2015 IL App (5th) 140234-U

NO. 5-14-0234

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EULESCIA N. WILLIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 12-L-361
	)	
CAPTAIN D'S, LLC, and	)	
DEREK SANTIAGO,	)	Honorable
	)	Robert P. LeChien,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Stewart and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment is affirmed in part, finding the arbitration agreement is valid, and reversed in part, finding the plaintiff's claims against the defendants are within the scope of the arbitration agreement.

¶ 2 This appeal comes before us on the denial of defendants Captain D's, LLC, and Derek Santiago's motions to compel arbitration. On appeal, the defendants assert that plaintiff Eulescia Willis's claims are subject to arbitration based on the plaintiff's signed "Employee Dispute Resolution Agreement" (Agreement), which contained an express arbitration agreement. The circuit court found the arbitration agreement valid, but refused

to compel arbitration of any of the plaintiff's claims, reasoning that the alleged claims did not arise out of her employment. This court is charged with the determination of whether the dispute is to be resolved through arbitration. For the reasons which follow, we affirm the decision of the court in part and reverse in part.

¶ 3 On February 10, 2011, the plaintiff was hired by Captain D's as a cashier at the Belleville, Illinois, location. The plaintiff had been previously employed by Captain D's in 2008. In relation to her hiring, the plaintiff signed the Agreement, in which she acknowledged she would "agree to and will abide by the terms of the [Employee Dispute Resolution] Plan ('Plan')." The plaintiff waived any right to have a jury decide any legal claim against Captain D's and acknowledged that in signing the Agreement, Captain D's agreed to consider and/or hire the plaintiff for employment at Captain D's, in that it specifically states, "In consideration for and as a material condition of my initial and/or continued employment with Captain D's, LLC (the 'Company') ***."

¶ 4 The Agreement provides, in pertinent parts, as follows:

> "(b) I understand that the Plan *** requires me to provide notice to the Company of any claims against the Company, including claims arising out of my application for employment, my employment, or the termination of my employment.
>
> ***
>
> (d) I understand that, if I file a lawsuit regarding a claim against the Company, including any claim arising out of or relating to my application for

employment, my employment, or the termination of my employment, the Company may use this agreement to support its request for the court to dismiss the lawsuit and require me to resolve my claim in accordance with the Plan."

¶ 5 In signing the Agreement, the plaintiff agreed to abide by the terms of the Plan, which states, in pertinent parts, as follows:

"[T]his Plan applies to any and all legal claims, demands or controversies between the Company and its employees, including those that relate to, arise from, concern, or involve in any way this Plan, the employment of the employee, or any other matter between the Company and the employee, whether or not involving the employee's employment relationship with the Company."

The Plan also applies to any legal claims against Captain D's "directors, limited liability company managers, officers, employees, and agents." The Plan details the three steps for the resolution of disputes, which includes: (1) an internal complaint process, (2) mediation, and (3) final and binding arbitration.

¶ 6 The plaintiff filed a complaint against a former Captain D's employee, James Soberalski (Soberalski), not a party to this action,[1] her general manager, Derek Santiago (Santiago), and Captain D's, alleging the following counts:

Counts I-III: Assault, Battery, and False Imprisonment (Soberalski);

[1]The record does not indicate the circumstances that surrounded Soberalski's termination of employment. Also, Soberalski is not represented by defense counsel in this suit.

Count IV: Negligent Hiring (Captain D's);

Count V: Negligent Retention (Captain D's);

Count VI: Negligent Supervision (Captain D's);

Count VII: Negligent Investigation of a Sexual Harassment Claim (Captain D's);

Count VIII: Intentional Infliction of Emotional Distress (Captain D's);

Count IX: Constructive Discharge (Captain D's);

Count X: Sexual Harassment Violation of Illinois Human Rights Act pursuant to 775 ILCS 5/2-101 (West 2010) (Captain D's);

Counts XI and XII;[2] and

Count XIII: Intentional Infliction of Emotional Distress (Santiago).

