fairmont, WV 26554

The Honorable Russell M. Clawges,
Chief Judge, 17th Judicial Circuit, Division II
Monongalia County Courthouse
243 High Street
Morgantown, WV 26505

Webster J. Arceneaux, III