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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DEWAYNE GATEWOOD, Plaintiff and Appellant, v. EL DORADO ENTERPRISES, INC., et al., Defendants and Respondents.	B237435 (Los Angeles County Super. Ct. No. BC400058)

APPEAL from orders of the Superior Court of Los Angeles, James R. Dunn, Judge. Affirmed.

Shegerian & Associates, Inc., Carney R. Chegerian and Donald Conway for Plaintiff and Appellant.

Lipsitz Green Scime Cambria and Jonathan W. Brown; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendants and Respondents.

Following confirmation of a 2011 arbitration award, appellant DeWayne Gatewood appeals the 2009 order compelling arbitration, and the order confirming the award, contending the arbitration provision in his employment agreement was unconscionable and invalid under California law. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2008, appellant filed a complaint in superior court. The complaint asserted claims for racial discrimination in employment and harassment under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq., "FEHA"), wrongful termination in violation of public policy, intentional infliction of emotional distress, and breach of implied contract not to terminate without good cause. The named defendants included his former employer, respondent Hustler Casino, and respondent El Dorado Enterprises, Inc.[1]

Respondents moved to compel arbitration. They presented evidence that on June 30, 2000, appellant was hired to be the assistant security director for Hustler Casino.[2] On that date, he signed an acknowledgment that he had received and read the casino's employee handbook. The handbook contained an arbitration provision, which stated: "It is in the interest of both Hustler Casino and its employees to resolve in a speedy and inexpensive way any legal controversy which may arise. Therefore, no dispute between Hustler Casino (or any of its officers, directors or employees) and any employee of Hustler Casino, which is in any way

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[1] Hustler Casino is owned and operated by El Dorado Enterprises, Inc. The complaint also named "Larry Flynt Publishing, Inc." and "Hustler Magazine Productions." Respondents were unaware of any entities by those names and no entities with such names appeared in the action.

[2] Appellant was promoted to security director in June 2001.

related to the employment of the employee (including but not limited to claims of wrongful termination; racial, sexual or other discrimination or harassment; defamation; and other employment-related claims or allegations) shall be the subject of a lawsuit filed in state or federal court. Instead, any such dispute shall be submitted to arbitration before the American Arbitration Association (AAA) or any other individual or organization on which the parties agree or which a court may appoint."[3]

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[3] The remainder of the handbook's arbitration provision stated: "In order to commence an arbitration proceeding, the claimant shall file with the AAA (or other agreed or appointed arbitrator) and serve on the other party a complaint in accordance with California law; the other party shall file and serve a response in accordance with California law. Each party shall be entitled to take one deposition, and to take any other discovery as is permitted by the Arbitrator. In determining the extent of discovery, the Arbitrator shall exercise discretion, but shall consider the expense of the desired discovery and the importance of the discovery to a just adjudication. The Arbitrator shall hear motions pertaining to the pleadings, discovery or summary judgment or adjudication, in accordance with California law.

"The Arbitrator shall render a decision that conforms to the facts, supported by competent evidence (except that the Arbitrator may accept written declaration under penalty of perjury, in addition to live testimony), and the law as it would be applied by a court sitting in the State of California. At the conclusion of the arbitration, the Arbitrator shall make written findings of facts, and state the evidentiary basis for each such finding. The arbitrator shall also issue a ruling, and explain how the findings of fact justify his/her ruling.

"Any Party may apply to a court of competent jurisdiction for entry of judgment on the arbitration award. The court shall review the arbitration award, including the rulings and findings of fact, and shall determine whether they are supported by competent evidence and by a proper application of law to the facts. If the court finds that the award is properly supported by the facts and law, then it shall enter judgment on the award; if the court finds that the award is not supported by the facts or the law, then the court may enter a different judgment (if such is compelled by the uncontradicted evidence) or may direct the parties to return to arbitration for further proceedings consistent with the order of the court."