The plaintiff claims Captain D's failed to exercise ordinary care in hiring and retaining Soberalski, and that her pre-attack grievances went unheeded by Captain D's and Santiago, ultimately forcing her to permanently leave Captain D's.

¶ 7 The plaintiff contends that for approximately three months, from March 2011 until June 24, 2011, Soberalski, a sales associate, intentionally and inappropriately touched the plaintiff by pinching, hitting, groping, and making uninvited advances towards her at Captain D's during working hours. The plaintiff claims that over time Soberalski's

[2]The plaintiff initially alleged count XI, intentional infliction of emotional distress, and count XII, sexual harassment in violation of the Illinois Human Rights Act pursuant to section 2-101 (775 ILCS 5/2-101 (West 2010)), against Sun Capital Partners, Inc. However, Sun Capital Partners, Inc., was later dismissed as a defendant.

advancements escalated to the groping of her breasts, vaginal area, and buttocks as well as directing inappropriate, sexually offensive and sexually harassing language at her during working hours.

¶ 8 At some point between March 2011 and the date of the final incident, June 24, 2011, Soberalski became the plaintiff's supervisor. The plaintiff alleges that neither Captain D's nor Santiago took any action to investigate or resolve her allegations concerning Soberalski's inappropriate and degrading misconduct.

¶ 9 On June 24, 2011, the plaintiff claims Soberalski ordered her to clean the women's bathroom. While cleaning, Soberalski entered the bathroom, cornered the plaintiff, and began assaulting her. Soberalski pulled down the plaintiff's pants, grabbed her breasts and buttocks, removed his penis from his pants, and attempted to have sexual intercourse with her. The plaintiff claims that at no time during the June 24, 2011, incident, or the prior instances, had she given consent. After this event, the plaintiff quit her position at Captain D's.

¶ 10 On August 31, 2012, the defendants filed a motion to compel arbitration, asserting that the plaintiff's claims were subject to arbitration pursuant to the Agreement she signed on February 10, 2011.

¶ 11 On April 30, 2014, after a hearing on the above matter, the circuit court found the arbitration agreement valid, but refused to compel arbitration of any of the plaintiff's claims, reasoning that the alleged claims did not arise out of or relate to her employment. The court opined that it was inappropriate, poor public policy, and "equally obvious" that

sexual claims of assault and battery would not arise out of or relate to the performance of the plaintiff's job. The defendants filed a notice of interlocutory appeal following the court's decision.

¶ 12 An agreement to arbitrate is treated like any other contract. *Vassilkovska v. Woodfield Nissan, Inc.*, 358 Ill. App. 3d 20, 24 (2005). Under the Illinois Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2012)), the parties are bound to arbitrate those issues that they have agreed to arbitrate. *Smola v. Greenleaf Orthopedic Associates, S.C.*, 2012 IL App (2d) 111277, ¶ 16. The question of whether parties have submitted a particular dispute to arbitration is for judicial determination. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Two "gateway" issues that raise a "question of arbitrability" for a court to decide, not an arbitrator, include: (1) whether the parties are bound by a given arbitration agreement, and (2) whether an arbitration provision applies to a particular type of controversy. *Id.* at 84. All other issues are for the arbitrator. *Id.* The interpretation of an arbitration agreement involves a question of law and is subject to *de novo* review. *Smola*, 2012 IL App (2d) 111277, ¶ 16.

¶ 13 The first "gateway" issue requires an analysis of whether the Agreement is a valid contract, such that the parties are bound to arbitration. The plaintiff acknowledges that she signed the Agreement on August 4, 2008, and again on February 10, 2011. However, the plaintiff argues that the Agreement is unenforceable because there was no meeting of the minds, the terms were indefinite, and insufficient consideration existed. In support, the plaintiff avers that on February 10, 2011, she was only given the Agreement signature

page, not the Plan, never given adequate time to read or understand the rights she was waiving, never received a copy of the rules governed by the American Arbitration Association, and never signed an agreement with Captain D's.

