

12-1371

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

CARA NEW,

Plaintiff,

v.

Civil Action No. 11-C-190  
Judge Perry

GAMESTOP Inc. , d/b/a  
GAMESTOP; ARRON DINGESS, Individually; and,  
DAVID TREVATHAN, Individually,

Defendants.

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

On March 30, 2012, came the Defendants GameStop, Inc. ("GameStop"), Aaron Dingess ("Dingess") and, David Trevathan ("Trevathan") (collectively, "Defendants") and the Plaintiff Cara New, by their respective Counsel, upon Defendants' Motion to Dismiss previously filed. Upon mature consideration of the record in this matter, together with the arguments of counsel, the Court finds as follows:

**FINDINGS OF FACT**

1. GameStop is a retailer of new and used video games, systems, accessories and entertainment software, and operates stores throughout the United States. GameStop has adopted the GameStop C.A.R.E.S. Program (Concerned Associates Reaching Equitable Solutions), (attached to Defendant's Motion to Dismiss as Exhibit A) as a means of resolving employment disputes for all of its employees throughout the United States. Participation in the program, and

the agreement to use it as the means of resolving all workplace disputes, is a material term and condition of employment for all GameStop employees.

2. On March 29, 2009, Plaintiff was an adult over the age 18, being 27 years old, and a high school graduate.

3. On March 29, 2009, GameStop hired Plaintiff as an Assistant Store Manager at its Logan, West Virginia retail store.

4. In connection with her employment, Plaintiff received a comprehensive GameStop Store Associate Handbook which includes a detailed description of GameStop C.A.R.E.S. Program.<sup>1</sup> The Handbook includes a statement that it is “intended to answer most of your questions, explain our important policies and provide guidelines on our Company standards and expectations.” Handbook, pg. 1. The Handbook also states that Plaintiff’s employment was “at-will” and that “in deciding to work for the Company, you must understand and accept these terms of employment.” *Id.* pg. 6.

5. The Handbook contains a “disclaimer” which provides in pertinent part that the handbook

has been prepared to acquaint you with GameStop policies, practices and benefits... The company reserves the right to modify, suspend or eliminate any or all, or any part of, the policies, practices and benefits set forth in this Handbook or in any other document, at any time, without prior notice, *except for the GameStop C.A.R.E.S. Rules for Dispute Resolution*. You do not have, nor does this Handbook constitute, an employment contract, express or implied. Your employment is not confined to a fixed term and may be ended by either you or GameStop, Inc. at any time and for any reason. All terms and conditions of employment are subject to change without notice *except for the GameStop C.A.R.E.S. Rules for Dispute Resolution*.

*Id.* pg. 40 (emphasis added).

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<sup>1</sup> A copy of the entire handbook was presented to the Court by Plaintiff’s counsel during oral argument upon Defendants’ Motion to Dismiss held on March 9.

6. Plaintiff executed an “Acknowledgement and Receipt of the Store Associate Handbook and GameStop C.A.R.E.S. Rules Including Arbitration.” (attached to Affidavit of Everett “Chuck” Smith as Exhibit B). In doing so Plaintiff acknowledged, in relevant part, that:

I have received a copy of the GameStop Store Associate Handbook, including the GameStop C.A.R.E.S. Rules for Dispute Resolution. The Rules set forth GameStop’s procedure for resolving workplace disputes ending in final and binding arbitration... I understand that it is my responsibility to read and familiarize myself with the information contained in the Handbook. **I understand that by continuing my employment with GameStop following the effective date of GameStop C.A.R.E.S., I am agreeing that all workplace disputes or claims, regardless of when those disputes or claims arose, will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective actions in which I might be included . . .** I understand that my employment with GameStop is “at will” and that I or GameStop may end my employment at any time and for any reason.

(emphasis added).

7. The GameStop C.A.R.E.S. program permits any employee to file a charge with the Equal Employment Opportunity Commission prior to submitting the dispute to either mediation (which is voluntary) or final and binding arbitration under the Program. In December 2010, Plaintiff filed a charge with the EEOC against GameStop alleging that she was the victim of sex discrimination and had been retaliated against for opposing such practices. (Complaint at ¶ 20).

8. On or about June 13, 2011, the EEOC issued a “Dismissal and Notice of Rights,” noting that “[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes,” and issued the Plaintiff a “Right-to-Sue” letter. (attached to Affidavit of Everett “Chuck” Smith as Exhibit C).

9. While the Notice of Right to Sue specifically provides that Plaintiff must bring any suit alleging violations of Title VII within 90 days of her receipt of that notice, the

GameStop C.A.R.E.S. Program allowed Ms. New to initiate a claim under the Program within 95 days of her receipt of the notice.