The acknowledgment executed by appellant at the commencement of his employment in 2000 stated: "I understand the policies, procedures and conditions of employment and the arbitration process outlined therein, and agree to the terms thereof. I understand that all of the policies, procedures and conditions of employment (other than those required by law) are subject to change at the sole discretion of Hustler Casino except that the at-will nature of the employment relationship may not be modified without the express, written agreement of the Owner or General Manager of Hustler Casino, and the agreement to arbitrate may not be waived without a written document signed by either the owner or General Manager of Hustler Casino, on the one hand, and by me, on the other hand."[4]

Respondents also presented evidence that in September 2004, Hustler Casino revised the arbitration provision. The revised provision included the paragraph quoted above pertaining to the type of employment disputes covered. The remaining four paragraphs differed substantially from the remaining paragraphs of the prior provision. Among other things, the revised arbitration provision eliminated the absolute right to one deposition and simply stated: "Each

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[4] The handbook contained two other provisions discussing modification. Under the heading "Introduction," it stated: "Of course, all company policies, practices and benefits are subject to changes, revisions or exceptions, which take precedence over the material contained in this booklet. In all matters (other than the at-will policy, discussed below), the Company retains the right to grant exceptions to general policies, practices and benefits, under the circumstances of individual cases." Under the heading "Termination" and after a discussion of the casino's right to terminate and the meaning of "at-will" employment, the handbook stated: "Apart from the policy of at-will employment, and those policies required by law, Hustler Casino may change its policies or practices at any time without advance notice. However, the above-stated policy of at-will employment may not be changed, and is fully and completely described by the foregoing."

party shall have the right to conduct reasonable discovery, as determined by the arbitrator as provided in [the] California Code of Civil Procedure."[5]

In December 2004, appellant executed an acknowledgment that he had "read and . . . underst[oo]d" the revised arbitration clause. The 2004 acknowledgment stated: "I acknowledge that I have read and that I understand the above arbitration clause. I further acknowledge that I have received a Company Handbook and that I understand all of the policies, procedures and conditions of employment (other than those required by law) are subject to change in the sole discretion of the Company except that the at-will nature of the employment relationship may not be modified without the express, written agreement of the Company, and the agreement to arbitrate may not be waived without a written document signed by both myself and the Company."

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[5] The revised paragraphs stated: "The arbitration shall be conducted by a single arbitrator selected either by mutual agreement of the employee and the Company or, if they cannot agree, from an odd-numbered list of experienced employment law arbitrators provided by the American Arbitration Association (AAA). Each party shall strike one arbitrator from the list alternately until only one arbitrator remains. The arbitrator shall have all powers conferred by law and a judgment may be entered on the award by a court of law having jurisdiction. The award and judgment shall be in writing and binding and final on both parties, and shall state the essential findings and conclusions upon which the arbitration is based. Each party shall have the right to conduct reasonable discovery, as determined by the arbitrator as provided in [the] California Code of Civil Procedure.

"The Company will pay the arbitrator's fees and costs and the costs of the hearing. This agreement shall continue during the term of employment and thereafter regarding any employment-related disputes.

"The employee has been advised to seek an attorney for advice regarding the effect of this Agreement prior to signing it. The parties understand that pursuant to these provisions, they give up their right to a civil trial and their right to a trial by jury.

"There shall be limited judicial review of the arbitrator's decision. Such review shall be limited to deciding whether the arbitrator complied with statutory law."

Appellant opposed the petition to compel arbitration, contending the arbitration agreement contained in the employee handbook was procedurally and substantively unconscionable. Appellant contended it was procedurally unconscionable because he was forced to sign the agreement as a condition of employment and was not provided a copy of the rules by which the arbitration was to be conducted.[6] He contended the agreement was substantively unconscionable because it carved out claims Hustler Casino was likely to pursue and permitted the casino to unilaterally modify or revoke the agreement, rendering the agreement one-sided and illusory.

The trial court granted the motion to compel arbitration "for the reasons stated in the moving papers." The matter proceeded to arbitration, which took place in May 2011. After a three-day arbitration, the arbitrator found in favor of Hustler Casino. The arbitrator set forth her findings of fact and conclusions of law in a lengthy written ruling. Appellant moved to vacate the award or, in the alternative, to confirm the award.[7] The court denied the motion to vacate the award and issued an order confirming the award. This appeal followed.

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[6] Appellant supported this contention with a declaration stating that when he was hired in June 2000, he was told he had to sign the acknowledgment in order to obtain the job. He was not told he had the option to not sign or to negotiate the terms of the agreement. In 2004, he was given the arbitration revision and instructed to sign it and make sure all the employees in his department signed as well. He signed with the understanding it was a condition of his continued employment.

[7] We presume appellant sought the alternative ruling to ensure that even if the court ruled against him, he would have the chance to appeal. (See *Law Offices of David S. Karton v. Segreto* (2009) 176 Cal.App.4th 1, 8-9 [holding that if the court does not dismiss the petition, correct the award, or vacate the award, it must confirm the award and that an order denying a petition to correct or vacate an arbitration award is not appealable]; Code Civ. Proc., § 1294.) An order compelling arbitration is not immediately appealable, but may be the subject of an appeal after the arbitrator's decision is confirmed and judgment entered. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1359-1360.) Under this standard, the current appeal was premature, as

(Fn. continued on next page.)

