IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. MARTIN EAST, On Behalf of Himself and All Others Similarly Situated, Plaintiff, v. CASH AMERICA CENTRAL INC., And FIRSTCASH, INC. Defendants.	)	No. 2:18-cv-02118-TLP-cgc JURY DEMAND COLLECTIVE ACTION COMPLAINT

ORDER GRANTING MOTION TO DISMISS

Before the Court is Defendant's Motion to Dismiss or, in the Alternative, to Stay the Proceedings and Compel Arbitration. (ECF No. 20.) For the following reasons, the Court grants the Defendant's Motion to Dismiss the case.

BACKGROUND

J. Martin East ("Plaintiff") was employed as a store manager by Cash America Central, which later merged with FirstCash, Inc. (ECF No. 1 at PageID 3, 7.) As a condition of his continued employment with FirstCash, Inc., Plaintiff signed an Arbitration Agreement (the "Arbitration Agreement"). (ECF No. 20 at PageID 60.) Plaintiff agreed that he and the Company would submit any disputes regarding his employment to arbitration. (*Id.* at PageID 60.) FirstCash, Inc. provided Plaintiff and other employees information about its Dispute Resolution and Arbitration program, which disseminated through the company's electronic Learning Management System. (ECF No. 20-1 at PageID 64.) Plaintiff logged into this system

using his personal login information to review the Arbitration Agreement. (*Id.* at PageID 65.) During the Learning Management System program, Plaintiff reviewed a page that stated,

> By continuing employment, with the Company or other Company affiliates after the date you receive this document and the Agreement, you agree to abide by the terms of the Agreement and to resolve any covered disputes through binding arbitration. Your agreement to arbitration is a term and condition of your employment with the Company.
>
> (*Id.*at PageID 65.)

On this same page, Plaintiff was required to click on a link to open and read the Arbitration Agreement. (*Id.* at PageID 65.) After reviewing the Arbitration Agreement, Plaintiff reached the next part of the program, which gave him the option to either reject or accept the Arbitration Agreement. (*Id.* at PageID 65.) Plaintiff accepted the Arbitration Agreement. (*Id.* at PageID 66.) The Arbitration Agreement provides that "[a]ll disputes covered by this Arbitration Agreement will be decided by a single arbitrator through final and binding arbitration and not by way of court or jury trial." (*Id.* at PageID 66.) Additionally, the Arbitration Agreement provides that all claims based on or related to "wages, minimum wages, and overtime or other compensation" must be resolved in arbitration. (*Id.* at PageID 66.)

While accepting the Arbitration Agreement was a requirement for continued employment at FirstCash, there was another provision in the Arbitration Agreement, the acceptance of which was not a mandatory condition for continued employment. (*Id.* at PageID 66.) This provision is entitled "Class and Collective Action Waivers." This provision of the Arbitration Agreement provided that both Plaintiff and Defendants would mutually waive the right to bring collective or class actions. (*Id.* at PageID 66.) It expressly states that "[t]he Class and Collective Action Waivers are not a mandatory condition of Your employment or a mandatory part of this Arbitration Agreement, and You may therefore opt out of and not be subject to the Class and

Collective Action Waivers. Your decision to be bound or not bound by the Class and Collective Action Waivers is entirely voluntary." (*Id.* at PageID 66.) Plaintiff voluntarily agreed to be bound to the Class and Collective Action Waivers. (*Id.* at PageID 66.)

Plaintiff, on behalf of himself and those similarly situated, brought an action under Section 216(b) of the Federal Labor Standards Act ("FLSA") alleging that he and other store managers were misclassified as employees who were exempt from overtime payment. (ECF No. 1 at PageID 1.) Plaintiff filed this case as a putative collective action.

STANDARD OF REVIEW

The standard for ruling on Defendant's Motion to Dismiss or, In the Alternative, To Stay the Proceedings and Compel Arbitration is governed by the Federal Arbitration Act (the "FAA"). The FAA was enacted with the goal of eradicating "judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011). Because there is a "liberal federal policy favoring arbitration . . . [and there is] the fundamental principle that arbitration is a matter of contract . . . courts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.* (citation omitted). However, arbitration agreements may be deemed unenforceable in certain circumstances. Section 2 of the FAA, known as the savings clause, dictates that arbitration agreements are only to be declared invalid, revocable, and unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2 (2015). Such arbitration agreements may be invalidated by "generally available contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC,* 563 U.S. at 339 (internal quotation marks and citations omitted).