10. Contrary to the terms of the GameStop C.A.R.E.S. Program, Plaintiff failed to prosecute her claims within 90 days (as required by Title VII) or 95 days (as required by the C.A.R.E.S. Program), instead filing her Complaint with this court on or about December 2, 2011. Plaintiff contends in this action that throughout her employment she was the victim of sex discrimination, sexual harassment and retaliation in violation of West Virginia Code §5-11-9, and raises additional claims against the Defendants which arise under state law and as a result of, or in connection with, her employment with GameStop, Inc.

### CONCLUSIONS OF LAW

#### Signed Acknowledgement is a Contract

1. The Federal Arbitration Act (FAA) applies to arbitration provisions existing within the state of West Virginia, including employment contracts, such as the one between Plaintiff and Defendant. *Marmet Health Care Center, Inc., et. al. v. Clayton Brown*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1201, 182 L.Ed.2d 42, (2012) (*per curiam*). See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). *AT&T Mobility LLC v. Concepcion*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011).

2. Section 2 of the FAA provides, in pertinent part, that:

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

9 U.S.C. § 2.

3. The GameStop C.A.R.E.S. Arbitration Agreement is a valid, enforceable and legally binding arbitration agreement under the FAA. *Ellerbee v. GameStop, Inc.*, 604 F. Supp. 2d 349, 355 (D. Mass. 2009); *Pomposi v. GameStop, Inc.*, 2010 WL 147196 at \*4 (D. Conn. 2010); *McBride v. GameStop, Inc.*, 2011 WL 578821 (N.D. Ga. 2011) (Finding a valid and enforceable Arbitration Agreement was entered into under the GameStop C.A.R.E.S. Program).

4. An agreement to arbitrate is treated like any other contract and its existence must be determined according to state law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995); *See Clites v. Clawges*, 685 S.E.2d 693 (W. Va. 2009) (citing *State ex rel. Dunlap v Burger*, 567 S.E.2d 265, 271 (W.Va. 2002)).

5. In construing arbitration clauses of contracts, there exists a presumption in favor of arbitrability. *Clark v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 924 F.2d. 550 (1991), *cert.den.* 112 S. Ct. 74, 502 U.S. 818, 116 L.Ed.2d 48; *Century Aluminum of West Virginia v. United Steelworkers of America*, 82 F.Supp.2d 580 (S.D.W.V. 2000); *Bd. Of Education of Berkeley County v. Harley Miller*, 160 W.Va. 473, 236 S.E.2d 439 (1977).

6. The West Virginia Supreme Court of Appeals has held that a valid contract exists where an employee agrees to arbitrate disputes as a condition of his or her employment. *Clites v. Clawges, supra*; *Wells v. Matish*, 600 S.E.2d 583 (W.Va. 2004).

7. Through her execution of the Acknowledgement (submitted as Exhibit B to the Affidavit of Everett “Chuck” Smith), Plaintiff has acknowledged that her continued employment with GameStop, Inc. constituted her acceptance of that Program, including but not limited to her agreement to submit employment disputes to final and binding arbitration.

8. While the “disclaimer” contained in the GameStop, Inc. Store Associate Handbook indicates that the handbook as a whole does not constitute a contract or employment,

that disclaimer does not permit GameStop, Inc. to amend, modify or discontinue *the GameStop C.A.R.E.S. Program* without notice to the Plaintiff. The “disclaimer” as contained in the GameStop, Inc. Store Associate Handbook specifically excepts the GameStop C.A.R.E.S. program from its coverage.

9. Plaintiff knowingly accepted and agreed to the terms of the Program by and through her execution of the Acknowledgement and her continued employment with GameStop. Plaintiff could have simply chosen not to accept or continue employment with GameStop, Inc., and was well aware that by accepting and continuing employment with that Defendant she would be required to abide by the terms of the GameStop C.A.R.E.S. Program.

10. By executing this Acknowledgement and voluntarily continuing her employment with GameStop, Inc., Plaintiff entered into a valid and binding contract under both the FAA and the law of West Virginia. This binding contract requires that she submit all disputes arising out of, or in connection with her employment by GameStop, Inc., to final and binding arbitration under the GameStop C.A.R.E.S. Program.

11. The claims asserted by Plaintiff in her Complaint arise out of, or in connection with, her employment by GameStop, Inc., and are therefore within the scope of claims which must be submitted for resolution through final and binding arbitration under the GameStop C.A.R.E.S. Program.

12. “(A)rbitration must be compelled ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *United Steel Workers of America v. Warrior & Gulf*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1353 (1960). *Baker v. Green Tree Servicing LLC*, 2010 WL 1404088 (S.D.W.Va. 2010) (citing *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997).