DISCUSSION

A. *Governing Law*

The parties do not dispute that the enforceability of the arbitration agreement is governed by the California Supreme Court's seminal decision in *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83 (*Armendariz*).[8] There, the Supreme Court set forth four "minimum requirements for the arbitration of nonwaivable statutory claims," including claims of discrimination in employment asserted under the FEHA. (*Armendariz, supra,* 24 Cal.4th at pp. 100-101, 113.) First, the arbitration agreement "may not limit statutorily imposed

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the record does not reflect that judgment had been entered when it was noticed. However, we exercise our discretion to address the merits of a premature appeal. (See *Zipperer v. County of Santa Clara* (2005) 133 Cal.App.4th 1013, 1019.)

[8] Currently pending before our Supreme Court is the issue whether the Federal Arbitration Act (9 U.S.C. § 1, et seq, "FAA") as interpreted by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740] preempts state court rules invalidating mandatory arbitration agreements in consumer contracts as unconscionable. (See *Sanchez v. Valencia Holding Co., LLC* (2011) 201 Cal.App.4th 74, review granted March 21, 2012, S199119.) The Supreme Court's decision could potentially affect *Armendariz*'s applicability to arbitration provisions in employment agreements falling under the provisions of the FAA. But the FAA applies only to contracts which "involve the channels of interstate commerce, the instrumentalities of interstate commerce, or persons or things in interstate commerce[,]" or "having a substantial relation to interstate commerce." (*Shepard v. Edward Mackay Enterprises, Inc*. (2007) 148 Cal.App.4th 1092, 1100; see, e.g., *Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 212 [agreement between California homeowner and California contractor to renovate a single family residence in California did not implicate interstate commerce or the FAA].) Neither party suggests on appeal, or presented evidence below to support that the arbitration agreement at issue should be governed by the FAA or that the agreement or the parties' dispute had a substantial relationship to interstate commerce. (See *Woolls v. Superior Court, supra,* at pp. 211-214 [burden is on party claiming FAA preemption to provide evidence that transaction involved interstate commerce]; accord, *Shepard v. Edward Mackay Enterprises, Inc*., *supra,* at pp. 1100-1101; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 179; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 250-251.) Accordingly, we do not consider the FAA as it may apply to the preemption doctrine.

remedies such as punitive damages and attorney fees." (*Id*. at p. 103.) Second, as "adequate discovery is indispensable for the vindication of FEHA claims," employees "are at least entitled to discovery sufficient to adequately arbitrate their statutory claim, including access to essential documents and witnesses . . . ." (*Id.* at pp. 104 & 106.) Third, "in order for . . . judicial review to be successfully accomplished, an arbitrator in a FEHA case must issue a written arbitration decision that will reveal, however, briefly, the essential findings and conclusions on which the award is based." (*Id*. at p. 107.) Fourth, "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." (*Id*. at p. 110, italics omitted.)

As the court in *Armendariz* further held, employer agreements purporting to require arbitration of nonwaivable statutory claims meeting these four "minimum requirements" must then be scrutinized under the principles of unconscionability "that apply more generally to any type of arbitration imposed on the employee by the employer as a condition of employment, regardless of the type of claim being arbitrated." (*Armendariz, supra,* 24 Cal.4th at p. 113.) The court recently reiterated and summarized the applicable principles of unconscionability in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223 (*Pinnacle*): "Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.]" (*Id*. at p. 241.) "'"Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed

form.”’’’ (*Id*. at p. 247, quoting *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317.)

“Substantive unconscionability pertains to the fairness of an agreement’s actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be ‘so one-sided as to “shock the conscience.”’’’ (*Pinnacle*, *supra*, 55 Cal.4th at p. 246, quoting *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) “The party resisting arbitration bears the burden of proving unconscionability. [Citations.] Both procedural unconscionability and substantive unconscionability must be shown, but ‘they need not be present in the same degree’ and are evaluated on ‘“a sliding scale.”’ [Citation.] ‘[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’” (*Pinnacle*, *supra*, at p. 247, quoting *Armendariz*, *supra*, 24 Cal.4th at p. 114.) “Where . . . the evidence is not in conflict, we review the trial court’s denial of arbitration de novo.” (*Pinnacle*, *supra*, at p. 236.)