The FAA also provides that, if a court determines that the cause of action is covered by an arbitration clause, the court must stay the proceedings until the arbitration process is complete if. 9 U.S.C.A. § 3. However, "[i]n cases where all claims are referred to arbitration . . . the litigation may be dismissed rather than merely stayed." *Wallace v. Red Bull Distributing Co.*, 958 F. Supp.2d 811, 816 (N.D. Ohio 2013). In deciding whether to dismiss the case or stay the proceedings and compel arbitration, a district court must undergo a four-part analysis of the arbitration agreement:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Fazio v. Lehman Bros., Inc., 340 F.3d 386, 392 (6th Cir. 2003).

DISCUSSION

From the outset, it is clear to this Court that the Arbitration Agreement's scope is broad. (*See* ECF No. 20-3 at PageID 1.) The Arbitration Agreement covers all claims or controversies, including employment-related claims. (*Id.*) Additionally, all claims related to or based upon wages, minimum wage and overtime or other compensation claims to be owed, and claims arising under the FLSA are included within the scope of the Arbitration Agreement. (*Id.*) Because Plaintiff's claims arise under the FLSA and are included in the scope of the Arbitration Agreement, the Arbitration Agreement governs this case. The fact that the Arbitration Agreement covers Plaintiff's claim is, in the Court's opinion, not in dispute. Thus, the Court's task is to determine whether the parties agreed to arbitrate. The answer to this question depends on whether the Arbitration Agreement is enforceable.

A. Enforceability of Collective Action Waiver in the Arbitration Agreement.

There is no question that arbitration agreements are generally enforceable in the employment context. In fact, the Supreme Court explained that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Circuit City Stores v. Adams,* 532 U.S. 105, 122–23 (2001). The issue in this case is not whether arbitration agreements are permitted in employment contexts such as Plaintiffs. Rather, the issue is whether arbitration agreements that include waivers of collective or class action procedures are enforceable.

The United States Supreme Court recently held that the FAA's savings clause does not provide a basis for refusing to enforce arbitration agreements that waive collective action procedures under the FLSA. *Epic Systems Corp. v. Lewis*, Nos. 16-285, 16-300, 16-307, 2018 WL 2292444, at *8 (2018). Furthermore, the Supreme Court also held that the NLRA does not displace the FAA and does not eradicate class and collection action waivers. *Id.* At the time Defendants filed their Motion to Dismiss, and Plaintiff responded, *Epic Systems* had not yet been decided. Now, it appears that *Epic Systems* invalidates many of Plaintiff's arguments, and the Sixth Circuit case law they relied on.[1]

Plaintiff argues that the Arbitration Agreement is invalid under the FAA's savings clause because it violates Plaintiff's statutory rights under the NLRA by waiving Plaintiff's right to

[1] The primary case Plaintiff relies upon is *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc*., 858 F.3d 393 (6th Cir. 2017). In *Alternative Entm't*, the National Labor Relations Board ("NLRB") sought enforcement of its administrative order finding that the employer had violated the NLRA by requiring its employees to agree to arbitrate all claims concerning or arising out of their employment individually. Specifically, the Sixth Circuit "join[ed] the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable." *Id.* at 408.

engage in concerted action in the form of a collective action under FLSA and because the Arbitration Agreement is both procedurally and substantively unconscionable. The provision in the Arbitration Agreement upon which Plaintiff focuses his attention is entitled "Class and Collective Action Waivers" ("collective action waiver"). This section essentially states that, if signed by the employee, there is no right for any dispute to be brought, heard, or arbitrated as a class or collective action.[2]

Plaintiff cites *Alternative Entm't* in making the argument that the Sixth Circuit has determined that waivers of concerted activity, including collection actions, are unenforceable because they violate the public policy of the NLRA and are "illegal on generally applicable grounds." *Alternative Entm't, Inc.*, 858 F.3d at 403. In *Alternative Entm't*, the court made clear that "[a]rbitration provisions that are illegal under the explicit and generally applicable terms of a federal statute . . . trigger the FAA's savings clause." *Id.* at 407. The crux of Plaintiff's argument against being compelled to arbitrate any dispute on an individual basis, rather than as a collective or class action, is identical to the argument posed to the Supreme Court in *Epic Systems* - that the NLRA renders his collective action waiver illegal because "illegality under the NLRA is a ground that exists at law . . . for the revocation of [his] arbitration agreement[]." *Epic Systems Corp.*, 2018 WL at *6. That argument failed before the Supreme Court and fails here.

