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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAY HORENSTEIN and KEVIN WASHINGTON, individually and on behalf of all persons similarly situated, Plaintiffs, vs. MORTGAGE MARKET, INC., an Oregon corporation and MARTY FRANCIS, Defendants.	Civ. No. 98-1104-AA OPINION AND ORDER

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AIKEN, Judge:

Plaintiffs file suit against their former employers alleging violations of the Fair Labor Standards Act ("FLSA") and Oregon wage and hour laws. Defendants seek a stay of the proceedings or dismissal of plaintiffs' claims on the ground that the plaintiffs entered into an enforceable arbitration agreement with defendant providing for binding arbitration of any and all claims relating to employment. Defendants contend that the Federal Arbitration Act governs the parties' agreement and compels the court to stay the present class action until individual arbitration proceedings are completed.

FACTS

According to the complaint, plaintiffs were employed by defendant Mortgage Market as loan officers. Defendant Marty Francis was and is employed by Mortgage Market as a corporate officer, agent and management employee. Plaintiffs allege that they were required to take a multi-week training program at the commencement of their employment for which they received no compensation. After the training period, plaintiffs allege that they were paid exclusively by commission and received no compensation for weeks in which they earned no commission. Plaintiffs also allege that, at the time they terminated their employment, defendants failed to make payment of wages due as required.

As a condition of employment, plaintiffs were required to sign an Arbitration Agreement. The Arbitration Agreement contains an "Exclusive Reference to Arbitration," which provides:

> Any claim or controversy, of any nature, legal, equitable, statutory, federal, state, local, or otherwise whether founded in contract or in tort, arising out of, concerning or relating the Employee's employment relationship with the Company or the performance or breach

> thereof, whether existing prior to or arising subsequent to this Agreement, whether direct or derivative, whether against the Company or any of its officers, as a result of their position with the Company, and whether or not such dispute is arbitrable in the first instance, shall be resolved exclusively by binding nonappealable arbitration, all as more particularly set forth in this Agreement.

Affidavit of Kenn Bartley, Exs. A and B, Section 1 ("Arbitration Agreement"). The agreement continues with an explanation of the time limits for demanding arbitration and the process for initiation of arbitration. Section 4 of the agreement explains the process for the appointment of the arbitrator. In particular, section 4.4 provides that

> After confirmation of the appointment of the Arbitrator, the Arbitrator shall deliver to each party the Arbitrator's estimate of fees and expenses for the arbitration. Within twenty (20) days of receipt of such statement, each party shall remit 50% of such statement to the Arbitrator. No party may participate in any arbitration, whether as Claimant or Respondent, until their respective share of the estimated fee is paid. Nonpayment shall not delay or postpone the proceedings. The Arbitrator shall thereafter submit interim billings to the parties, which shall be similarly paid by the parties.

The agreement further provides that the arbitration provided by the Agreement "shall be governed by and follow the policies and procedures set forth in that document entitled Supplemental Rules of Arbitration . . . ." Arbitration Agreement, Section 5.1. Defendants may amend the rules and any amendments shall be enforceable against the parties and arbitration proceedings initiated after the effective date of an amendment.

The Supplemental Rules of Arbitration governs the arbitration procedures, including representation, discovery, privilege, evidence and the hearing process. Affidavit of A.E. Bud Bailey, Ex. A ("Supplemental Rules"). In particular, Supplemental Rule 14.1 provides that

> [T]he Hearing may proceed in the absence of any party or representative . . . who is unable to participate for failure to pay their share of the Arbitrator's fees and expenses. . . . The Arbitrator shall require the party who is present to submit such evidence as the Arbitrator may require for the making of an award.

Further, the Arbitrator may grant any remedy "within the scope of the agreement of the parties" and may "assess the Arbitrator's fees and expenses in favor of the prevailing party." Supplemental Rule 26.1. However, "(e)ach party to the arbitration shall bear their own attorney fees and costs, without regard to who is the prevailing party." Supplemental Rule 30.1.

DISCUSSION

The Federal Arbitration Act ("FAA") makes a written agreement to arbitrate in "a contract evidencing a transaction involving commerce . . . 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. The FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). The policy concern behind passing the FAA "was to enforce private agreements into which parties had entered," which "requires that we rigorously enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985). It is well-established that statutory claims may be the subject of an arbitration agreement, because the "party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer, 500 U.S. at 26, citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

Based on a recent Ninth Circuit ruling, plaintiffs contend that

the FAA does not apply to the arbitration agreement between plaintiffs and defendants because it is an employment contract. Craft v. Campbell Soup Co., ___ F.3d ___ 1998 WL 828105 (9th Cir. 1998). The ruling in Craft implicitly, if not explicitly, overrules prior Ninth Circuit case law holding that FLSA claims are arbitrable. See Kuehner v. Dickinson & Co., 84 F.3d 316, 320-21 (9th Cir. 1996). Whether the FAA applies and whether FLSA claims are arbitrable, the court finds it prudent to review the agreement and discern what grounds, if any, exist to invalidate a contract signed by both parties. Thus, the court finds relevant those cases interpreting arbitration agreements in the face of claims asserting statutory rights. See Cole v. Burns International Security Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("beneficiaries of public statutes are entitled to the rights and protections provided by the law").