As discussed below, we conclude the arbitration agreement did not run afoul of the minimum requirements of *Armendariz*, and that appellant did not meet the heavy burden of establishing unconscionability.

B. *Armendariz Factors*

The arbitration agreement at issue indisputably meets three of the four *Armendariz* factors. It does not limit damages or remedies available to employees. It requires the arbitrator to issue a written decision. It requires the employer to bear all of the costs of arbitration. On appeal, appellant contends for the first time that the agreement did not provide for adequate discovery. Generally, a party who

contends an arbitration agreement is invalid or unenforceable must raise all grounds for declaring it to be so prior to the arbitration hearing on pain of forfeiture. (*Cummings v. Future Nissan* (2005) 128 Cal.App.4th 321, 328-329.) "The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome." (*Id*. at p. 328.) By failing to raise this contention below, appellant forfeited it.

Moreover, were we to consider his claim, we would reject it. In *Armendariz*, the arbitration provision incorporated the rules for discovery set forth in the California Arbitration Act (Code Civ. Proc., § 1280 et seq., "CAA"). The Supreme Court concluded that "[a]dequate provisions for discovery are set forth in the CAA" and that even without regard to the CAA, by agreeing to arbitrate FEHA claims, the employer impliedly agreed to all discovery necessary to adequately arbitrate the claims. (*Armendariz*, *supra*, 24 Cal.4th at pp. 105-106.) Relying on *Armendariz*, two recent appellate court decisions have upheld the validity of discovery provisions which, like the one at issue here, placed discretion with the arbitrator to permit reasonable discovery.

In *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, the agreement incorporated the rules of the AAA, which gave the arbitrator the authority "'to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.'" (*Roman v. Superior Court*, *supra*, 172 Cal.App.4th at p. 1475.) The court rejected the argument that the discovery provision rendered the arbitration agreement invalid because it unfairly delegated to the arbitrator the discretion to deny depositions, contrary to the rules of civil discovery. Noting that in *Armendariz*, the Supreme Court rejected an employee's similar claim, the court stated: "There appears to be

no meaningful difference between the scope of discovery approved in *Armendariz* and that authorized by the AAA employment dispute rules, certainly not the role of the arbitrator in controlling the extent of actual discovery permitted." (172 Cal.App.4th at p. 1476.)

More recently, in *Dotson v. Amgen, Inc*. (2010) 181 Cal.App.4th 975, the court found no fault with a discovery provision giving each party the right to take the deposition of one individual and any designated expert witnesses and which further provided: "'Additional discovery may be had where the Arbitrator selected pursuant to [the parties'] Agreement so orders, upon a showing of need.'" (*Id*. at p. 982.) The court explained: "Although the . . . agreement purports to limit discovery to one deposition of a natural person, the agreement gives the arbitrator the broad discretion contemplated by the AAA rules to order the discovery needed to sufficiently litigate the parties' claims. . . . [T]he discovery provision in this case does not require a showing of 'substantial' or 'compelling' need or contain any other limitation on the arbitrator's power to grant further discovery. [¶] . . . We assume that the arbitrator will operate in a reasonable manner in conformity with the law." (*Id*. at p. 984.)

Here, the provision stated that "[e]ach party shall have the right to conduct reasonable discovery, as determined by the arbitrator as provided in [the] California Code of Civil Procedure." This is equivalent to the provisions found valid in *Roman* and *Dotson*. Respondents contend, and appellant does not dispute, that prior to the arbitration hearing, appellant took five witness depositions and promulgated various forms of written discovery. The record indicates that the arbitrator granted appellant's motion to compel the deposition of Hustler founder Larry Flynt. Appellant does not identify any additional discovery he sought or suggest that additional discovery would have tipped the balance of the arbitration

in his favor. Accordingly, all four of the minimum factors set forth in *Armendariz* were met.