[2] This section states, in pertinent part:

> There will be no right or authority for any dispute to be brought, heard, or arbitrated as a class or collective action. Nor will the arbitrator have any authority to hear or arbitrate any such dispute. Accordingly, . . . (b) THE COMPANY AND I WAIVE THE RIGHT FOR ANY DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A COLLECTIVE ACTION AND THE ARBITRATOR WILL HAVE NO AUTHORITY TO HEAR OR PRESIDE OVER ANY SUCH CLAIM.

As the Supreme Court recently made clear, the savings clause of the FAA only recognizes defenses that apply to any contract in general. Plaintiff's argument that the NLRA makes the collective action waiver illegal must fail because the savings clause "offers no refuge for 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AA&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011). Additionally, the savings clause cannot be manipulated to save defenses that "target arbitration . . . by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" *Id.* (quoting *AT&T Mobility LLC*, 563 U.S. at 344). Like the plaintiffs in *Epic Systems*, Plaintiff's argument "seeks to interfere with one of arbitration's fundamental attributes" by attacking solely "the individualized nature of the arbitration proceedings." *Id.* Because of this interference, Plaintiff's argument is unavailing.

Even if the FAA requires courts to enforce arbitration agreements that waive an employee's right to arbitrate or litigate a collective or class action, Plaintiff makes another argument, like the plaintiffs in *Epic Systems*, that the NLRA overrules the FAA in such situations. Despite this argument that seemingly places the NLRA and the FAA in conflict, Plaintiff does not contend that the FAA and NLRA are conflicting. Rather, Plaintiff maintains that the two federal statutes work together to ensure that while arbitration agreements are as enforceable as other contracts, unenforceable arbitration agreements are not deemed enforceable. Under this theory, the NLRA acts as a "check" on the FAA, according to Plaintiff. This argument, however, is fundamentally flawed. The NLRA, specifically section 7, focuses on protecting employees' rights to unionization and to collective bargaining. [3] It is silent on

[3] Section 7 of the NLRA guarantees workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing,

collective or class action procedures. *Id.* at *9. Therefore, it is not logical to conclude that the NLRA overrides the FAA when collective or class action procedures are involved. *See id.* at *10 ("The fact that we have [no language in the NLRA that explicitly overrides the FAA] is further evidence that Section 7 does nothing to address the question of class and collective actions."). Because this Court finds that the holding of *Epic Systems* explicitly deems waivers of class or collective action court proceedings valid and enforceable, Plaintiff's argument that the waiver at issue violates the NRLA and is thus unenforceable must fail.

B. Unconscionability of the Arbitration Agreement.

Plaintiff next argues that regardless of how the Court rules concerning the enforceability of the waiver under the NRLA, the Court should find the Arbitration Agreement to be both substantively and procedurally unconscionable. It is well-established law that unconscionability is a valid defense to contracts, including arbitration agreements. *See Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 68 (2010) ("Like other contracts, however, [arbitration agreements] may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.") (citations omitted). Under Tennessee law, there are two elements of unconscionability—substantive and procedural. Substantive unconscionability arises when contract terms are unreasonably harsh, while procedural unconscionability arises when one party has a lack of a meaningful choice. *Cooper v. MRM Investment Co.,* 367 F.3d 493, 503 (6th Cir. 2004). Tennessee courts tend to "lump the two together and speak of unconscionability resulting when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would [accept] them on one hand, and no honest and fair person would [make] them on the other." *Id.* at 503–

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and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C.A. § 157.

04 (citing *Trinity Indus., Inc. v. McKinnon Bridge Co.,* 77 S.W.3d 159, 170–71 (Tenn. Ct. App.2001)).

Plaintiff contends that the Arbitration Agreement is a contract of adhesion, thus "bearing the hallmarks of a procedurally unconscionable contract." (ECF No. 23 at PageID 8.)[4] Contracts of adhesion are "standardized contract form[s] offered to consumers of goods and services on essentially a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of the contract." *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996). The distinguishing feature is that the weaker party has no meaningful choice. *Id.* However, "[a] contract is not adhesive merely because it is a standardized form offered on a take-it-or-leave-it basis." *Cooper v. MRM Investment Co.,* 367 F.3d 493, 500 (6th Cir. 2004). In the employment context, "employers often condition employment on a commitment to arbitration." *Cooper*, 367 F.3d 493 at 502. An employee may realistically have no choice but to agree to the arbitration agreement if that employee wants a job. *Id.* The argument can be made that the arbitration agreement at issue is a contract of adhesion because Plaintiff's continued employment with Defendants was conditioned on accepting the arbitration agreement. Plaintiff presumably had no real opportunity to bargain with Defendants when presented with Arbitration Agreement on Defendants' electronic Learning Management System. (ECF No. 23 at PageID 9.) However, even if the Court assumes that the Arbitration Agreement is a contract of adhesion, such a contract is only unenforceable if the terms of the contract are also unconscionable.