¶ 14 Under Illinois law, an offer, acceptance, and consideration are the basic ingredients of a contract, and a party who signs an agreement is charged with knowledge of and assent to its contents. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 150-51 (2006). It is clear on the facts that these basic requirements have been satisfied. First, Captain D's offered, and the plaintiff accepted, employment that was conditional on her agreeing to abide by the terms of arbitration under the Agreement and Plan.

¶ 15 The plaintiff's signature, under Illinois law, is evidence of her acceptance of the contract's terms. *Melena*, 219 Ill. 2d at 150. The plaintiff argues that she was misguided in her decision to sign the Agreement and therefore lacked sufficient understanding of the rights she was waiving because the Plan was withheld from her at the time of signing. However, assuming it was true that the plaintiff never received the Plan, an issue in dispute, the record does not reflect that the plaintiff was ever denied access upon requesting. In fact, the record shows she never requested a copy of the Plan's contents in either 2008 or 2011. See *Johnson v. Orkin, LLC*, 928 F. Supp. 2d 989, 1006 (N.D. Ill. 2013) (applying Illinois law, the court determined plaintiff's claims were arbitrable after plaintiff alleged he was refused review of the plan, but the record reflected plaintiff never requested the plan prior to signing). Further, by accepting employment, the plaintiff assented to be bound by the Agreement, under which all claims would be submitted to

arbitration with Captain D's. See *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150, 154 (N.D. Ill. 1997).

¶ 16 The court in *Vargas v. Esquire, Inc.*, 166 F. 2d 651, 654-55 (7th Cir. 1948) (applying Illinois law) stated:

> "[A] written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs it. And in the absence of fraud, *** a man in possession of all his faculties, who signs a contract, cannot relieve himself from the obligations of the contract by saying he did not read it when he signed it, or did not know or understand what it contained. *** [W]hen a party to a contract is able to read and has the opportunity to do so, he cannot thereafter be heard to say he was ignorant of its terms and conditions."

¶ 17 We note, and found it particularly significant, that two times Captain D's offered the plaintiff employment contingent on the Agreement's terms, and thus, she had two separate occasions to ask questions and become familiar with arbitration and the rights she would waive under this particular dispute resolution process. Therefore, she cannot now plead ignorance after accepting the terms on two separate occasions by claiming she was never shown the Plan, had no opportunity to read the details, and was never provided a copy of the rules of the American Arbitration Association. We find there was a meeting of the minds between the parties.

¶ 18 Next, this court will address the plaintiff's contentions that the terms of the

agreement were indefinite. The plaintiff argues that the arbitration agreement is unenforceable as she did not contract with Captain D's because Captain D's, at the time of execution, was not a subsidiary of Sagittarius, but Sun Capital Partners. Although Sagittarius is referenced as a parent corporation in the Agreement and Plan, it is clearly written that the "Company" refers to Captain D's. Captain D's is, in turn, delineated as the "Company" referenced throughout the entire Agreement. The Agreement states that the consideration given is between the plaintiff and Captain D's. Further, the Plan references the "Company" as Captain D's and does not state the dispute resolution is only for employees of Sagittarius, but between the plaintiff and the "Company," which obviously includes Captain D's. Regardless, we do not find the fact that Sagittarius was incorrectly stated, instead of Sun Capital Partners, to be material to invalidate this agreement. Interpreting the agreement clearly provides that it was a contract binding the plaintiff and Captain D's. The circumstances surrounding the execution are material to this decision, given this was the plaintiff's second time signing the agreement and she was hired by Captain D's that day, obviously understanding that this was an agreement between herself and her new employer, Captain D's.

¶ 19 Next, this court finds sufficient consideration existed to form a valid, binding contract. In particular, mutual promises were made by both parties−Captain D's employed the plaintiff, while the plaintiff gained employment. However, the plaintiff argues there was insufficient consideration to enforce the Agreement as there was no mutual promise to contract and, once again, she entered into a purported agreement with

Sagittarius, not Captain D's.

