[Cite as *Jones v. Carrols, L.L.C.*, 2015-Ohio-2250.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ERICK JONES Appellant v. CARROLS, LLC, dba BURGER KING, et al. Appellees	C.A. No. 27385 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2013 12 5850

DECISION AND JOURNAL ENTRY

Dated: June 10, 2015

HENSAL, Presiding Judge.

{¶1} Erick Jones appeals the trial court's dismissal of his complaint against Carrols, LLC., Keren McGirr, Darren Greenwood, and Charity Snyder (collectively, "Defendants"). For the reasons set forth below, we reverse and remand.

I.

{¶2} In 2004, Mr. Jones began working at a Burger King location owned by Carrols, and he was eventually promoted to shift supervisor and took on certain managerial duties. In July 2006, Carrols implemented a Mandatory Arbitration Policy ("MAP") that required employees to arbitrate nearly all claims associated with their employment. Although Carrols required all new employees to sign a copy of the MAP, it did not require current employees to do so. Instead, Carrols distributed a memorandum to franchise managers to be disseminated to the employees. The memorandum stated that, by reporting to work on or after August 1, 2006, the

employee was agreeing to the MAP. Carrols also required managers to hang a poster containing the MAP in the office.

{¶3} Mr. Jones was fired in December 2012. On December 16, 2013, Mr. Jones filed a complaint against Defendants, alleging racial and age discrimination, intentional infliction of emotional distress, invasion of privacy, and negligent supervision. Defendants moved to compel arbitration pursuant to the MAP, and Mr. Jones opposed their motion, arguing that he had never agreed to the MAP and had been unaware of its existence. Following a hearing, the trial court found that Carrols "took reasonable steps to inform [Mr. Jones] of the company's mandatory arbitration requirement." The trial court also determined that the MAP was not procedurally or substantively unconscionable and dismissed Mr. Jones' complaint.

{¶4} Mr. Jones has appealed, raising five assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE CASE BECAUSE ERICK JONES NEVER AGREED OR ASSENTED TO ARBITRATION WITH CARROLS, LLC OR ANY OF THE INDIVIDUAL DEFENDANTS.

{¶5} Mr. Jones argues that the trial court erred in granting Defendants' motion to compel arbitration and dismissing his complaint because he had never agreed to the arbitration policy. Specifically, Mr. Jones argues that he could not have agreed to the policy because he never knew of its existence.

{¶6} Ohio's public policy strongly favors arbitration, as expressed in the Ohio Arbitration Act codified in Revised Code Chapter 2711. *Cook v. Community Health Partners*, 9th Dist. Lorain No. 13CA010520, 2015-Ohio-1075, ¶ 5.

> If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

R.C. 2711.02(B). Whether an issue is referable under an arbitration agreement is a question of contract, and a court must determine whether the parties have agreed to submit their disputes to arbitration. *Cook* at ¶ 5, citing *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 488, 2006-Ohio-657, ¶ 11. With few exceptions, "'an arbitration clause is to be upheld just as any other provision in a contract should be respected.'" *Academy of Medicine of Cincinnati* at ¶ 16, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471 (1998). In fact, "'an arbitration clause is, in effect, a contract within a contract, subject to revocation on its own merits[, and, therefore,] * * * an alleged failure of the contract in which it is contained does not affect the provision itself.'" *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 41, quoting *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 501-502 (1998).

{¶7} The parties do not dispute that, in August 2006, Carrols instituted the MAP or that Mr. Jones was working for Carrols at that time. However, the parties disagree as to whether Mr. Jones knew about the policy and whether his actual knowledge of the MAP was required. The trial court never resolved the former dispute, instead deciding that, because Carrols had taken "reasonable steps to inform [Mr. Jones] of the company's mandatory arbitration requirement[,]" Mr. Jones was bound by the MAP.

{¶8} As noted above, the primary consideration is whether the parties have agreed to submit their disputes to arbitration, which is a matter of contract. *See Cook* at ¶ 5, citing *Academy of Medicine of Cincinnati* at ¶ 11. It is well established that, in order for parties to

enter a contract, there must be mutual assent to its terms—i.e. a meeting of the minds. *Rayess v. Educational Comm. For Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012-Ohio-5676, ¶ 19. Axiomatically, a party cannot assent to a term of which the party is unaware. If Mr. Jones did not have actual knowledge of the MAP, there is simply no way he could have assented to it, and, therefore, it would be impossible to conclude that he had agreed to its terms.

{¶9} Unfortunately, from the record before us, we cannot determine whether Mr. Jones had actual knowledge of the MAP. Mr. Jones in his affidavit and during the hearing on Defendants' motion to compel arbitration denied having any knowledge of the arbitration agreement. Defendants, however, presented evidence that a poster informing employees of the MAP was hung in the office at the Burger King where Mr. Jones worked. Defendants also presented a memorandum that they alleged was distributed to all employees in which they informed the current employees of the MAP and that, by attending work after August 1, 2006, any employee subject to the MAP was agreeing to its terms. Defendants even presented evidence that, on the day the memorandum was distributed to the Burger King locations, it would have been Mr. Jones' duty to log into the computer and review memorandums from the corporate offices, which would have included the memorandum about the MAP. However, Mr. Jones disputed that it was ever his duty to review memorandums like the one in this case.