Regardless of any applicable policy favoring arbitration, an arbitration agreement cannot abrogate statutory rights granted to either party. For example, an arbitration clause cannot "purport[] to forfeit certain important statutorily-mandated rights or benefits." Graham Oil v. Arco Products Co., 43 F.3d 1244, 1247 (9th Cir. 1994), cert. denied, 516 U.S. 907 (1995); Coughlin v. Shimizu America Corp., 991 F. Supp. 1226, 1230 (D. Or. 1998). In Graham Oil, the Ninth Circuit denied enforcement of an arbitration agreement under the Petroleum Marketing Practices Act because the agreement denied the right of the prevailing party to obtain attorney's fees. Id. at 1249

Plaintiffs emphasize that, like the agreement in Graham Oil, the arbitration agreement does not include a fee-shifting provision as does the FLSA and Oregon wage and hour law. 29 U.S.C. § 216(b); Or Rev. Stat. §§ 652.200(2), 653.055(4). Therefore, plaintiffs argue

that the arbitration agreement denies their right to recovery attorney's fees and is unenforceable. Plaintiffs also claim that the arbitration agreement denies the right to proceed collectively, also a right granted under the FLSA. 29 U.S.C. § 216(b). While recognizing these deficiencies in the agreement, the court finds even more problematic the requirement that each individual employee pay half of the estimated arbitrator fees before the employee may participate in the arbitration hearing.[1] The agreement is explicit that any participation in the hearing is prohibited unless the arbitrator's fees are paid. The agreement also states expressly that the hearing will not be postponed to allow for payment; the hearing will continue without the participation of one party. Accordingly, if an employee did not have the financial means to cover the fees, the employee would be prevented from appearing at the hearing with counsel, making an opening or closing statement, presenting testimony and documentary evidence, confronting opposing witnesses or rebutting the opposing party's evidence.

The court finds that this provision unabashedly violates the letter and spirit of the FLSA and Oregon wage and hour laws by denying the basic right of participation in the adjudicatory process. Defendants cannot overcome this fundamental barrier to meaningful adjudication by waving the federal and state policy favoring arbitration.[2] As succinctly stated by one court, "it would undermine

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[1]In rendering its decision, the court relies solely on the arbitration agreement at issue and disregards evidence presented by the parties regarding the amount or payment of fees.

[2]The federal Oregon cases cited by defendants to show a policy in favor of arbitration are distinguishable from this case. Neither involved statutory rights. Mittendorf v. Stone Lumber Co., 874 F. Supp. 292 (D. Or. 1994); Pauly v. Biotronik, 738 F. Supp. 1332 (D. Or.

Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." Cole v. Burns International Security Services, 105 F.3d 1465, 1484 (D.C. Cir. 1997). "If there is any risk that an arbitration agreement can be construed to require this result, this would surely deter the bringing of arbitration and constitute a de facto forfeiture of the employee's statutory rights." Id. at 1468. As in Cole, the court is not persuaded by the fact that plaintiffs may be able to recover the Arbitrator's fees as part of an award. That possibility is small consolation when plaintiffs are prevented from participating in the hearing if unable to pay the fees in the first place. "At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections." Cole, 105 F.3d at 1482.

Taken as a whole, the arbitration agreement in this case denies plaintiffs' their statutorily-granted rights, under both the FLSA and Oregon law, to obtain attorney's fees and to participate collectively and without undue financial burden in the adjudication proceedings. As a result, the agreement effectively deters, if not prevents, a sole employee from seeking redress for wage and hour violations of the FLSA and Oregon law because it is not financially beneficial to do so. In wage and hour claims, monetary recovery by a single plaintiff can be relatively low. As defendants repeatedly emphasize, the arbitration agreement does not provide for collective arbitration, and the court

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1990). Moreover, Mittendorf held that the FAA did not apply to employment contracts. 874 F. Supp. at 295.

could not compel arbitration on a class basis. Defendants, therefore, are able to segregate all similarly-situated employees and force them into individual arbitration proceedings in which the employees may not participate unless they pay substantial fees and are prevented from recovering their own attorney's fees. Defendants are thus able to bar access to the courts while failing to provide meaning access to the arbitration process. Consequently, the arbitration agreement effectively does an end-run around the rights protected by the FLSA and Oregon wage and hour laws.

Further, the court does not find the offending provisions of the arbitration agreement severable. As in Graham Oil, the "offending parts of the arbitration clause do not merely involve a single isolate provision." 43 F.3d at 1249. Rather, the arbitration agreement is akin to an "integrated scheme" that denies statutorily-mandated rights. Id. Thus, the court finds the entire agreement unenforceable as to plaintiffs' federal and state law claims.

CONCLUSION

This court certainly is not hostile to alternative forums for dispute resolutions so long as the rights guaranteed by statute are adequately protected. For the reasons explained above, the court finds that the arbitration agreement between plaintiffs and defendants violates both the FLSA and Oregon wage and hour law. Therefore, the agreement is unenforceable, and defendants' Motion to Stay or Dismiss (doc. 10) is DENIED. IT IS SO ORDERED.

Dated this 7 day of January, 1999.

Ann Aiken
United States District Judge