¶ 20 It is a basic tenet of contract law that in order for a promise to be enforceable there must be some consideration for the promise. *Vassilkovska*, 358 Ill. App. 3d at 26. "Consideration" is a bargained-for exchange of promises or performances, and may consist of a promise, an act, or forbearance. *Id.* We find three acts on the part of Captain D's that provide sufficient consideration: (1) Captain D's promised to consider the plaintiff for employment; (2) Captain D's continued to employ the plaintiff after the plaintiff signed the Agreement; and (3) Captain D's, like the plaintiff, was obligated to submit to binding arbitration.

¶ 21 First, Captain D's promised to consider the plaintiff for employment. The plaintiff argues that her signature on the Agreement was only a promise for Captain D's to review the plaintiff's employment application, nothing more. Under Illinois law, "where an employer promises to consider an applicant for employment in exchange for the applicant's return promise to abide by company rules upon employment−including the arbitration of all claims−there is sufficient consideration to establish a valid, enforceable contract." *Chatman v. Pizza Hut, Inc.*, No. 12 C 10209, 2013 WL 2285804, at *4 (N.D. Ill. May 23, 2013) (citing *Sheller*, 957 F. Supp. at 154).

¶ 22 It is this court's opinion that Captain D's never promised to simply review the plaintiff's application, but upon her acceptance of the terms, would offer her employment at Captain D's. Supporting this opinion is the Agreement's language which provides, "In consideration for and as a material condition of my initial and/or continued employment

with Captain D's, LLC (the 'Company') ***." Based on an interpretation of this language, Captain D's promised to consider and then offer the plaintiff employment as long as she promised to accept, sign, and abide by the Agreement upon and throughout employment. The plaintiff did just that; she signed the Agreement and was hired that same day on February 10, 2011. This arbitration agreement was a condition for the plaintiff to be considered for employment, and thus was enforceable, as shown above, where an offer, acceptance, and mutual consideration were present.

¶ 23 Second, by continuing to employ the plaintiff for three months, Captain D's provided sufficient consideration. Under Illinois law, continued employment after notice of an arbitration agreement constitutes acceptance and sufficient consideration. *Melena*, 219 Ill. 2d at 152 (Illinois Supreme Court found continued employment is sufficient consideration for the enforcement of employment agreements); see *Seremak v. American Express, Inc.*, No. 10 C 3463, 2011 WL 3359915, at *2-3 (N.D. Ill. Aug. 3, 2011) (court found sufficient consideration existed where plaintiff signed an arbitration agreement on the first day of work and continued employment with the company). By continuing her employment for over three months, for the second time at Captain D's, the plaintiff provided the necessary consideration for the Agreement's terms.

¶ 24 Third, a mutual promise to arbitrate is sufficient consideration to support an arbitration agreement. *Vassilkovska*, 328 Ill. App. 3d at 28. The plaintiff argues that the Agreement is unenforceable because the plaintiff is forced to arbitrate any and all claims, while Captain D's can sue her for a variety of claims.

¶ 25 In *Vassilkovska*, plaintiff contracted with defendant for the sale of a car, and plaintiff signed an arbitration agreement. 358 Ill. App. 3d at 22. The court found the arbitration agreement unenforceable, concluding that defendant's promise to arbitrate was "empty" in that it "completely exempted issues that could arise from its sale of the automobile to the plaintiff," thus the very substance of the agreement. *Id.* at 29. Although both parties signed the agreement "[w]aiv[ing] all rights to pursue any legal action in a court of law," defendant essentially secured the right to sue in a court of law for a myriad of issues, primarily those centered on the recoupment of money from plaintiff for the sale of a car, while the plaintiff was bound to arbitrate any and all claims. *Id.* at 22, 28.