{¶10} The trial court was in the best position to resolve the contradictory testimony and evidence in this case but did not do so, instead focusing on whether Carrols had taken "reasonable steps to inform [Mr. Jones] of the company's mandatory arbitration requirement." *See Sandhu v. Sandhu*, 9th Dist. Summit No. 27207, 2015-Ohio-90, ¶ 15-16 (Trier of fact is in the best position to judge credibility.). Although there are a number of cases dealing with the question of whether a party had reasonable notice of the arbitration agreement, this Court has not

found a case from Ohio applying the reasonable notice standard in the absence of a signed contract. Defendants have directed this Court to *Mannix v. Cty. of Monroe*, 348 F.3d 526 (6th Cir.2003), for the proposition that actual notice is not required for changes to workplace policy. *See id*. at 535-536. However, the reasonable notice discussion in *Mannix* was an application of Michigan law. *See id*. at 535, quoting *Lytle v. Malady*, 458 Mich. 153, 168, 579 NW.2d 906 (1998), citing *In re Certified Question (Bankey v. Storer Broadcasting Co.)*, 432 Mich. 455-457, 443 NW.2d 112 (1989). Without engaging in a lengthy discussion of Michigan employment jurisprudence, we simply note that the "reasonable notice" standard is a result of Michigan holding that employees may have "contractual rights" despite there being no meeting of the minds, a statement of law that, to this Court's knowledge, has not been accepted in Ohio. *See In re Certified Question*, 432 Mich. at 447-448 ("[E]mployer statements of policy * * * can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee * * *.' Under circumstances where 'contractual rights' have arisen outside the operation of normal contract principles, the application of strict rules of contractual modification may not be appropriate.") (Internal citation omitted.), quoting *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 614-615, 292 NW.2d 880 (1980). *Compare Broadstock v. Elmwood at the Springs*, 6th Dist. Sandusky No. S-12-021, 2013-Ohio-969, ¶ 7 ("Although employee handbooks are not employment contracts in and of themselves, they may define the terms and conditions of an at-will employment relationship *if the employer and employee manifest an intention to be bound by them*.") (Emphasis added.), citing *Sowards v. Norbar, Inc.*, 78 Ohio App.3d 545, 549 (10th Dist.1992). Under the circumstances, we do not find *Mannix* persuasive.

{¶11} Defendants also direct this Court to *Seawright v. Am. Gen. Fin. Serv., Inc.*, 507 F.3d 967 (6th Cir.2007), and *Green v. Carrols Restaurant Group, Inc.*, S.D.Fla. No. 1:10-CV-23471 (June 9, 2011), for the proposition that the memorandum and poster satisfied any notification issues. However, *Seawright* is readily distinguishable because the plaintiff in *Seawright* did not dispute that he had notice of the arbitration agreement. *See Seawright*, 507 F.3d at 971. Similarly, Defendants' reliance on *Green* is also misplaced as, in that case, the court found that the employee had received a copy of the MAP *and* had signed a receipt indicating that she had received a copy of the employee handbook, which contained a copy of the arbitration agreement. *Green* at 2. By contrast, Mr. Jones denies having ever seen the memorandum or the poster, and there was no evidence that he received a copy of the employee handbook containing a copy of the arbitration agreement. While Defendants presented contradictory evidence at the hearing concerning Mr. Jones' knowledge of the memorandum, poster, and the MAP, the trial court in this case, unlike the court in *Green*, did not resolve the dispute.

{¶12} Because there is a dispute as to whether Mr. Jones knew about the MAP, it is necessary to remand this case to the trial court for it to resolve the conflict as it would be inappropriate for us as the reviewing court to make such factual findings in the first instance. *See Valley City Elec. Co., Inc. v. RFC Contracting, Inc.*, 9th Dist. Lorain No. 09CA009608, 2010-Ohio-964, ¶ 20. Accordingly, to the extent Mr. Jones' first assignment of error alleges that the trial court erred in enforcing the MAP without first finding that Mr. Jones had actual knowledge of it, the assignment of error is sustained.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE CASE BECAUSE SEVERAL OF ERICK JONES' CLAIMS DO NOT FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE CASE BECAUSE THE MAP PROGRAM DID NOT CREATE A VALID ARBITRATION AGREEMENT UNDER OHIO LAW.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE CASE BECAUSE THE ARBITRATION AGREEMENT IS UNCONSCIONABLE AND AGAINST PUBLIC POLICY.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS THE CASE BECAUSE ERICK JONES NEVER WAIVED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL ON HIS LEGAL CLAIM.

{¶13} In Mr. Jones' remaining assignments of error, he also challenges the enforceability of the arbitration agreement. However, Mr. Jones' arguments are inextricably intertwined with whether he assented to the MAP, which, as discussed above, turns, in part, upon whether he knew about its existence. Because that issue must be decided by the trial court in the first instance, Mr. Jones' third, fourth, and fifth assignments of error are not ripe at this time. Similarly, because his second assignment of error concerns the scope of the arbitration agreement, it is also not ripe since the arbitration agreement may not be enforceable, which would render the issue moot. Accordingly, it would be inappropriate to address these assignments of error at this time. *See Universal Real Estate Solutions, Inc. v. Snowden*, 9th Dist. Summit No. 27171, 2014-Ohio-5813, ¶ 18-19 (declining to address issues inextricably intertwined with other issues that must be decided by the trial court).

III.

{¶14} In light of the foregoing, we sustain Mr. Jones' first assignment of error and reverse the trial court's order compelling arbitration. The matter is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and matter remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

JENNIFER HENSAL
FOR THE COURT

WHITMORE, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

ROBERT E. KERPER, JR., Attorney at Law, for Appellant.

CARL H. GLUEK, Attorney at Law, for Appellees.

JEFFREY J. MAYER, Attorney at Law, for Appellees.