C. *Procedural Unconscionability*

The arbitration provision in this case was written in straightforward language. The original arbitration provision appeared in the handbook, immediately before the signature page. It was not written in small-font or buried in the middle of a lengthy agreement riddled with complex legal terminology.[9] The first acknowledgment, signed by appellant in 2000, referred to the "arbitration process outlined" in the handbook. The second acknowledgment, signed by appellant in 2004, was a one-page document containing the entirety of the revised arbitration procedures. Accordingly, the arbitration provision at issue lacked many of the elements on which courts have based findings of procedural unconscionability. (See *Samaniego v. Empire Today, LLC* (2012) 205 Cal.App.4th 1138, 1145-1146 [pre-printed agreement was comprised of "11 pages of densely worded, single-spaced text printed in small typeface"; arbitration clause was "the penultimate of 37 sections which . . . were neither flagged by individual headings nor required to be initialed by the subcontractor"]; *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1253 [arbitration provision appeared near the end of a lengthy, single-spaced document, was one of 12 paragraphs in a section entitled "'Miscellaneous,'" and was not highlighted or separately initialed (capitalization removed)]; *Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 89 [arbitration clause was "printed in eight-point typeface on the opposite side of

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[9] Appellant contends for the first time on appeal that the handbook was written in small print, referencing the photocopies in the record. Respondents assert, and appellant does not dispute, that these photocopies are reduced versions of the originals.

the signature page of the lease" and leasee was "never informed that the lease contained an arbitration clause" or "required to initial [it]"].)

Moreover, appellant was hired as assistant director of security for the casino and had been promoted to director of security when he signed the 2004 revisions to the arbitration agreement. Thus, he was not a person whose vulnerability or lack of sophistication would add support to a finding of procedural unconscionability. (Compare *Samaniego v. Empire Today LLC*, *supra*, 205 Cal.App.4th at p. 1145 [parties to employment agreement were low-level manual laborers, not proficient in English]; *Higgins v. Superior Court*, *supra*, 140 Cal.App.4th at pp. 1252-1253 [parties to agreement to appear in reality television program were young and unsophisticated and had recently lost both parents].)

Nonetheless, a sufficient modicum of procedural unconscionability existed to support appellant's contention in this regard. Courts have uniformly held that "[t]he finding that the arbitration provision was part of a nonnegotiated employment agreement establishes, by itself, some degree of procedural unconscionability." (*Ajamian v. CantorCO2e, L.P.* (2012) 203 Cal.App.4th 771, 796; see *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329 ["no dispute that the contract satisfies this component of procedural unconscionability" where employer "provided the Handbook to its employees and . . . each employee was required to acknowledge his or her consent to its terms, including the arbitration provision, as a condition of continued employment with the company"].) This rule prevails even where the employee is knowledgeable and sophisticated and possesses significant bargaining strength. (See, e.g., *Dotson v. Amgen, Inc.*, *supra*, 181 Cal.App.4th at p. 981 ["minimum degree of procedural unconscionability" found where party was "highly educated attorney, who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package"]; *Nyulassy v. Lockheed Martin*

Corp. (2004) 120 Cal.App.4th 1267, 1285 [fact that the employee "was able to negotiate a three-year 'good cause' provision in the employment agreement" did not "place him on equal footing with [the employer] in the negotiation process"]; *Abramson v. Juniper Networks, Inc*. (2004) 115 Cal.App.4th 638, 662 [neither employee's "business stature and skills" nor his "ability to negotiate other aspects of his employment" demonstrated "his power to bargain with respect to arbitration" (italics omitted)]; *Stirlen v. Supercuts, Inc*. (1997) 51 Cal.App.4th 1519, 1533-1534 ["successful and sophisticated" corporate executive who had been "'hired away'" from another highly paid position found to have "no realistic ability" to modify arbitration terms of the employment contract, where terms were presented to him after he accepted employment and "described as standard provisions that were not negotiable," and evidence established that "every other corporate officer was required to and had signed an identical agreement"].)

In addition, courts have uniformly held that the failure to make available the rules under which the arbitration will proceed contributes to the element of surprise and supports a finding of procedural unconscionability. (See, e.g., *Samaniego v. Empire Today LLC, supra*, 205 Cal.App.4th at p. 1146; *Trivedi v. Curexo Technology Corp*. (2010) 189 Cal.App.4th 387, 393; *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 721; *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406-1407.)

Appellant established that he signed the first acknowledgment after having been told he was required to do so to obtain the job. He signed the 2004 acknowledgment with the understanding that he was required to do so as a condition of his continued employment. Respondents presented no contrary evidence. Respondents do not dispute that appellant was not provided a copy or the relevant AAA rules. Accordingly, the minimum elements of procedural unconscionability have been established. We next turn to substantive

unconscionability. In so doing, we adhere to the rule that "[w]here . . . the degree of procedural unconscionability of an adhesion agreement is low, . . . the agreement will be enforceable unless the degree of substantive unconscionability is high." (*Ajamian v. CantorCO2e, L.P.*, *supra*, 203 Cal.App.4th at p. 796.)