¶ 26 Here, five areas are exempt from arbitration, including worker's compensation and equitable relief for claims alleging trade secret violations, trademark infringement, breach of fiduciary duty, and breach of noncompetition agreements. Distinguishable from *Vassilkovska* is that, here, the Agreement exempts both parties from arbitration, not only Captain D's. The Agreement does not explicitly reserve to Captain D's the right to sue in court, as the plaintiff has asserted. Instead, it applies to any and all legal claims, whether asserted by Captain D's or the plaintiff, with certain exclusions applying to both parties. Further, worker's compensation, in particular, is advantageous for the plaintiff, providing her with an opportunity to bring her claims before the Illinois Workers' Compensation Commission, not an arbitrator. Although the defendants are more likely than the plaintiff to assert the remaining claims, those are likely claims asserted against high-level

employees, not an individual in the plaintiff's employment position.

¶ 27 Next, the plaintiff asserts that the Plan is illusory because Captain D's retains the right to amend and/or terminate the Plan. Illinois courts have not addressed this exact issue concerning the modification and/or termination of arbitration agreements in this context. However, *Tinder v. Pinkerton Security*, 305 F.3d 728, 736 (7th Cir. 2002), applying Wisconsin law, found that an employer's right to modify or terminate its policies did not make its promises illusory. Further, here, we find it important to note that modification and termination were never instant. In fact, no amendment or modification would apply to any claim in which Captain D's had received actual notice. Further damning to the plaintiff's argument is that termination of the Plan required a 60-day grace period before its effective date and did not apply to claims that arose prior to a set termination date. Therefore, the modification and termination provisions have no bearing on the plaintiff's claims.

¶ 28 Finally, the plaintiff asks the court to invalidate the Agreement on the basis of unconscionability, both procedural and substantive. The plaintiff argues, once again, that she did not review the terms of the Plan, the documents were not explained to her, and she was not given an opportunity to negotiate the Agreement, thus unequal bargaining power existed.

¶ 29 A finding of unconscionability may be based on procedural or substantive unconscionability, or a combination of both. *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99 (2006). First, we address whether the Agreement is procedurally

unconscionable. "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it ***." (Internal quotation marks omitted.) *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 22 (2006). Factors a court should consider are the manner in which the contract was entered into by the parties, whether reasonable opportunity to understand the terms existed, whether important terms were hidden in a maze of fine print, and whether disparity in bargaining power existed. *Kinkel*, 223 Ill. 2d at 22-23.

¶ 30 Pursuant to Illinois contract law, the plaintiff assented to the terms of the Agreement on two separate occasions, and cannot now claim ignorance. First, the Agreement's terms and reference to the Plan were conspicuous and not hidden in a maze of fine print. See *Kinkel*, 223 Ill. 2d at 26 (agreement found procedurally unconscionable where terms were presented in fine print in language that the average consumer might not fully understand). In fact, there is no fine print anywhere in either document. Instead, the Agreement's terms were clearly set forth in a one-page document and the Plan's terms were detailed in four pages. The first sentence of the Agreement stated, "I have received and read carefully the Employee Dispute Resolution Plan (the 'Plan') ***," thus alerting the plaintiff's attention to the fact that she was assenting to the details of another document. Therefore, the plaintiff cannot dispute that she did not have knowledge of the Plan. Further, written on the Agreement in an all-capitalized statement directly above the signature line stated, "I UNDERSTAND THAT I MAY CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT."

¶ 31 Lastly, this was the plaintiff's second time signing the Agreement to arbitration, thus she had ample opportunity to familiarize herself with the provisions, and cannot now claim the Agreement was an adhesion contract depriving her of meaningful choice. The Illinois Supreme Court rejected this exact implication that an arbitration agreement written as a condition of employment on a "take it or leave it basis" was unenforceable. *Melena*, 219 Ill. 2d at 152. The court noted that to deem an arbitration agreement unenforceable because it was conditional for employment "contravenes federal, as well as Illinois, decisional law." *Id.* Without some evidence of fraud or wrongdoing on the part of Captain D's, the agreement will not be invalidated simply because the plaintiff, in an inferior bargaining position, entered an agreement where employment was conditioned on accepting the arbitration agreement's terms. For the foregoing reasons, we find the arbitration agreement procedurally conscionable as the terms were conspicuous and bargained for by the plaintiff on two separate occasions.