### **Contract is not Unconscionable**

13. As the West Virginia Supreme Court noted in its *Brown v. Genesis Healthcare Corp.*, 2012 WL 2196090 (June 12, 2012), (“*Brown II*”) opinion, an agreement to arbitrate is unenforceable if it is both procedurally unconscionable and substantively unconscionable. *Id.* at Syl. Pts. 4, 5, 9 (citing Syl. Pts. 12, 20 of *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011) (“*Brown I*”), vacated on other grounds by *Marmet Health Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012)). *I*; *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749 (W.Va. 2011)) (emphasis added). Plaintiff bears the burden of demonstrating unconscionability. *Montgomery v. Credit One Bank*, 2012 WL 275477 (S.D.W.Va. January 31, 2012).

14. When Cara New signed the agreement on March 31, 2009, she expressly agreed “that all workplace disputes or claims, regardless of when those disputes or claims arose, will be resolved under the GameStop C.A.R.E.S. program rather than in court [.]”

15. The law presumes that a person knows and understands the contents of an agreement prior to signing it. *See Reddy v. Community Health Foundation of Man*, 298 S.E.2d 906 (W.Va. 1982) (a person who fails to read a document to which he places his signature does so at his peril); *Sedlock v. Moyle*, 668 S.E.2d 176 (W.Va. 2008) (holding that in the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms); *see also Fulton v. Messenger*, 56 S.E. 830 (W.Va. 1907).

16. “Substantive unconscionability involves unfairness in the contract itself and an analysis of whether a specific contract term is one-sided and will have an overly harsh effect on the disadvantaged party.” Syl. Pt. 12, *Brown I*.

17. Plaintiff argues that the contract is substantively unconscionable because GameStop has the ability to unilaterally change the contract. However, Plaintiff's argument fails because the Court finds the language is contrary to this allegation. GameStop, Inc. *cannot change the terms of the program without giving employees 30 days notice and that any change will only be prospective.* See *C.A.R.E.S. Program* at p. 3.

17. In *Brown II*, the West Virginia Supreme Court defined "procedural unconscionability" as:

involv[ing] a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the contract.

*Id.* at Syl. Pt. 10 (citing Syl. Pt. 17 of *Brown I*).

18. A contract being one of adhesion does not render the contract automatically unconscionable. See *Brown II* at \*8 (citing *Dunlap v. Berger*, 576 S.E.2d 265 (W. Va. 2002)). As the West Virginia Supreme Court noted, "the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts." *Id.* Therefore, "a rule automatically invalidating adhesion contracts would be completely unworkable." *Id.* (emphasis added).

19. As an initial matter, a mere disparity in bargaining power is insufficient to render the Agreement unconscionable. In order to demonstrate "unconscionability", the Plaintiff must identify *specific unfair terms* in the contract. *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854, 860-61 (1998); *Troy Mining*, 346 S.E.2d at 753 ("A litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability").

20. In West Virginia, an alleged inequity in bargaining power alone does not indicate an unconscionable contract. *Adkins v. Labor Ready, Inc.*, 185 F.Supp.2d 628 (S.D.W.Va. 2001).

21. Cara New was a 27 year old adult with a high school diploma. She was qualified to hold a management position at GameStop and had held other jobs prior to the GameStop employment. She signed a contract that was void of any complex contract terms. The purpose of signing the acknowledgment form was to make it clearly known to employees that by signing the acknowledgment and continuing employment, the employee would be obligated to arbitrate any dispute. GameStop was also mutually bound by the arbitration agreement. GameStop could not unilaterally change the arbitration agreement without notice and the changes then would only be prospective. Cara New was not forced to sign the acknowledgment and agree to arbitration because she had the option to not accept employment.

24. The arbitration agreement is not procedurally unconscionable or substantively unconscionable.

### **SUMMARY**

Although, the growing trend toward arbitration personally concerns me, it appears the defendant in this case has carefully crafted its arbitration agreement to conform to the law.

IT IS THEREFORE **ORDERED** that the Defendants' Motion to Dismiss, etc. be, and the same hereby is, **GRANTED**, and it is **FURTHER ORDERED** that this matter be **DISMISSED** pending Plaintiff's submission of her claims to final and binding arbitration in accord with the terms of the GameStop C.A.R.E.S. Program.

To all of which Plaintiff objects.

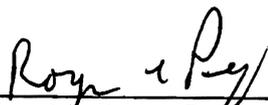
The Clerk is directed to mail a certified copy of this Order to all counsel of record.

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MADISON, WV

ENTER: This 10<sup>th</sup> day of October, 2012

  
\_\_\_\_\_  
Honorable Roger L. Perry, 7<sup>th</sup> Circuit

A COPY ATTEST  