D. *Substantive Unconscionability*

Appellant contends the agreement was substantively unconscionable for three reasons: (1) it listed only employee claims in giving examples of the specific types of claims subject to arbitration; (2) the acknowledgments he signed stated *he* understood and agreed to be bound by the arbitration provision, but did not specifically state that *Hustler Casino* agreed to be bound; (3) the casino retained the unilateral right to modify, revise, or make exceptions to the arbitration agreement. We conclude that appellant misinterprets the scope of the arbitration provision and that the casino's ability to modify the agreement did not render it unconscionable.

The Supreme Court in *Armendariz* held that one-sided agreements imposed by the employer requiring only employees to submit disputes to arbitration were unconscionable because "the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself." (*Armendariz, supra*, 24 Cal.4th at p. 118.) Courts have consistently found one-sided employer-imposed arbitration provisions unconscionable where they provide that employee claims will be arbitrated, but the employer retains the right to file a lawsuit in court for claims it initiates, or where only the types of claims likely to be brought by employees (wrongful termination, discrimination, etc.) are made subject to arbitration. (See, e.g., *Stirlen v. Supercuts, Inc*., *supra*, 51 Cal.App.4th at p. 1530;

O'Hare v. Municipal Resource Consultants (2003) 107 Cal.App.4th 267, 274-279; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 175-176.)

Appellant contends that the language of the arbitration provision at issue is similarly one-sided and provides for arbitration of only those claims an employee is likely to pursue to court. We are not persuaded. The arbitration provision stated that all disputes between the employer and employee "which [are] in any way related to the employment of the employee . . . shall be submitted to arbitration . . . ." It lists specific examples ("claims of racial, sexual or other discrimination or harassment; defamation"), but states that the arbitrable claims include, but are not limited to, those examples. That language is properly interpreted to mean that a broader category of employment-related claims is included within the arbitration agreement. (See *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101 ["[T]he word 'includes,' [is] ordinarily a term of enlargement[,] rather than limitation."].)

To support his contention that the arbitration provision bound only him, appellant relies on *Higgins v. Superior Court*, where the court found an arbitration provision substantively unconscionable on the ground that it "require[d] only [the plaintiffs] to submit their claims to arbitration." (*Higgins v. Superior Court, supra*, 140 Cal.App.4th at pp. 1253-1254.) There, the agreement to participate in a reality television program signed by the plaintiffs stated: "'I agree that any and all disputes or controversies arising under this Agreement or any of its terms, any effort by any party to enforce, interpret, construe, rescind, terminate or annul this Agreement, or any provision thereof, and any and all disputes or controversies relating to my appearance or participation in the [subject reality television] Program, shall be resolved by binding arbitration . . . .'" (*Id*. at p. 1243.) It went on to state that the other parties to the agreement, the producers, had the right to apply to a court for "'injunctive or other equitable relief.'" (*Ibid*.) The holding in *Higgins* was clarified in *Roman v. Superior Court*, where the court explained that it

was this combination of provisions that caused the agreement to be deemed unconscionable: "[I]n addition to the 'I agree' language itself, the *Higgins* court pointed to other aspects of the arbitration agreement, such as the [producers'] unilateral reservation of the right to seek injunctive relief without identifying the corresponding business necessities for reserving that right, that reinforced its conclusions on lack of mutuality and substantive unconscionabilty." (*Roman v. Superior Court, supra,* 172 Cal.App.4th at p. 1473.) In *Roman*, the acknowledgment executed by the employee provided "'I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application'" and "'I further agree, in the event that I am hired by the company, that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with the company, whether during or after that employment, will be submitted to binding arbitration.'" (*Id*. at p. 1467, fn. omitted.) The court concluded that "the mere inclusion of the words 'I agree' by one party in an otherwise mutual arbitration provision" did not destroy the bilateral nature of the agreement. (*Id*. at p. 1473.)[10]

Here, appellant signed two different acknowledgments, neither of which contained the language of the agreement in *Higgins* in which the employer attempted to carve out exceptions for certain types of claims or judicial relief. The first acknowledgment, executed in 2000, stated that appellant had read the Hustler Casino employee handbook, "underst[oo]d the policies, procedures and conditions of employment and the arbitration process outlined there," and "agree[d] to the

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[10] The issue whether language in an agreement or acknowledgment which states "I hereby agree to submit to binding arbitration all disputes and claims [arising out of the employment relationship]" creates a unilateral or mutual agreement to arbitrate is currently before the Supreme Court. (See *Wisdom v. Accent Care, Inc.* (2012) 202 Cal.App.4th 591, 595, review granted March 28, 2012, S200128.)