¶ 32 The plaintiff also argues the Agreement was substantively unconscionable for a number of reasons. First, the plaintiff claims the Agreement is unconscionable because it mandates a three-step process requiring the plaintiff to pay attorney fees, costs, and travel expenses, thus claiming a financial bar to recovery. The Illinois Supreme Court in *Kinkel* defined substantive unconscionability as referring to terms so " 'one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.' " *Kinkel*, 223 Ill. 2d at 28 (quoting *Maxwell v. Fidelity Financial Services, Inc.*, 907 P.2d 51, 58 (Ariz. 1995)).

Courts have refused arbitration agreements where the cost-price disparity was so large and prohibitive so as to essentially preclude one from taking action. *Melena*, 219 Ill. 2d at 156.

¶ 33 In *Kinkel*, the Illinois Supreme Court found the class action waiver to be substantively unconscionable, explaining that the agreement was a contract of adhesion because the agreement did not readily reveal the fees associated with arbitration, the consumer was required to arbitrate all claims, and the expenses associated with vindicating claims would far exceed the amount in controversy that plaintiff could potentially recover. *Kinkel*, 223 Ill. 2d at 28-29, 30. When costs approach or exceed the potential recovery, the court noted, "consumers in the plaintiff's position are left without an effective remedy." (Internal quotation marks omitted.) *Id.* at 27.

¶ 34 A party who opposes arbitration by claiming excessive costs bears the burden of demonstrating that he or she will likely incur these prohibitive costs. *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, 1146 (2004). The plaintiff has failed to meet this burden. We find the Agreement in this case does not limit the financial remedies available to the plaintiff and the costs would likely not approach or exceed her potential recovery.

¶ 35 First, the contents of the Plan make clear that the arbitrator is free to "award monetary or injunctive relief as the arbitrator may deem just and reasonable under applicable law, including attorney's fees and costs." Thus, the Plan allows for the opportunity for full recovery for the claims asserted. Second, the Plan provides the plaintiff's initial arbitration fee was $120, and provides that Captain D's will pay

administrative fees in excess of this initial filing fee for arbitration. It is important to note that the plaintiff paid $251 to file in circuit court, a fee that exceeds her initial arbitration costs as stated above. Further, and distinguishable from *Kinkel*, the plaintiff's potential recovery is in excess of $50,000, which includes punitive damages and attorney fees. Thus, there is an opportunity for the plaintiff to be made whole through individual arbitration, even though she must pay upfront costs such as transportation and attorney fees as specified in the Plan. Based on the plaintiff's ability to afford more than the initial filing fee to file in court and then exert funds to obtain counsel, it is evident that arbitration, too, is a cost-effective method, as it does not cause the plaintiff to forgo the full range of remedies available at law and her potential recovery far exceeds the associated costs.

¶ 36 Next, the plaintiff argues the Agreement is one-sided and oppressive as it restricts all claims by the plaintiff from litigation, while allowing Captain D's the right to pursue legal recourse against her in a court of law. For the reasons stated above, this court believes the Plan explicitly provides several causes of action that are subject to arbitration by either party, not solely Captain D's. Therefore, the Agreement is not one-sided and oppressive.

¶ 37 The plaintiff asserts that if the Agreement and Plan are found valid that rescission should be granted because of mistake of fact. To support her argument, the plaintiff again argues that she was never shown the Plan, had no opportunity to read and understand the details of the Plan, and was never provided a copy of the rules of the American

Arbitration Association. Lastly, the plaintiff argues that Captain D's is not a party to the Plan.