[4] This argument is not entirely correct. Contract terms in a contract of adhesion can also be substantively unconscionable. *See Cooper v. MRM Investment Co.,* 367 F.3d 493, 503 (6th Cir. 2004). Therefore, the presence of a contract of adhesion does not automatically trigger only procedural unconscionability. For this reason, the Court will first examine whether the Arbitration Agreement was a contract of adhesion. Then, the Court will address whether the terms are unconscionable.

As previously explained, unconscionability can take the form of either procedural unconscionability or substantive unconscionability. In examining the presence of procedural unconscionability in this case, "there is no basis for a negative answer to '[t]he crucial question . . . [of] whether each party to the contract . . . [had] a reasonable opportunity to understand the terms of the contract . . . ." *Id.* (quoting *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 666 (6th Cir. 2003)). Plaintiff was afforded time to read and understand the Arbitration Agreement. Furthermore, there is no "evidence that, in consequence of the imbalance, the party in the weaker position was defrauded or coerced into agreement in the arbitration clause." *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758, 768 (N.D. Ohio 2009). In addressing a claim of procedural unconscionability, it is not sufficient if the Plaintiff's only argument is that he possessed an unequal bargaining position compared to Defendants. Accordingly, this Court finds no procedural unconscionability.

As to substantive unconscionability, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmore v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991). This is because such inequality in bargaining power does not automatically result in unreasonable and unfair terms. Traditionally, the presence of unreasonable and unfair contract terms that create overly harsh and abundantly one-sided results supports a finding on substantive unconscionability. *See Wallace v. Red Bull Distributing Co.*, 958 F. Supp. 2d 811, 824 (N.D. Ohio 2013). Here, both Plaintiff and Defendant were bound to the Arbitration Agreement. Both parties submitted to arbitration, as evidenced by language in the Arbitration Agreement stating "the Company and I mutually agree to arbitrate all claims or controversies, past, present, or future . . . ." (ECF No. 20-3 at PageID 1.) This does not indicate any level of one-sidedness that would evidence unfair

contract terms. *See, e.g., Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 756 (Tenn. 2015) (finding no substantive unconscionability because the Arbitration Agreement required both parties to submit their disputes to arbitration). Accordingly, this Court finds no substantive unconscionability.

Because the Court finds no evidence of procedural or substantive unconscionability, the Arbitration Agreement is enforceable.

C. Disposition of the Case.

The FAA requires a court to "stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C.A § 3. However, many courts in the Sixth Circuit, as well as other circuits, have found dismissal of cases appropriate if all of the claims in the suit are to be referred to arbitration. *See, e.g., Ozormoor v. T-Mobile USA, Inc.*, 354 F. App'x 972, 975 (6th Cir. 2009) ("[Plaintiff] challenges the dismissal of his suit, asserting that 9 U.S.C. § 3 requires district courts to stay suits pending arbitration rather than dismiss them. We have already rejected that argument."); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (finding that the district court did not err in dismissing the complaint after ordering arbitration). Because this case consists entirely of Plaintiff's FLSA claim for unpaid overtime wages, and because the Arbitration Agreement expressly covers any claims arising from the FLSA, this Court finds it to be clear that Plaintiff's claims all fall within the scope of the Arbitration Agreement. Accordingly, dismissal of this case is appropriate.

CONCLUSION

Because this Court finds that the Supreme Court unequivocally held that waivers of class actions are valid and not precluded by Section 7 of the NLRA, and that the Arbitration Agreement contains no evidence of unconscionability, this Court GRANTS Defendant's Motion

to Compel Arbitration. Because the Arbitration Agreement expressly covers any claims arising from the FLSA and Plaintiff's claims all fall within the scope of the Arbitration Agreement, the Court DISMISSES the Action, without prejudice. Defendants' alternative Motion to Stay the Proceedings is therefore, DENIED. Additionally, Defendants' Motion for Leave to File a Reply is DENIED as moot.

SO ORDERED, this 12th day of June, 2018.

s/ Thomas L. Parker
THOMAS L. PARKER
UNITED STATES DISTRICT JUDGE