terms thereof." The second, which followed the 2004 revision of the arbitration provision, stated "I acknowledge that I have read and that I understand the above arbitration clause." Both arbitration provisions specifically stated that it was in the interests of "both the Company and its employees to resolve in a speedy and inexpensive way any legal controversy which may arise" and further provided that "no dispute between the Company . . . and any employee . . . which is in any way related to the employment of the employee . . . shall be the subject of a lawsuit filed in state or federal court," but would instead "be submitted to arbitration." The 2004 revision further stated: "The parties understand that pursuant to these provisions, *they* give up their right to a civil trial and *their* right to a trial by jury." (Emphasis added.) This language clearly created a bilateral arbitration requirement binding on both parties.

Finally, appellant contends that one-sidedness/lack of mutuality is established by the language which permitted Hustler Casino to "change in [its] sole discretion" all the policies, procedures and conditions of employment.[11] Generally, an employer has the right to unilaterally alter the terms of an employment

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[11] Respondents contend the right of modification did not extend to the arbitration provision, pointing to the language in the acknowledgments stating that all of the policies, procedures and conditions of employment (with certain limitations not relevant here) were subject to change, but further stating "the agreement to arbitrate may not be waived without a written document signed by both myself and the Company." We find this contention unpersuasive. "Modification" and "waiver" are not interchangeable terms. In the arbitration context, "waiver" is a term of art referring to a party's loss of a contractual right to arbitrate due to voluntary relinquishment or failure to perform a required act, such as failure to timely demand arbitration, after a claim arises. (*Zamora v. Lehman* (2010) 186 Cal.App.4th 1, 12.) Because we disagree that that language limiting "'waive[r]'" of the arbitration provision had any effect on the casino's right to modify, we need not consider appellant's contention that conflicts between the language of the modification provisions in the handbook and the language of the provisions in the acknowledgments were misleading and thus support a finding of unconscionability. (See fn. 4.)

agreement "provided that the alteration does not violate a statute or breach an implied or express contractual agreement." (*Schachter v. Citigroup, Inc*. (2009) 47 Cal.4th 610, 619-620.) "An 'employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.'" (*Id*. at p. 620, quoting *DiGiacinto v. Ameriko-Omserv Corp*. (1997) 59 Cal.App.4th 629, 637.) Courts have specifically considered the ramifications of unilateral modification provisions in employment contracts containing arbitration provisions and concluded that a binding arbitration agreement existed. (*Peleg v. Neiman Marcus Group, Inc*. (2012) 204 Cal.App.4th 1425, 1465 (*Peleg*); *24 Hour Fitness, Inc. v. Superior Court, supra,* 66 Cal.App.4th at p. 1214 (*24 Hour Fitness*).)

In *24 Hour Fitness*, the employee argued that the arbitration clause was "illusory" and "fatally lacking in mutuality" because it permitted the employer to unilaterally modify any provision in its personnel handbook, including the arbitration provision, at any time. The court concluded that the employer's discretionary power to modify the terms of the employment agreement "indisputably carries with it the duty to exercise that right fairly and in good faith." (*24 Hour Fitness, supra,* 66 Cal.App.4th at p. 1214.) So construed, the court held, "the modification provision does not render the contract illusory." (*Ibid*.)

In *Peleg*, the employee similarly contended the arbitration provision was illusory because the employer "retained the unilateral right to amend, modify, or revoke it on 30 days' advance written notice, with the change to apply to any unfiled claim." (*Peleg, supra,* 204 Cal.App.4th at p. 1437.) Citing *24 Hour Fitness*, the court explained that due to the implied covenant of good faith and fair dealing, the agreement was not illusory under California law: "A unilateral modification provision that is silent as to whether contract changes apply to claims,

accrued or known, is impliedly restricted by the covenant so that changes do not apply to such claims." (*24 Hour Fitness, supra,* 204 Cal.App.4th at p. 1465.)