¶ 38 Under Illinois law, mistakes of fact that constitute grounds for rescission are mistakes "fundamental in character, relating to an essential element of the contract which prevent a meeting of the minds of the parties and so no agreement is made," including mistakes that relate to the identity of the subject matter within the contract. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 871 (2008). "Where parties to an agreement are ignorant of facts which, if known, would have caused a different contract, the remedy is rescission." *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19, 27 (1941).

¶ 39 For the reasons stated above, there was a meeting of the minds between the plaintiff and Captain D's, and her argument that she did not read or understand the facts has no validity. The question in addressing the plaintiff's contention regarding the identity of Captain D's is: Did the agreement, when executed, represent the actual contract of the parties? We believe it did. Although Sagittarius is referenced as a parent corporation, it is apparent on the face of the contract that the "Company" is Captain D's. In fact, Captain D's was referenced in the first paragraph of both the Agreement and Plan as the "Company," the company where the plaintiff was being considered for employment. The plaintiff claims she was ignorant to the facts that, at the time of the execution, Sagittarius did not own Captain D's, but rather had sold the company to Sun Capital Partners. Regardless, we do not believe that if the plaintiff knew of this incorrect reference to Sagittarius that this would have caused the execution of a different contract,

as required by rescission. Instead, the Agreement's identity of the subject matter, that being arbitration, does not change, especially since Captain D's is specifically referenced throughout the documents. Additionally, it is undisputed that Santiago is an employee of Captain D's, and as the Plan specifically states, all claims against other employees must be arbitrated.

¶ 40 For the reasons stated, the circuit court did not err in determining that the Agreement was valid. The court's judgment is affirmed.

¶ 41 The second "gateway" issue for this court's consideration is whether the disputes in question fall within the Agreement's scope. Before addressing the arguments concerning contract interpretation, it is important to note here that the plaintiff did not file claims of assault and battery against either of the defendants in this case. Her claims against Captain D's include counts IV through X, and count XIII against Santiago, as stated earlier. Thus, this court is not being called upon to decide whether the plaintiff's claims of assault and battery fall within the scope of her employment, a determination the circuit court made. Rather, this court's determination is on whether the plaintiff's above claims against Captain D's and Santiago are within the scope of the arbitration agreement.

¶ 42 The plaintiff cites a number of cases arguing that battery and assault are not employment-related, thus outside the scope of the Agreement. However, as stated above, Soberalski is not a defendant in this suit. Rather, the claims for review relate to the defendants in this lawsuit, Captain D's and Santiago, not Soberalski. We believe that the plaintiff cannot deny that each and every claim asserted against Captain D's and Santiago

concerns events that occurred at her place of employment while she was working, hence arising out of and relating to her employment.

¶ 43 Next, this court addresses the plaintiff's argument concerning the specific word "including." The plaintiff believes the use of "including" is ambiguous and thus should be construed against the drafter, Captain D's, as it is susceptible to more than one interpretation. The plaintiff argues that she interpreted the term "including" to mean arbitration was limited to employment disputes only, not any and all disputes that could arise.

¶ 44 Further, we note the use of broad language in both documents. In providing a language interpretation, a court should afford an undefined term in an agreement its plain and ordinary meaning. *Clayton v. Millers First Insurance Cos.*, 384 Ill. App. 3d 429, 432 (2008); see *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011) (courts will not interpret a contract provision contrary to the plain and obvious meaning). In *People v. Perry*, the Illinois Supreme Court relied on the following definition of "including" stating, "when followed by a listing of items, means that the preceding general term encompasses the listed items, but the list is not exhaustive." *People v. Perry*, 224 Ill. 2d 312, 328 (2007). Relying on the same definition, we believe "including," as written in the Agreement, encompasses more than strictly "claims arising out of [the plaintiff's] application for employment, [her] employment, or the termination of [her] employment." Rather this list is nonexhaustive and simply delineates some of the potential claims that could be subject to arbitration, thus it includes the claims between the parties raised by the plaintiff in this

suit.