Appellant misconstrues the holding in *Peleg*, erroneously contending it supports his position. The agreement at issue in *Peleg* specified it was to be governed by Texas law. The court concluded that the unilateral modification arbitration agreement was invalid *under Texas law*, which "mandates that an employer's unilateral right to amend, modify, or revoke a stand-alone arbitration agreement be *expressly* restricted so that a contract change does not apply to any claim that has accrued or of which the employer has knowledge." (*Peleg, supra,* 204 Cal.App.4th at p. 1457, some italics omitted.) Because the provision gave the employer an opportunity to modify the arbitration provision after it had knowledge of a claim but before the claim was filed, it was invalid under decisions of the Texas Supreme Court. (*Ibid*.) Summarizing the distinction between the two states' principles, the court stated: "Under Texas law, an arbitration agreement containing a modification provision must expressly state that a change in the agreement will not apply to a claim that has arisen or is known to the employer. Under California law, a court may imply such a restriction if an arbitration agreement is silent on the issue." (*Peleg, supra,* at p. 1466, italics omitted.) Accordingly, the court invalidated the arbitration agreement, recognizing that Texas law was "more demanding than California law," but not "contrary to a fundamental policy of California." (*Id*. at pp. 1466-1467.)

After briefing was concluded in the instant appeal, appellant drew our attention to the recently filed opinion in *Sparks v. Vista Del Mar Child and Family Services* (2012) 207 Cal.App.4th 1511 (*Sparks*), contending that it supports a finding of unconscionable one-sidedness. In *Sparks*, the agreement to arbitrate was found in an employee handbook which contained a provision stating the employer could modify it at any time without notice, as well as a provision not present in the

Hustler Casino handbook, stating that the handbook was "'not intended to create a contract of employment . . . .'" (207 Cal.App.4th at p. 1516.) In addition, the arbitration provision was buried in the handbook, and was not prominently distinguished from the other provisions or otherwise highlighted. The court concluded that no contract to arbitrate existed, focusing primarily on the language that the handbook was not intended to create a contract of employment -- which suggested that the handbook was "informational rather than contractual" -- and on the fact that the acknowledgment signed by the employee "failed to point out or call attention to the arbitration requirement." (*Id*. at p. 1520.) The court explained: "To support a conclusion that an employee has relinquished his or her right to assert an employment-related claim in court, there must be more than a boilerplate arbitration clause buried in a lengthy employee handbook given to new employees. At a minimum, there should be a specific reference to the duty to arbitrate employment-related disputes in the acknowledgment of receipt form signed by the employee at [the] commencement of employment. The increasing phenomenon of depriving employees of the right to a judicial forum should not be enlarged by imposing upon employees an obligation to arbitrate based on one obscure clause in a large employee handbook distributed to new employees for informational purposes. [¶] [The employee] signed a form acknowledging receipt of the Handbook, which Handbook contained 'important information about [the employer's] general personnel policies' and included an 'understand[ing]' he would be 'governed' by its contents. That should not, under the circumstances, qualify as an agreement to be bound by the arbitration clause. At best, it expressed the employee's understanding that he must comply with personnel policies and obligations, rather than an agreement to arbitrate." (*Id*. at p. 1522.)

Having already determined the invalidity of the arbitration agreement on these grounds, the court in *Sparks* went on to add: "The arbitration clause is

unenforceable for other reasons. An agreement to arbitrate is illusory if, as here, the employer can unilaterally modify the handbook." (*Sparks, supra,* 207 Cal.App.4th at p. 1523.) The proposition is followed by citation to only out-of-state authorities. As discussed in *Peleg*, California law prevents a party from exercising a discretionary power in bad faith or in a way that deprives the other of the benefits of the agreement. (*Peleg, supra,* 204 Cal.App.4th at p. 1465; see *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc*. (1992) 2 Cal.4th 342, 371-372; *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589.)

Noting that courts may not imply terms which would undermine a right expressly given to a contracting party, appellant contends the right to modify retained by Hustler Casino would be defeated by imposing an implied restriction on its power. The employment agreement did not expressly state that contract changes would apply to accrued claims or claims known to the casino. As explained in *Peleg*, "a modification provision expressly [stating that] contract changes apply to claims that have accrued or are known to the employer" cannot be modified by an implied term requiring the employer to exercise the discretion to modify in a reasonable fashion. (*Peleg, supra,* 204 Cal.App.4th at p. 1465.) However, where, as here, the agreement "is silent as to whether contract changes apply to claims, accrued or known," the modification provision "is impliedly restricted by the covenant so that changes do not apply to such claims." (*Ibid*.) We agree with *Peleg* that the covenant of good faith and fair dealing precludes the casino from modifying the agreement to affect claims of which it has knowledge. Accordingly, the arbitration agreement was not unconscionably one-sided, and appellant has presented no ground to reverse the court's order compelling arbitration.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

Epstein, P. J.

Suzukawa, J.