¶ 45 "[P]arties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate ***." (Internal quotation marks omitted.) *Keeley & Sons, Inc. v. Zurich American Insurance Co.*, 409 Ill. App. 3d 515, 520 (2011). However, an exception to this "clear language" principle is when an arbitration provision is deemed, "generic," meaning "nonspecific in its designation of arbitrable disputes." (Internal quotation marks omitted.) *Id.* Arbitration agreements containing language that all claims "arising out of" or "relating to," or variations thereof, an agreement are bound by arbitration are deemed generic, thus nonspecific and nonlimiting in what falls within the scope. *Id.* The use of the language "arising out of" without coupling it with "relating to" denotes a narrow rather than broad clause. See *id.* at 522 (agreement only stated, " 'Any dispute arising out of *** this Agreement,' " thus the court found it was limiting in nature to the specific terms of the contract).

¶ 46 The Agreement and Plan contain both variations of the generic terms "arising out of" and "relating to," and thus this court reads the language as broad in nature. In particular, the Agreement includes that arbitration encompasses "*a claim against the Company, including any claim arising out of or relating to my application for employment, my employment, or the termination of my employment*." (Emphasis added.) Further, the Plan states arbitration will cover "*any and all legal claims, demands, or controversies *** including those that relate to, arise from, or involve in any way this Plan, the employment of the employee, or any other matter between the Company and the*

employee, whether or not involving the employee's employment relationship with the Company." (Emphasis added.) The Agreement does not specifically denote what types of disputes do or do not trigger arbitration. Instead, both the Agreement and Plan contain broad language that encompasses any and all claims between the two parties, which would include her above claims against the defendants.

¶ 47 Furthermore, the plaintiff argues that her claims fall outside the scope of the Agreement by asserting a material ambiguity exists because Captain D's was not a subsidiary of Sagittarius at the time of execution. However, in the first paragraph of both documents, Captain D's is referenced as the "Company." Further, throughout both the Agreement and Plan only the "Company" is referenced, which includes Captain D's. Regardless of the inclusion of Sagittarius in both the Agreement and Plan as a parent corporation, this court does not believe a material ambiguity exists, for reasons previously discussed.

¶ 48 For the reasons stated, the circuit court did err in finding the plaintiff's claims were outside the scope of the Agreement. The court's judgment pertaining to the scope of the Agreement is reversed.

¶ 49 Lastly, the plaintiff claims the arbitration agreement, even if found valid and enforceable, is unenforceable upon Captain D's material breach of the Agreement. Specifically, the plaintiff argues that Captain D's failed to follow its own policy in resolving internal complaints.

¶ 50 As previously stated, two issues that raise a "question of arbitrability" for a court to

decide, not an arbitrator, include: (1) whether the parties are bound by a given arbitration agreement, and (2) whether an arbitration provision applies to a particular type of controversy. *Howsam*, 537 U.S. at 84. All other issues are for the arbitrator. *Id.* Under Illinois law, a condition precedent is one "which is to be performed by one party to an existing contract before the other party is obligated to perform." *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of the Regional Transportation Authority*, 262 Ill. App. 3d 334, 338 (1994). We conclude that procedural issues as well as contractual conditions precedent, such as the methods of initiating arbitration through a three-step process as set forth by the Plan, are issues for the arbitrator to decide and not this court. See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-57 (1964) (Supreme Court determined that compliance with grievance procedures was "procedural" and thus left for the arbitrator); see also *Village of Carpentersville v. Mayfair Construction Co.*, 100 Ill. App. 3d 128, 133 (1981) (court determined procedural issues and other actions detailed in the contract, such as time requirements and waiver, are best answered by an arbitrator, not the court). Therefore, this court will leave the plaintiff's related procedural issues for the arbitrator.

¶ 51 For the foregoing reasons, we affirm the judgment in part, finding the Agreement is valid, and reverse in part, finding the plaintiff's claims against the defendants are within the scope of the Agreement.

¶ 52 Affirmed in part and reversed in part.